



The Scottish Parliament  
Pàrlamaid na h-Alba

Published 23 March 2021  
SP Paper 997  
1st Report 2021 (Session 5)

## **Committee on the Scottish Government Handling of Harassment Complaints**

# **Report of the Committee on the Scottish Government Handling of Harassment Complaints**



**Published in Scotland by the Scottish Parliamentary Corporate Body.**

---

All documents are available on the Scottish  
Parliament website at:  
[http://www.parliament.scot/abouttheparliament/  
91279.aspx](http://www.parliament.scot/abouttheparliament/91279.aspx)

For information on the Scottish Parliament contact  
Public Information on:  
Telephone: 0131 348 5000  
Textphone: 0800 092 7100  
Email: [sp.info@parliament.scot](mailto:sp.info@parliament.scot)

# **Committee on the Scottish Government Handling of Harassment Complaints**

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.

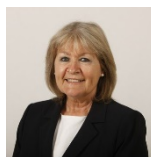


[SGHHC@parliament.scot](mailto:SGHHC@parliament.scot)

# Committee Membership



**Convener**  
**Linda Fabiani**  
Scottish National Party



**Deputy Convener**  
**Margaret Mitchell**  
Scottish Conservative  
and Unionist Party



**Alasdair Allan**  
Scottish National Party



**Jackie Baillie**  
Scottish Labour



**Alex Cole-Hamilton**  
Scottish Liberal  
Democrats



**Murdo Fraser**  
Scottish Conservative  
and Unionist Party



**Alison Johnstone**  
Scottish Green Party



**Stuart McMillan**  
Scottish National Party



**Maureen Watt**  
Scottish National Party

## Committee substitutes

Tom Arthur participated as a committee substitute at meetings on 27 October 2020 and 9 February 2021.

Donald Cameron participated as a committee substitute at a meeting on 24 February 2021.

Andy Wightman participated as a committee substitute at every committee meeting from 1 December 2020 to 18 March 2021.

## Previous committee members

Donald Cameron was a committee member until 13 August 2020.

Angela Constance was a committee member until 22 December 2020.

# Report of the Committee on the Scottish Government Handling of Harassment Complaints

## Contents

Report of the Committee on the Scottish Government Handling of Harassment Complaints .....	1
Introduction .....	4
The Committee and its remit .....	5
The purpose of our inquiry .....	6
Background information .....	6
Challenges faced by the Committee .....	7
Introduction .....	7
Our legal obligations .....	7
Challenges obtaining information from the Scottish Government .....	9
Our expectations .....	9
Delays in the provision of documents .....	10
Redactions .....	11
Gaps in evidence .....	12
Challenges associated with taking evidence from civil servants .....	13
Recollection of events .....	15
Access to judicial review court documents .....	15
Access to legal advice .....	16
Overall conclusion on information provided by the Scottish Government .....	20
Former First Minister .....	20
Other challenges .....	22
Clarification of evidence .....	22
Overcoming challenges .....	23
Development of the Scottish Government Procedure .....	24
Introduction .....	24
Culture .....	24
The Fairness at Work policy .....	28
The identification of a gap in policies around former Ministers .....	30
Development of new procedure to deal with harassment complaints against current and former Ministers .....	31

Interaction between Fairness at Work policy and the procedure.....	37
Consultation and engagement and speed of drafting process .....	37
Involvement of individuals who raised concerns .....	40
Independence of process .....	42
The Handling of the Complaints .....	47
Introduction .....	47
Overlap of development of procedure and raising of concerns .....	47
Formal complaints: roles and responsibilities.....	52
The role of the Permanent Secretary .....	55
Referral of matters investigated under the procedure to the Crown Agent and Police Scotland .....	59
Transparency and access to information .....	64
The conclusion of the procedure and issues of confidentiality .....	66
Alternative Dispute Resolution .....	72
The Judicial Review.....	78
Terminology .....	78
Introduction .....	79
Judicial review: key dates .....	80
Key stages in the judicial review .....	82
Analysis.....	101
Concession of judicial review .....	105
Awarding of full costs to the former First Minister.....	108
Governance arrangements .....	110
The status of the procedure .....	112
Scottish Ministerial Code .....	114
Introduction .....	114
The Scottish Ministerial Code .....	114
Referral by the First Minister to the independent advisers .....	115
Remit of the referral to James Hamilton.....	115
Report of the independent adviser .....	118
Our role .....	118
Accurate and truthful information to the Parliament .....	119
Recording of meetings .....	124
Legal advice.....	127
The views of this Committee .....	128
Overall Conclusions.....	131
Wider reflections .....	132

Note of private oral evidence session held by the committee on the Scottish Government handling of harassment complaints on Monday 15 March 2021 ....	133
Annexe A – Overview of Evidence.....	144
Annexe B – Timeline of events 31 October 2017 to 31 August 2018 .....	148
Annexe C – Scottish Parliament Committees: Functions and Powers.....	158
Annexe D – Scottish Government structure and key figures in the inquiry .....	163
Annexe E – Adjustments to the Petition and Answers .....	166
Annexe F – Procedure development and Head of People Advice contact with Ms A and Ms B prior to appointment as Investigating Officer .....	169
Annexe G – Interlocuter of Lord Pentland, 8 January 2019.....	171
Annexe H – Parliamentary Privilege .....	173
Annexe I – Scottish Parliament work on sexual harassment and sexist behaviour comparisons .....	175
Endnotes .....	180

## Introduction

1. Much has been written and discussed about this inquiry. It is very important, therefore, to introduce the context within which this inquiry was set up and to be clear about what it was set up to investigate.

2. At the heart of the matters considered in this report lies the experience of two women who made complaints of sexual harassment against the former First Minister, Alex Salmond, who were badly let down by the Scottish Government's complaints process.

3. These complaints were made in the wake of the #MeToo movement. The purpose of #MeToo was to focus attention on the sexual harassment of women and to encourage women to speak about their experiences. It gathered momentum in late 2017, in the wake of the sexual abuse allegations against the film producer Harvey Weinstein. Stories also began to appear in the media about alleged sexual harassment within politics.

4. In November/December 2017, the Scottish Government developed a new procedure to deal with complaints of harassment against current and former Ministers and two women came forward with formal complaints against the former First Minister in January 2018. These complaints were investigated, and in August 2018 the Permanent Secretary to the Scottish Government decided that the complaints were well-founded. The former First Minister raised concerns about how the investigation had been conducted and, following the Permanent Secretary's decision in August, challenged the decision and the procedure under a legal process known as "judicial review". This is where a judge reviews the lawfulness of a decision or action made by a public body. The Scottish Government conceded the judicial review in January 2019 on the grounds that the decisions were unlawful in that they were taken in circumstances which were procedurally unfair and tainted by apparent bias. The Permanent Secretary's decisions in relation to these complaints were "reduced" (effectively set aside).<sup>i</sup>

5. In the same month, the former First Minister was charged with a number of offences. In March 2020, the former First Minister was acquitted of all charges. It is not the Committee's role to revisit events that were the focus of the trial, because that could be seen to constitute a rerun of the criminal trial. Similarly, it is not the Committee's role to consider the substance of the allegations made under the Scottish Government's procedure.

6. This inquiry was established to look at what went wrong with the process followed by the Scottish Government that led to the concession of the judicial review and the associated costs to the taxpayer.

7. The Committee was grateful to have the opportunity to take evidence from the two women, particularly as we are aware that the inquiry process has added to their distress. We took evidence from the women in private in order to protect their identity.

8. We found this to be an important and informative session. We heard about the impact that the events had on them personally. We also heard their comments and



views about how their complaints had been handled and their reflections on the culture of the Scottish Government at the time of the events.

9. We hope that this report can reflect the experience of the two women, both by setting out their accounts in their own words, but also in the conclusions we reach. It is essential that lessons are learned to ensure that what went wrong never happens again and there is confidence in complaints procedures in the future.

10. We echo the words of the women who told us—

“I hope that something positive can come out of this and that there is a much easier process for anyone who wants to come forward in future. A lot of things have come out in the media and from an organisational perspective through this process that have been damaging to potential complainers.

I hope that there will be an opportunity through the work of the Committee and its report to potentially right some of those negative impacts and to set a positive example of how such complaints can be dealt with in future in a way that creates a culture in which people feel that they can come forward and have their complaints handled appropriately.”

11. A summary of the evidence that we heard from the women can be found at the end of the report.

### **The Committee and its remit**

12. The Parliament agreed to set up a committee to scrutinise the actions by the Scottish Government. On 5 February 2019, this Committee was set up with the following remit—

“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.”

13. As set out in [the Committee’s approach to the inquiry](#), we agreed to break the inquiry into 4 phases—

- The development of the procedure
- How the complaints were handled
- The judicial review of the process
- The Scottish Ministerial Code

14. We are aware of the intense scrutiny of our work. However, a number of the issues raised in the media and on social media relating to our work do not in fact fall within the remit of the Committee. These matters may be of wider interest to others, but our task has been to work within the remit which we have been set.

15. It is the role of committees to scrutinise Government and in this case, the actions of the First Minister, Scottish Government officials and special advisers. However, it also needs to be recognised that this involves details of the experiences of individuals who made complaints on the understanding that their complaints would be dealt with on a confidential basis and that their identities would not be revealed. Court orders, reproduced in full later in the report, preventing the publication of the identity of the complainers or information likely to identify the complainers were made by—

- Lord Woolman on 8 October 2018 in relation to the complainers under the Scottish Government’s procedure as part of the judicial review proceedings, and
- Lady Dorrian on 10 March 2020 (as amended on 11 February 2021) in relation to all complainers in the criminal trial.

16. The women who took forward complaints under the Scottish Government’s procedure are referred to throughout this report as Ms A and Ms B. This follows the nomenclature adopted by the Scottish Government and in the judicial review proceedings. This should not be confused with the nomenclature used during the criminal trial.

### **The purpose of our inquiry**

17. At the heart of our work is the need to ensure that individuals have the confidence that complaints will be taken seriously. In any organisation, the prevailing culture, structural inequalities and power imbalances have an impact on the extent to which people will feel confident about challenging behaviour and about bringing forward complaints. This is a particular issue within Governments and Parliaments. The Committee therefore welcomes the commitment made by the Scottish Government to address this and recognises that the intention of the procedure was to address these issues.

18. Given how daunting it can be to raise a complaint, particularly against someone in a position of power or authority over the person making the complaint, and given the impact of harassment, we are concerned that any lack of confidence in the Scottish Government’s procedures for investigating complaints could further discourage individuals from coming forward in the future. The Committee hopes the recommendations in this report can lead to significant improvements which will generate, in time, a renewed confidence in the Scottish Government’s ability to respond to complaints and to learn from them as an organisation.

### **Background information**

19. This has been a complex inquiry. Readers of the report might want to refer to the following additional sources of background information.

- Annexe B of the report includes a timeline covering 31 October 2017 to 31 August 2018. This covers the period of the development of the procedure and the consideration of the complaints by the Scottish Government.

- Annexe C of the report includes a description of the functions of committees of the Scottish Parliament, including a guide to the powers available to committees and the limitation on these powers.
- Annexe D of the report includes a summary of structures within the Scottish Government and the roles and job descriptions of key figures in the senior civil service who are referred to in this report.
- Annexe H of the report sets out the position of the Scottish Parliament in relation to what is commonly referred to as parliamentary privilege and how that differs from the UK Parliament.

## **Challenges faced by the Committee**

### **Introduction**

20. The Committee would wish to highlight at the outset of its report some of the significant challenges it faced in its work.

21. These challenges are important because they provide some context to the extent to which we were able to properly scrutinise the matters within our remit and report to Parliament.

22. The main challenge we faced was to obtain and publish the necessary evidence we required to properly undertake our work.

23. Whilst the Committee has done all that it reasonably can to mitigate the impact of these challenges on its work, it has found reaching firm conclusions difficult in some areas where it is not in possession of all of the relevant evidence or where it has had insufficient time to consider the evidence before it prior to producing this report.

24. We discuss the main challenges we faced below, starting with a discussion of the Committee's legal obligations and how they have impacted on our work.

### **Our legal obligations**

25. The Scottish Parliament was established with a central principle of ensuring that its work would be open and transparent. This enables its work to be scrutinised by the people its members are elected to represent, the public.

26. This Committee has operated in line with this principle. It has held all evidence sessions in public, except for one session with the complainers that, to protect their identity, was held in private. The Committee has also published all submissions provided that they complied with the [Committee's statement on the handling of information and evidence](#). Our aim has been to ensure that, as far as possible, our conclusions and recommendations are all based on material that is in the public domain.

27. This Committee, like all committees, must ensure that the publication of evidence complies with relevant legal obligations, including under data protection and human rights law. This may at times limit what can be said in public and published. In addition,

as [set out in the statement](#), there were specific restrictions that the Committee had to be mindful of, in particular the court orders made by Lord Woolman, in the judicial review, and by Lady Dorrian, in the criminal trial. These are reproduced below—

### **Judicial Review Court Order – Lord Woolman, 8 October 2018**

“The Lord Ordinary, in chambers and in light of the absence of Lord Pentland, having resumed consideration of the interim order granted by Lord Pentland on Thursday 4 October 2018, makes an order in terms of Chapter 102.3(5) of the Rules of Court withholding from the public in these proceedings the names and the designations, past and present, of the complainers referred to in the decision report which is the subject matter of this petition and any other information concerning those complainers which would lead to their identification; orders, in terms of section 11 of the Contempt of Court Act 1981, that no publication by any means, including on social media, of any of the aforementioned information relating to the complainers, be made; further, allows the complainers to be referred to as “Ms A” and “Ms B” respectively in the present proceedings.”

### **Criminal Trial Court Order – Lady Dorrian, 10 March 2020 (as amended on 11 February 2021)**

“The court, on the motion of the advocate depute, there being no objection, made an order at common law and in in terms of Section 11 of the Contempt of Court Act 1981, preventing the publication of the names and identity and any information likely to disclose the identity of the complainers in the case of HMA v Alexander Elliot Anderson Salmond, as such complainers in those proceedings.”

28. These mean the Committee cannot make public any evidence that directly identifies any complainer – under the Scottish Government procedure or in the criminal trial – or that when combined with other information in the public domain would be likely to identify a complainer (known as jigsaw identification). For an explanation of why the Scottish Parliament, including the Committee, is not exempt from the terms of these and similar court orders, see Annexe H on parliamentary privilege.

29. The need to protect the identity of the complainers has rightly been an absolute priority of the Committee. In particular, the Committee has been very aware of the need to avoid the jigsaw identification of any complainers. However, on occasion this approach has meant that the Committee was restricted in the questions that it could ask witnesses or the documents it could publish. The Committee wishes to acknowledge, without revisiting the specific details, that it was sometimes required to take a number of challenging and finely balanced decisions regarding the publication of material during the course of the inquiry.

30. The Committee accepts that these restrictions are both understandable and necessary. However, they have had an impact on the Committee’s ability to scrutinise all the matters within its remit in full. One of the particular challenges is that the Committee has not been able to explain why certain decisions have had to be taken

and has not even been able to highlight particular areas that it has not been able to explore in full as this of itself could contribute to jigsaw identification.

## **Challenges obtaining information from the Scottish Government**

31. The Committee's ability to scrutinise has also been significantly impacted by delays in the provision of information. We set out firstly the difficulties in obtaining information from the Scottish Government and, secondly, difficulties relating to the former First Minister's evidence. These difficulties cannot be overstated as they have seriously hindered our ability to fully scrutinise the work of the Scottish Government, which is at the heart of our remit.

### **Our expectations**

32. The Committee agreed not to begin its formal inquiry until the criminal proceedings were concluded, but to undertake some preparatory work.

33. A key part of that involved setting out to the Scottish Government our expectations in relation to the retention and provision of records relevant to the Committee's remit. These were detailed in [a series of letters between the Committee and the Scottish Government](#) during 2019.

34. Following the conclusion of the criminal trial, the [Committee wrote to the Scottish Government on 30 April 2020](#) asking for information and evidence in relation to the development of the policy for dealing with complaints against Ministers and former Ministers.

35. [In a letter of 19 May 2020](#), the Committee asked for information and evidence in relation to the remaining parts of its inquiry, namely the investigation of the two complaints, the judicial review and the Ministerial Code.

36. Our expectation was that the Committee would receive all of this information in time to inform our oral evidence-taking sessions, which began in August 2020. Annexe A provides an overview of all evidence including oral evidence sessions.

37. While we recognised there was likely to be a substantial amount of documentation, we did expect that preparatory work would have been undertaken to allow these timescales to be met, given the Committee was established in February 2019 and set out its expectations in correspondence with the Scottish Government shortly after that.

38. We note [the First Minister told the Parliament on 17 January 2019](#)—

“The inquiries will be able to request whatever material they want, and I undertake today that we will provide whatever material they request. That is the definition of full, thorough and open inquiries. It will not be for me to decide what material the parliamentary inquiry, when it gets under way, wants to request. My commitment is that the Government and I will co-operate fully with it, which is, I think, appropriate.”

39. The Committee regrets that the reality of our engagement with the Scottish Government in relation to the provision of information did not meet these promises of full co-operation.

40. The Scottish Government has highlighted the number of pages of documents it has submitted to the inquiry and the number of hours that Scottish Government witnesses have spent in committee meetings giving evidence. However, these statistics do not reflect the frustrations we have faced in obtaining the key pieces of information that we actually required. Quantity and quality of information are not always the same.

41. We highlight our main concerns with the Scottish Government's provision of information below.

### **Delays in the provision of documents**

42. One of the Committee's main frustrations has been the constant delays in the Scottish Government producing the documents and other material requested by the Committee.

43. We would highlight one example as being indicative of our experiences.

44. In February 2019, [the Committee requested](#) that the Scottish Government retained records relating to how the complaints involving Ms A and Ms B were handled. The Committee then [specifically requested them](#) in May 2020.

45. [Writing in June 2020](#), and again in [a letter in July 2020](#) the Permanent Secretary indicated that this material would be delivered as soon as possible and by the end of August 2020. Then [on 31 August 2020, the Deputy First Minister wrote to the Committee](#) indicating that a formal objection had been received on behalf of an individual and this would lead to further delay.

46. From further correspondence<sup>ii</sup> about access to documents relating to the judicial review, it became apparent that the Scottish Government considered it necessary to seek a view from the courts in relation to the extent to which these documents were covered by an undertaking given by Scottish Ministers to the court in the judicial review. The Committee promptly confirmed that it was not seeking, nor did it require the Government to seek, documents that could not be released without a court order.

47. By the end of October 2020, the Scottish Government indicated that it would shortly be in a position to provide the (over 400) documents to Mr Salmond's legal representatives to consider whether they agreed to disclosure and, if not, the basis for any objection.

48. Finally, on 30 November 2020, a written statement and timeline with [288 supporting documents](#) were provided, with a further [80 documents](#) and [final statement and timeline on 18 December 2020](#). This was almost two years from when the Committee asked that they be retained and seven months after they were specifically requested.

49. The position of the Scottish Government in summer 2020 was that the initial delays were due to the resource impacts of prioritising work on COVID-19, in which key individuals were involved, combined with the challenges of remote working. The Scottish Government then identified challenges with the process of ensuring the documentation met the relevant legal restrictions, including data protection obligations. As noted above, a formal objection was received, and it appears that this combined with the time it took the Scottish Government to review papers and a difference in understanding over the terms of the undertaking given by Scottish Ministers to the court, led to months of further delay.

50. Whilst the Committee was understanding of the challenges resulting from the pandemic, the Committee did not see, on the basis of the further explanation provided by the Scottish Government, why these matters could not have been resolved many months ago and the relevant documents provided. The Committee is frustrated that this did not happen. Furthermore, the delays experienced with these particular documents being produced were mirrored in the Scottish Government's approach to our other requests for records, including for example documentation relating to the judicial review – the last tranche of which was not provided to the Committee until February 2021.

51. These delays (and the delay of information from the former First Minister detailed later in the report) had direct consequences for the work of the Committee and our ability to scrutinise the Scottish Government's actions. They have also led to the timetable for our work frequently slipping, which has meant that the time taken to prepare this report to the Parliament has been significantly curtailed.

52. To give an example, on one occasion, Scottish Government witnesses could not attend a committee meeting as the documents had not yet been provided. Furthermore, an evidence session on 1 December 2020 on how the complaints were handled had to go ahead in order to meet the Committee's tight timetable for oral evidence taking before the relevant written evidence had been processed and published, after it was only provided the afternoon before the meeting.

53. The Committee has voiced its frustration at these delays on a number of occasions. It is simply unacceptable that a committee of the Parliament has had repeatedly to seek documents and to extend deadlines for receiving the information. Our scrutiny role has been significantly impeded by this.

## **Redactions**

54. A second concern the Committee had with the information produced by the Scottish Government was the number of redactions in the documents provided to us and the way that these redactions had been presented.

55. The Committee entirely accepts that the Scottish Government could not share any information that could contribute to the identification of Ms A and Ms B or disclose others' personal data without a clear legal basis. This is our position too – as set out



in the Committee's [statement on the handling of information and evidence](#). Indeed, on a number of occasions the Parliament has made additional redactions to Scottish Government documents beyond those made by the Government, in order to ensure that was the case. We have been careful to follow the Committee's own agreed statement, but we note that the Scottish Government has its own approach to redacting information which it has followed and which sometimes differed from ours.

56. Our concerns are not about the legitimate redaction of information that could identify complainers or that is necessary in line with data protection legislation. Similarly, it is not about the redaction of identifying information of officials below senior civil service grade, which the Committee agreed in most cases would not be required.

57. However, the documents provided by the Scottish Government on the development of the procedure were extremely challenging to follow, and therefore scrutinise, because large sections of text were redacted. We were in the position of receiving certain documents that were almost completely blank. Other documents had pages and pages of fully redacted text.

58. Another challenge was that the documents were frequently repetitious, with the same email chain appearing in multiple documents. Furthermore, there was no obvious indexing of the documents, which made them very hard to follow. It was only at the Committee's instigation that the Government provided timelines to support navigation of the documentation.

59. Scottish Government officials confirmed that their decision to assert legal professional privilege over the material was one of the main reasons for these redactions. However, it would have been helpful to have received at least a general indication of the reasons for the redactions, so the Committee could have a sense of why particular information was being withheld. We understand that sometimes redactions need to be made for legitimate reasons, but our frustration came from the fact that we did not know the basis on which redactions were being made.

60. The Scottish Government, as will be explored in the section on access to legal advice, has now waived legal professional privilege over certain documents. It would have been preferable for the Scottish Government to review the redactions in documents already provided to the Committee to assess whether some or all of them could have been lifted. However, because the waiving of legal professional privilege took place at such a late stage, we would have no time to consider this even if the Scottish Government did undertake such a review. This is a very unsatisfactory position to be in.

## **Gaps in evidence**

61. Another challenge the Committee faced was the gaps in the evidence provided by the Scottish Government.

62. We would like to highlight two examples. First, the Committee was only informed by the Scottish Government in a [letter from the Deputy First Minister of 6 November](#)



[2020](#) that the Principal Private Secretary to the First Minister had held two meetings with Ms A on 20 and 21 November 2017. These meetings had not been revealed in any previous material provided to the Committee by the Scottish Government, despite our request for all relevant material to our remit. In the view of the Committee this should have been provided as it was of relevance to our inquiry. The Committee only found out about these meetings after asking the Scottish Government why the Principal Private Secretary to the First Minister had been due to give evidence to the Commission and Diligence in the judicial review.

63. A second example relates to the timeline of events provided to the Committee on 7 September 2020 by the Scottish Government about its handling of the judicial review. This timeline did not include details of the 17 meetings held between civil servants, including the Permanent Secretary's office, and counsel about the handling of the judicial review. Again, this is information that the Committee would expect to have been provided with as a matter of course on the basis of our initial request for all relevant information.

64. Many documents were, in our view, insufficient to provide a complete picture of the events being considered by the Committee and again that has hampered the Committee's work.

### **Challenges associated with taking evidence from civil servants**

65. We wish to highlight some of the challenges we faced in taking evidence about the role of civil servants during our inquiry. Civil servants played a key role in areas such as the development of the complaints procedure and the Scottish Government's response to the judicial review.

66. The UK [Civil Service Code](#) sets out the framework within which all civil servants work, and the core values and standards of behaviour that they are expected to uphold. The Civil Service Code applies to civil servants supporting the UK Government and the Devolved Administrations. It forms part of the terms and conditions of employment of every civil servant.

67. Paragraph 2 of the Civil Service Code in Scotland states that "as a civil servant, you are accountable to Scottish Ministers, who in turn are accountable to the Scottish Parliament."

68. The Deputy First Minister wrote in [a letter of 6 November 2020](#)—

"You wrote to three Scottish Government civil servants on 29 October asking questions in connection with the Committee's work. As you know, civil servants work on behalf of Ministers, and so I am responding to your questions on behalf of the Scottish Government."

69. The Deputy First Minister interpreted the Civil Service Code to mean that individual written submissions cannot be made to the inquiry by individual civil

servants. In a [letter to the Committee](#) of 14 August 2020, the Deputy First Minister explained—

“it is not possible under the Civil Service Code for personal reflections or private opinions to be offered on matters which are properly the responsibility of the Government. To do so would be entirely contrary to the constitutional and contractual status of the Civil Service.

This point is relevant to the suggestion in some of the Committee’s recent letters that civil servants should provide written evidence on an individual basis to the Committee rather than as part of a Scottish Government response on behalf of Ministers. The Committee has made clear its wish to hear oral evidence from civil servants who can assist with the Committee’s considerations. I must emphasise that officials’ attendance is on behalf of and with the consent of Ministers, and not on an individual or personal basis. Neither Scottish Ministers nor the Permanent Secretary of the Scottish Government have the power to set aside or suspend the application of the Civil Service Code in Scotland.”

70. This view was echoed by Dave Penman of the FDA union, who argued in a [letter to the Committee](#) that “the role of the civil service – including special advisers – is to serve and be accountable to the elected government of the day. It is Ministers who in turn are accountable to parliament for the actions of government”.

71. Our position is that this inquiry is into the actions of the Scottish Government, and therefore it is perfectly reasonable to ask officials about what they did. The Committee notes that the [Scottish Government’s guidance note for officials giving evidence to committees of the Scottish Parliament](#) says—

“Officials are accountable to Ministers and are subject to their instruction; but they are not directly accountable to the Parliament. This does not mean, of course, that officials may not be called upon to give a full account of Government policies, or indeed of their own actions or recollections of particular events.”<sup>iii</sup>

72. We also note that, in reality, individual civil servants have provided supplementary submissions following their appearances before the Committee. In addition, the First Minister’s Chief of Staff has made a submission, given the distinct role of special advisers in the Scottish Government.

73. In addition, we wish to note the role of civil servants in the inquiry is about record keeping. Paragraph 6 of [the Civil Service Code](#) states that civil servants must “keep accurate official records and handle information as openly as possible within the legal framework”. However, we are not clear whether this has occurred on the basis of the limitations in the information provided to us. We will go on to discuss later in this report some other issues with the Scottish Government record keeping in the context of the judicial review.

74. The Committee's view is that the Scottish Government should have provided the complete picture regarding its actions, whether or not it was able to share documents relating to those actions.

75. The Committee would have expected to have had access to the full records of key decision making through consistently made notes, minutes and document retention processes. However, as noted above, on the basis of the limitations in the information provided, the Committee is simply not in a position to say whether such key documents existed in the first place or whether they were not provided to the Committee.

76. The Committee recommends that the Permanent Secretary should publish a statement detailing what the requirements under the Civil Service Code are for record keeping and how the Scottish Government intends to improve its performance in meeting these requirements under the Civil Service Code.

77. These issues, which have been highlighted during this inquiry, are relevant more broadly to the public administration of Scotland. As the Scottish Government assumes more powers under the updated devolution settlement, it is even more important that the Parliament can hold it to account for its decisions in an open and transparent manner

78. The Committee further recommends the Parliamentary Bureau should explore the potential for one of the committees established in session 6 of the Parliament to be able to look at the quality and standards of administration provided by the civil service in the Scottish Government in a similar vein to the role of the Public Administration and Constitutional Affairs Committee in the House of Commons.

## **Recollection of events**

79. The Committee appreciates that we have been asking individuals for very detailed recollections of events that took place a number of years ago. On that basis, the Committee entirely accepts there have been occasions where witnesses have, understandably, needed to write back to the Committee to correct a specific date or where a witness has made clear they cannot recall an exact detail or offered to provide supplementary evidence in writing.

80. However, there were occasions where recollections, in our view, could and should have been clearer. For example, the involvement of special advisers in the judicial review process was clearly referenced in written documentation from the Scottish Government but this was not reflected in the Permanent Secretary's account during evidence.

## **Access to judicial review court documents**

81. The Committee was disappointed that the written statement from the Scottish Government on the judicial review was accompanied by a very limited number of documents. These were a copy of the procedure and documents covering some of the

contact by the Head of People Advice, before her appointment as Investigating Officer, with Ms A and Ms B in advance of their decisions to make formal complaints. No documentation covering the period from when the petition was lodged to the settlement of the case was provided.

82. The [quantity of correspondence](#) – in place of evidence – on the Committee’s website in relation to the judicial review stage of this inquiry attests to the lengths the Committee has had to go to in order to obtain further information from the Scottish Government and the Scottish Government’s continual refusal to provide much of it.<sup>iv</sup>

83. As covered further below, the Scottish Government asserted legal professional privilege over all communications it holds about or in relation to legal advice to the Scottish Government and litigation involving the Scottish Government. As additional reasons for not providing documents, the Scottish Government cited the undertaking provided to the court covering specific documents and also that it could not provide documents that form part of the court process in relation to the judicial review as they are the property of the court and cannot be disclosed, [unless they are already in the public domain or with the court’s permission](#). The Deputy First Minister elaborated on this at the request of the Committee and [even suggested](#) that the Committee may need to make an application to the court to recover these documents.

84. The Committee challenged the Scottish Government’s initial position in relation to documents forming part of the court process, which led to the Scottish Government providing a [copy of the Open Record](#) on 21 September 2020. This document combines the pleadings in the case and is key in seeking to understand how each party’s argument developed at different stages. The Committee took the further step of [writing to the Principal Clerk of Session and Justiciary](#) regarding access to court documentation and the [response](#) further put into question the original position taken by the Scottish Government. Despite [further requests](#) by the Committee, the Scottish Government did not provide all the documents requested.

## **Access to legal advice**

85. The final challenge faced by the Committee in obtaining information from the Scottish Government was arguably the most significant. This was obtaining access to the legal advice that is necessary to understand how and why the Scottish Government took particular decisions at particular times. This is a central part of our remit and particularly relevant to the strand of our work that looked at the events of the judicial review. As noted above, the initial submission from the Scottish Government provided no documentation covering the period from when the petition was lodged to the settlement of the case.

86. The [written statement from the Scottish Government](#) explained its position in relation to legal professional privilege—

“Legal professional privilege exists in two forms. The first form, also called legal professional privilege, applies to communications between a client and their legal representative. The second form is litigation privilege which applies when litigation is in contemplation or taking place. The Committee will be aware because of the subject matter of this statement litigation privilege applies to

much of the information held by the Scottish Government about the judicial review proceedings. In addition, the Law Officers' Convention, as referenced in paragraphs 2.38 to 2.41 of the Scottish Ministerial Code (2018)<sup>2</sup>, means that Ministers do not disclose whether or not advice has been taken from the Law Officers or the content of such advice."

87. The Deputy First Minister expanded on this position in a [letter to the Committee](#)—

"In order to ensure the good government referred to in the Scottish Ministerial Code, it is important that Ministers and officials can seek legal advice whenever they need to and that legal advice can be freely provided by legal advisers to the Scottish Government; these exchanges must be full and frank to be of value. If the Scottish Government were to waive privilege it would undermine this ability on future occasions when Ministers and officials choose to seek legal advice and would impact negatively on when and how legal advice is provided. This would not be in the interests of good government and the upholding of the rule of law."

88. Legal professional privilege is a long-established principle of Scots law which recognises the right of a client to absolute privilege (confidentiality) in respect of communications between them and their lawyer relating to advice and also in respect of any documents prepared in contemplation of litigation. The rationale for this includes that it is necessary in a society in which the restraining and controlling framework is built upon a belief in the rule of law that communications between clients and lawyers, whereby clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients) affairs, should be secure against the possibility of any scrutiny from others.

89. The [Ministerial Code](#) sets out that Ministers must not divulge either who provided legal advice or its contents in order to take account of the public interest in maintaining legal professional privilege and the Law Officer Convention that the Scottish Government does not, other than in exceptional circumstances, disclose the fact that legal advice has or has not been given to the Government by or sought from the Law Officers (the Lord Advocate and the Solicitor General for Scotland), or the content of any such advice.

90. The Committee acknowledges that it is not normal for a third party's legal advice to be sought by committees or for the Scottish Government to share its legal advice. Whilst the Committee recognises the importance and sanctity of legal professional privilege, in light of the Committee's remit the Committee considered there were exceptional circumstances that justified the Scottish Government waiving privilege in relation to material requested by the Committee.

91. The Government's assertion of legal professional privilege meant the Committee had not seen the majority of the remaining documents that it considered to be relevant to the judicial review element of its work. Eventually, the Deputy First Minister acceded to the Committee's request and released notes of written advice from external counsel and associated documents<sup>v</sup>. Notes of written advice from external counsel in September, October and December 2018 were released on 2 March 2021 with further notes and associated documentation and a submission from the Lord Advocate in

relation to the potential for sisting (pausing) the judicial review released on 4 and 5 March 2021. No notes – other than two associated email chains – for key meetings with counsel on 2 and 13 November 2018 have been provided.<sup>vi</sup>

92. The Committee also found that Scottish Government witnesses frequently cited legal professional privilege when asked questions about the judicial review process. This meant that in practice it could be hard for the Committee to obtain a direct or useful answer to the question being asked.

93. For example, legal professional privilege was asserted in response to—

- A question to the former Interim Director of Legal Services about whether the Scottish Government’s counsel threatened to resign during the judicial review process.
- A question to the Permanent Secretary about whether counsel advised the Scottish Government to concede the judicial review in October 2018.
- A question to the Lord Advocate about whether there might have been occasions on which the advice of counsel was not followed by the Scottish Government.

94. The Committee throughout its inquiry called for access to the relevant legal advice, and for it to be published so it could inform public scrutiny of the events surrounding the judicial review. Furthermore, the Parliament as a whole voted on two occasions for the Scottish Government to publish all the legal advice it received regarding the judicial review into the investigation of the alleged behaviour of the former First Minister.

95. However, the decision on whether or not to waive legal professional privilege rests with the client, in this case the Scottish Government. The Law Officer Convention as referenced in the Scottish Ministerial Code reflects that legal advice may be disclosed in exceptional circumstances. The Committee requested on numerous occasions that the Scottish Government waive its privilege given the exceptional and unique nature of the inquiry.

96. After much correspondence the Committee agreed to an offer by the Scottish Government to read the report of the former Director-General for Organisational Development and Operations of 29 December 2018, which informed the Permanent Secretary’s decision to concede the judicial review. This offered a snapshot of the Government’s legal position but did not satisfy the Committee’s request for access to the legal advice. Despite the reiteration by the Committee on more than one occasion of the need to see this advice for the purposes of fulfilling its remit, this was repeatedly refused by the Scottish Government.<sup>vii</sup>

97. The Committee’s ability to understand what went wrong with the Scottish Government’s handling of the judicial review defence has been hampered by continual refusal to publish all the relevant legal advice, despite the two votes mentioned above. Given that the Committee repeatedly argued that these were exceptional circumstances and that, therefore, legal professional privilege should be waived, we are dismayed that it took until the beginning of March 2021 for the Scottish Government to recognise this, by which time the Deputy First Minister was facing a



vote of no confidence in Parliament. The Scottish Government then published a partial set of documents but even that fell short of what the Committee had demanded.

98. In his [letter of 1 March 2021](#), the Deputy First Minister stated—

“I am concerned that this debate [about the ability of Parliament to hold the Government to account and the conduct of the judicial review] and the accusations, if not responded to, could impact negatively on public confidence in the Parliament, Government and even our justice institutions. I have determined therefore, consistent with the terms of section 2.40 of the Scottish Ministerial Code, that, in these exceptional circumstances, the balance of public interest now lies in releasing to the Committee and for publication the contents of legal advice received by the Government during the judicial review, in particular the contents of advice from external Counsel.”

99. The first set of external counsel notes and opinions was made available to the Committee on the evening of 2 March, after the Lord Advocate’s final evidence session. It is deeply regrettable that they were not made available to the Committee prior to this session, to allow the Lord Advocate to be questioned on this.

100. The Committee made it clear repeatedly that it believed the Scottish Government should have waived legal professional privilege over key documents. It is deeply frustrating therefore that the Scottish Government only waived privilege – and only in relation to certain material – at the very last minute. We have already set out the impact that delays in the provision of information have had on the Committee’s work but this extremely late release of legal advice has had perhaps the most significant impact.

101. The Committee acknowledges that governments do not normally share their legal advice, but, as we made clear, repeatedly, these were exceptional circumstances and such legal advice was critical to our remit. The exceptional nature of this inquiry has finally been acknowledged. We share the Deputy First Minister’s view that all of this could have a negative impact on public confidence in the institutions of Government and Parliament, particularly combined with the Government’s consistent refusal to waive legal professional privilege despite two votes of the Scottish Parliament.

102. Therefore, we recommend that a protocol between the Scottish Government and the Parliament be developed setting out the general circumstances in which the Parliament would expect legal professional privilege to be waived in the future.

103. Whilst some documents were produced prior to the First Minister’s appearance on 3 March 2021, crucial notes and opinions from external counsel were not made available to the Committee until after her appearance, on 4 and 5 March 2021. This meant that the First Minister could not be properly questioned on the Scottish Government’s decision making around the judicial review, particularly during December 2018. The withholding of these papers by the Scottish Government prior to the First Minister’s appearance substantially frustrated the Committee’s ability to

explore with the First Minister the Scottish Government's position in relation to the defence of the judicial review.

104. The motion agreed by the Committee at its meeting on 15 December 2020 required the Scottish Government to produce the “legal advice from counsel and associated minutes of meetings relating to the judicial review with legal professional privilege (‘LPP’) waived and that this needs to be published in the interests of transparency”. The Deputy First Minister wrote to the Committee on 8 March 2021 to advise that minutes or notes did not exist in relation to meetings that were held with counsel, including a consultation on 2 November 2018 and a consultation that was attended by the First Minister on 13 November 2018. On 15 March 2021, the Scottish Government published two email chains associated with these meetings on 2 and 13 November 2018. Given the importance placed on keeping accurate official records in the Civil Service Code, the professional obligations of solicitors, the significance of this case, and the timing and attendees of these consultations, the Committee would have expected that notes would have been taken and retained. The Committee is dismayed by the lack of explanation provided by the Scottish Government for the absence of such records. This is yet another example of where the Scottish Government's approach to records management has impeded the work of the Committee and which the Committee considers requires to be addressed.

### **Overall conclusion on information provided by the Scottish Government**

105. The Committee's scrutiny has been significantly impacted by the delays in the provision of information from the Scottish Government and by its constant refusal to release legal advice. The Committee has been frustrated by the impression that on occasion it has not been given all of the relevant information simply because it has not struck upon all the right questions to ask to lead to the release of a particular additional detail. This perception has not been helped by the significant delays in providing the requested batches of evidence to the Committee.

106. This is an unacceptable position for a parliamentary committee to find itself in when trying to scrutinise the Scottish Government, particularly when both the First Minister and the Permanent Secretary stated there would be full co-operation with the inquiry.

### **Former First Minister**

107. The Committee [wrote to the former First Minister on 7 July 2020](#) seeking his full account of the complaints handling process, the judicial review and his contact with the First Minister during the complaints handling process. In common with other witnesses, the former First Minister was given a deadline of 4 August 2020.

108. The Committee notes the position of the former First Minister is that he has been unable to present all of the evidence he would wish to cite in his submission to the Committee. The former First Minister's position is set out in a number of letters to the Committee from his lawyers.<sup>viii</sup>



109. The Committee acknowledges the restrictions placed on the former First Minister but made it clear to him on numerous occasions that he should make a submission to the extent that he was able and that he could provide supplementary evidence and documentation at a later date if required. The Committee wrote to the former First Minister's lawyers on 10 September, 30 September, 19 October, 6 November and 26 November 2020 and to the former First Minister directly on 21 November 2020 seeking his written submission.

110. The Committee noted, in its [letter of 6 November 2020](#), that when the Committee had written seeking insight on particular matters, such as about individuals due to attend the Commission and Diligence, the information had been provided and that partial evidence had also been provided through the numerous letters that the former First Minister's lawyers had sent to the Committee. There was clearly information that could readily be shared at that stage.

111. The Committee received productions to the judicial review from the former First Minister at the end of October 2020 (the Committee acknowledges that these could not have been provided earlier). It then received an interim submission on the non-disclosure of documents on 14 December 2020, a submission on the Ministerial Code phase of the inquiry on 31 December 2020 (revised on 17 February 2021), a submission on the judicial review on 27 January 2021 and a final submission on 17 February 2021. The former First Minister made two further submissions on 10 March 2021 following publication of legal advice by the Scottish Government.

112. These timescales have contributed to the delays experienced by the inquiry. Furthermore, given that all submissions needed to be processed and checked to ensure compliance with all of the Committee's legal obligations, the delays and, in some cases prior publication, have made this process more difficult than it needed to be and, in the case of the submission on the Ministerial Code, has meant evidence sessions having to be arranged at extremely short notice with all the attendant confusion and publicity that attracted.

113. While the Committee recognises the complexities involved in this process, it is frustrated that the former First Minister, in common with the Scottish Government, repeatedly missed deadlines set for the submission of evidence. As set out above, the Committee repeatedly wrote to the former First Minister and his initial submission was received four months after the original deadline. Additionally, the actions of both the Scottish Government and the former First Minister have given the appearance that only information and documentation that would advance a particular position has been willingly given, leaving the Committee to repeatedly ask for the information it was in fact seeking.

114. Despite saying that he had "upheld at every stage in this process" the anonymity of complainers, the former First Minister, through his solicitors (Levy & McRae), on multiple occasions sent documents directly to Committee Members rather than using the Committee's document-handling procedure to ensure that no material that may inadvertently reveal the identity of a complainer is released. This

resulted in unredacted documents being sent to Members. Given the focus that the Committee has had on confidentiality, this is a very serious situation.

## **Other challenges**

115. We would like to highlight one final challenge that arose because of the particular nature of the inquiry.

116. This inquiry has been conducted in the full glare of publicity. However, this has led to social media speculation and commentary that has not been helpful to our work. Some of the speculation and commentary has not always been accurate, and at times there have been misconceptions about the Committee's remit and about the rationale for a particular course of action

## **Clarification of evidence**

117. The Committee used its powers under section 23 of the [Scotland Act 1998](#) to require the production of documents. This was the first time these powers have been used in the history of the Parliament.

118. This involved the Clerk of the Parliament issuing notices<sup>ix</sup> on behalf of the Committee under section 24 of the Scotland Act requiring the Crown Office and Procurator Fiscal Service to produce certain documents. Some of the documents the Committee was seeking were correspondence between individuals.

119. On reading the documents received in response to the first notice, the Committee determined they were in the main personal messages showing individuals supporting each other and we agreed not to publish them.

120. On reading the documents received in response to the second notice, the Committee was of the view that the messages were also either supportive in nature or involved individuals commenting on external events. As such, we agreed not to publish them.

121. However, we wish to make one comment about the messages. This relates to evidence provided to the Committee by Peter Murrell, Chief Executive of the SNP, on 8 December 2020.<sup>x</sup> At that meeting, Mr Murrell was asked to comment on messages he had sent to an individual about police activity in relation to the former First Minister, which had appeared in the public domain.

122. We are now aware that the messages quoted at the committee meeting formed part of a longer exchange of messages. This exchange of messages was provided to the Committee in response to its second notice under section 24 of the Scotland Act. Having considered the messages referred to on 8 December 2020 in their full context, the Committee is clearer that the messages support the explanation for the messages set out by Mr Murrell in his [written evidence](#).

123. There are other individual messages in the correspondence released to the Committee which appear to fall into a similar category, namely that when these

messages are viewed in the context of the full exchanges it becomes clearer that they are primarily supportive messages.

124. The Committee received further messages from the Crown Office in response to a section 24 notice issued on 15 March 2021. These messages along with a statement from the Committee [can be read here](#).

### **Overcoming challenges**

125. The Committee wishes to make one final point in this section.

126. Despite the difficulties we have faced in this inquiry, we have been persistent in our efforts to obtain the information we require. As a result, we have had some success in overcoming the challenges we have faced and have managed to undertake meaningful scrutiny of the Scottish Government in a number of areas.

127. Importantly, we have fulfilled our remit to report to the Parliament, despite a challenging timetable caused by significant delays in receiving evidence and by the necessity to report to Parliament before the Parliament goes into recess ahead of the Scottish general election. The last date for publication is 24 March 2021.

128. We have operated in an open and transparent manner by putting evidence online and hearing from witnesses in public and on the record.

129. We have uncovered significant new evidence which has assisted our understanding of events. For example, we managed to secure access to documents such as the Open Record of the judicial review proceedings that had not previously been made public and which were initially denied to us.

130. Finally, for the first time key officials in the Scottish Government have been questioned in a public forum and their actions within the Committee's remit have been scrutinised as part of Parliament's role in holding the Scottish Government to account.

131. The work to overcome these challenges has not been straightforward but it demonstrates the value in the Committee's persistent approach to fulfilling our remit. Taken together, the information we have uncovered and the evidence we have received form the basis of the following findings and recommendations.

# Development of the Scottish Government Procedure

## Introduction

132. The first phase of the Committee's inquiry focused on the development, formulation and implementation of the Scottish Government's "Handling of harassment complaints involving current or former Ministers"<sup>xi</sup> procedure ("the procedure").

133. As set out in the introduction to this report, many employers began to look again at the adequacy of their workplace policies on harassment in light of the #MeToo movement and in response to allegations of inappropriate behaviour in workplaces. Media reports alleged sexual harassment within politics, throwing the spotlight on to parliaments, governments and political parties. In response to this, [Cabinet commissioned civil servants](#) to review the Scottish Government policies in place to deal with harassment on 31 October 2017. The Head of the UK Civil Service, Sir Jeremy Heywood also [asked](#) all Permanent Secretaries to satisfy themselves that proper processes were in place.

134. A new procedure was drafted during November and December 2017, with the final version being agreed by the First Minister on 20 December 2017. The new procedure was published on the Scottish Government's intranet on 12 February 2018<sup>xii</sup>.

135. This section of the report looks at—

- the culture of the Scottish Government to provide context on how bullying and harassment was viewed and dealt with prior to and at the time the procedure was developed – as referenced below
- the review of existing policies and procedures that took place prior to the formulation of the new procedure;
- how the new procedure was developed.

## Culture

136. In considering whether the new procedure was sufficient and fit-for-purpose and whether any lessons can be learned for the future, it was important for the Committee to have an understanding of the organisational culture in which the procedure on complaints against current and former Ministers was developed in 2017.

137. The Committee focused on both the period prior to the establishment of the procedure and the period in which complaints were made against the former First Minister. The Committee took oral evidence on this from two of the trade unions that represent staff in the Scottish Government, as well as from senior Scottish Government officials and the previous Permanent Secretary, Sir Peter Housden.

138. The FDA (formerly known as the "First Division Association" a union for managers and professionals in public service) highlighted that its "Members have reported concerns of bullying or inappropriate behaviour of Ministers towards civil

servants in all the administrations of varying political colours.”<sup>xiii</sup> It noted that around the time of the Fairness at Work review in 2010 the culture within the former First Minister’s Office and other ministerial offices in relation to bullying behaviour became a concern that was raised with successive Permanent Secretaries. The action taken did not bring about an overall change in culture.

139. The FDA’s General Secretary, Dave Penman, stated in [written](#) and [oral evidence](#) that, over a period of more than a decade, around 30 individuals across five offices had come forward with concerns about ministerial behaviour. However, the FDA suggested that these concerns had not necessarily become formal complaints, and highlighted some of the barriers to people raising formal complaints: for example, that complaints might not be handled sensitively or confidentially, and that raising a complaint could impact on their career. The Committee understood the general feeling of staff to be one of a lack of confidence about raising concerns with the Scottish Government and noted evidence that it was usually a complainer who was moved out of a situation rather than the employer looking to address the broader problem.

140. The FDA told the Committee that some civil servants expressed to the FDA that they felt unable to “speak truth unto power” and that they operated “in a culture of fear”.<sup>xiv</sup> When the Committee questioned the Permanent Secretary on this, she said that she did not recognise the term “culture of fear” and it was not a term she would use.<sup>xv</sup>

141. In [written evidence](#), Sir John Elvidge, who served as Permanent Secretary between 2003 and 2010, said it was not his perception that “staff felt a general inhibition in expressing concerns about bullying and harassment”. This sentiment was echoed by Sir John’s successor, Sir Peter Housden (Permanent Secretary from 2010 to 2015), in his [written evidence](#).

142. Despite the number of concerns that trade unions indicated to the Committee had been raised by staff in relation to Ministerial behaviour, it is apparent that there have been very few formal complaints. The current Permanent Secretary told the Committee that she did not recognise the specific figures from the FDA in light of the hard data that, over the past 10 to 13 years, there had been “only a handful of complaints”.<sup>xvi</sup>

143. The Committee heard from trade unions that they continue to be concerned that staff do not raise concerns. The General Secretary of the FDA told the Committee that—

“We would not say that people still have confidence in the process for dealing with complaints. We would indicate that the issues that we talk about are not historical; they are current.”<sup>xvii</sup>

144. A number of witnesses provided evidence in relation to the organisational culture around behaviours and a sense that there was a reluctance to address unacceptable behaviours formally. The Committee heard [detailed evidence from Sir Peter Housden](#) indicating that, when he was in post, informal resolution was the regular and expected approach taken when concerns were raised in relation to Ministers’ treatment of civil

servants. There was an expectation that the Permanent Secretary would manage these situations without recourse to formal procedures.

145. Sir Peter distinguished situations where a formal complaint was brought against a Minister, and/or there was presenting evidence that an “egregious act” had been committed, indicating that, in these cases, formal procedures would be followed.<sup>xviii</sup>

146. Sir Peter confirmed there had been no formal complaints raised against any Minister during his tenure as Permanent Secretary. When asked if he was aware of concerns about Ministers, including the former First Minister, he said “I knew that the former First Minister could display bullying and intimidatory behaviour, yes.”<sup>xix</sup>

147. The Committee heard evidence that this preference for informal resolution of issues remains. The Committee is mindful that informal resolution is a common feature of employment policies. The Permanent Secretary [stated](#) that—

“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.”<sup>xx</sup>

148. The Committee examined the results of the [Scottish Government Annual People Survey](#) of 2016 (part of the annual Civil Service People Survey), which showed that—

- 10% of Scottish Government staff had faced bullying or harassment.
- Of those respondents who said they had been bullied or harassed 43% reported it; 42% did not and 15% preferred not to say whether they had reported it.
- Of the respondents who said they had faced bullying or harassment, 16% said the issue had been resolved; 65% reported that it had not been and 19% preferred not to say.
- Respondents who indicated that they had encountered bullying or harassment were asked to indicate who behaved this way towards them. Respondents were able to select multiple categories. The majority of incidents of bullying or harassment came from colleagues (117), direct managers (117) or managers in the same part of the organisation (123).

149. The figures on bullying and harassment from the Annual People Survey contrast with few formal complaints over the period. A [Freedom of Information \(FOI\) response](#) details that between 1 January 2013 and 3 October 2017 there were fewer than five complaints of sexual harassment and that complaints of verbal harassment were fewer than five in 2013, 2014 and 2016 with seven complaints in both 2015 and 2017 (until 30 September).

150. A Scottish Government email dated 30 October 2017 also notes that the figures released under FOI raised concern as to whether they “reflected the true picture” given what had been reported across other organisations.<sup>xxi</sup>

151. The Scottish Government told the Committee that the tension between the findings of the 2016 People Survey and the number of formal complaints “suggested

a possible lack of awareness of or confidence in existing processes and procedures”.<sup>xxii</sup>

152. The results sparked a workstream around organisational culture within the Scottish Government and, as a first step, the Permanent Secretary met Deputy Directors across the Scottish Government to discuss organisational culture.

153. In spring 2017, a Director was appointed within the Scottish Government to champion tackling bullying and harassment. The Permanent Secretary explained in oral evidence to the Committee that the Director appointed undertook “live research” to consider the effect culture has on people feeling able to raise concerns about bullying and harassment. The Committee understands that part of this workstream was a review of the Fairness at Work policy, which is explored in more detail in the next section of this report.<sup>xxiii</sup>

154. In the autumn of 2017, in response to the #MeToo movement and reports of misconduct in political institutions, the Scottish Government sought to engage with staff more directly on the issue as well as to accelerate its review of policies in place to deal with harassment.

155. A staff email of 2 November 2017 from the Permanent Secretary about sexual harassment reads—

“We all have an important part to play in creating a positive culture by making sure that we treat others with respect and dignity and by calling it out when that doesn’t happen. This includes challenging unacceptable behaviour, reporting incidents and supporting colleagues, regardless of whether you think the perceived harassment, discrimination or bullying is intentional or unintentional.”<sup>xxiv</sup>

156. The Permanent Secretary told the Committee that the most recent People Survey (carried out in 2019) showed a marked increase in the reporting of bullying and/or harassment. Some 57 per cent of those who had experienced bullying and/or harassment said that they had reported it, which was up 19 percentage points from the previous year.<sup>xxv</sup>

157. The Committee appreciates the unique relationship between civil servants and Ministers as highlighted by the Permanent Secretary in oral evidence to the Committee and understands the atmosphere of pressure in which they work.<sup>xxvi</sup>

158. Whilst the Committee is realistic about rare heated exchanges that can occur in the moment, the Committee agrees with the Permanent Secretary that the relationship between civil servants and Ministers, unique as it may be, must be governed by an expectation of respect and good behaviour.

“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.”<sup>xxvii</sup>

159. It is clear to the Committee that there were differences of opinion between the trade unions representing staff in the Scottish Government and senior Scottish Government officials about the extent to which staff felt they could raise concerns and the effectiveness of the Scottish Government’s reliance on informal approaches to resolve matters of concern.

160. The Committee recognises the innate power imbalance between civil servants and Ministers. This can make it extremely difficult to challenge the behaviour of Ministers. It is of paramount importance that governments foster an organisational culture which tackles this issue in practice. From the evidence it has heard the Committee is deeply concerned that this has not always been the case across the Scottish Government.

161. The Committee notes the improved results of the 2019 People Survey and commends the Scottish Government on its work to improve organisational culture. Nevertheless, the Committee remains troubled at the testimony of trade unions that staff still feel unable to raise matters of concern. It is of paramount importance that Scottish Government staff feel enabled and empowered to raise concerns without fear for their current position or their future career.

162. Whilst the Committee accepts that informal resolution is an important part of workplace policies, it is of the view that there is a marked difference between informal resolution methods within the framework of a policy and senior staff addressing concerns outside of a policy in an informal way. The Committee believes that the Scottish Government must seek to reassure staff that matters of bullying and harassment will be dealt with properly, fairly and robustly.

### **The Fairness at Work policy**

163. From 2003 to 2010, the Scottish Government had in place a Dignity at Work policy under which staff could make complaints about bullying and harassment. Ministers were not included in this policy.

164. In September 2010, this was replaced by the Fairness at Work policy, and one of the new inclusions was a section on dealing with complaints about current Ministers (it should be noted it does not explicitly cover complaints about a First Minister). The 2010 policy set out that where local resolution of an issue with a Minister had not worked, that the member of staff could contact HR who would discuss with them whether informal resolution was possible. If formal resolution was required, the person should submit a complaint to HR which would be passed to the Permanent Secretary and the Deputy First Minister. It should be noted that in a revised version of the [Fairness at Work policy dated 2 November 2018](#), the section on complaints against Ministers is now much briefer, stating ‘you should contact the Deputy Director, People Development, if your concern relates to ministers’.



165. Trade unions told the Committee that they had pushed for the inclusion of Ministers. The [written submission from Prospect](#) stated that—

“there was an indication from members of the Unions that sometimes ministerial behaviours fell within the parameters of what we were discussing in respect of unacceptable behaviour and that the policy should be broadened.”

166. The submission continued—

“it was the Unions which broached the issue about why it did not apply to ministers or indeed other third parties for example contractors. At the time there was concern about bullying behaviour in the Scottish private office, this had been a long standing concern across a number of administrations.”

167. In evidence to the Committee the former First Minister said of the Fairness at Work policy, which was introduced whilst he was in office—

“Before the fairness at work policy was introduced in 2010, there was no set personnel process for holding ministers to account or for them being on the receiving end of complaints—it did not exist. Having such a process was the aim and ambition of the unions. At the time, the unions gave the example of a matter concerning a minister in a previous Administration and how that was dealt with by the permanent secretary, but there was no set role at all. The ambition of the unions was to put ministers, in effect, under the same policy and on the same footing as civil servants.<sup>xxviii</sup>”

168. As part of the work to address concerns of bullying and harassment in the wake of the 2016 People Survey, Scottish Government officials undertook a review of the Fairness at Work policy and the process for making complaints about current Ministers.

169. The Committee understands that as at February 2017 it was acknowledged that there should be a “refreshed stand-alone policy on raising harassment cases against ministers” and that there should be “refreshed content” in the Fairness at Work policy on raising harassment complaints against staff and contractors.<sup>xxix</sup> The Committee notes that former Ministers are not mentioned in relation to this refreshed stand-alone policy.

170. In tandem with the Fairness at Work policy review, the Scottish Government identified the need for more information on challenging unacceptable behaviours on its internal intranet “Saltire”. A document received by the Committee indicates that this was to be addressed by the publication of a route map to highlight to staff the different processes available to raise concerns and pursue complaints.<sup>xxx</sup>

171. Before the 2017 review of the Fairness at Work policy could be completed, however, allegations of sexual misconduct in political institutions began to surface. As such, the Scottish Government undertook a rapid review of its existing policies to deal with misconduct. This review led to the development of the new procedure.

172. It should be noted that the Fairness at Work policy is (and remains) an overarching policy dealing with staff and contractor complaints on bullying and harassment. The Committee believes that it also covers staff complaints on bullying in relation to current Ministers<sup>xxx</sup>.

173. Paragraph 18 of the Scottish Government's [written statement on the development of the "Handling of harassment complaints involving current or former Ministers" procedure](#) states—

"The Fairness at Work policy provided for a range of circumstances in which it might be applied. One of those was in relation to complaints against Ministers and the policy set out a process under which such complaints can be considered. That policy remains in place."

174. Reflecting on the Fairness at Work policy in evidence to the Committee, the First Minister said—

"There is a lot of focus on fairness at work, informal resolution and mediation, and perhaps the bar is too high in terms of when things get to formal complaints. Perhaps that approach is not entirely appropriate when you are dealing with sexual harassment allegations."<sup>xxx</sup>

### **The identification of a gap in policies around former Ministers**

175. The Committee notes that, in its written statement to the Committee on the development of the procedure, the Scottish Government states that—

"The review process in 2017 identified that while options were available to consider potential sexual harassment complaints about serving Ministers, no such option was available in respect of former Ministers. Those involved in the review process identified that there was a gap in the coverage in terms of having a procedure that could be deployed should any historical complaints arise in Scotland. It was recognised that a number of the allegations that had emerged at Westminster related to the actions of former Ministers during their time in office."<sup>xxx</sup>

176. This identification of a potential issue in relation to concerns being raised about former Ministers appears to be first identified in writing on 7 November 2017 in a "sexual harassment cases – route map" document<sup>xxx</sup>. The route map of 7 November 2017 was sent by the Head of People Advice to the Director of People at 16:11. It noted that it had been produced "this afternoon" and that the route map was "to help inform the conversation with the Perm Sec, as per our discussions this morning."

177. The Permanent Secretary told the Committee that—

"The point about ministers past and present was particular to the circumstances of the 2017 procedure, in that the commission that had brought about the gap analysis of the fairness at work process...had identified even then an inconsistency in how we were dealing with complaints against or concerns about ministers. That was not prompted by the 2016 people survey, although

bullying and harassment were an important part and therefore an important context for subsequent work and the subsequent commission that came up in October.”<sup>xxxv</sup>

178. The Head of Cabinet, Parliament and Governance at the Scottish Government, who was asked to lead the work on developing a new policy, indicated to the Committee that the issue of potential historic complaints was part of his thinking prior to the Cabinet commission of 31 October 2017, saying—

“Given my ministerial code responsibilities, I was already thinking about what we would do here if we had the same kind of allegations [from Westminster and Whitehall] surfacing in Scotland. Therefore, my mind was already in that space.”<sup>xxxvi</sup>

179. In [written evidence by the PCS union](#), it is stated that the issue of former Ministers was identified during the stage 1 review of the Fairness at Work policy, and that Scottish Government officials explained a two stage process at the first and only meeting of the Harassment Working Group which took place on 15 November 2017. Stage one was a review of existing policies and stage two was to begin in 2018 and involve a more detailed review of complaints and discipline policies.

“Within stage 1 the official side highlighted one specific area for attention, regarding Ministers and former Ministers, as the then current approach did not fit in with the First Minister’s expectations. They confirmed, however, that the intention was not to change policy coverage, but to clarify better. They further indicated an intention to come back the following week with specific proposals for dealing with complaints about Ministers and former Ministers.”

180. The first documented evidence of the issue of former Ministers being identified as a gap in the Scottish Government policies is in the “route map” of 7 November 2017 although evidence from the Head of Cabinet, Parliament and Governance suggests this may have been identified the preceding week<sup>xxxvii</sup>.

181. The Committee is satisfied that former Ministers were included in this procedure as a result of a gap having been identified, consistent with historic complaints being allowable under the procedure.

### **Development of new procedure to deal with harassment complaints against current and former Ministers**

182. [The Scottish Government’s written statement](#) provided to the Committee on the development of the procedure reflects the importance for the organisation of responding to the #MeToo movement.

183. On Monday 30 October 2017, the First Minister and the Scottish Parliament’s Presiding Officer exchanged letters about allegations that had surfaced over the weekend of inappropriate conduct by individuals holding elected office<sup>xxxviii</sup>. The letters set out the First Minister’s and the Presiding Officer’s shared belief that the Scottish

Parliament should take a robust stand against harassment. The Presiding Officer indicated that he was convening an urgent meeting of party leaders the following day (31 October 2017).

184. A Cabinet commission, of 31 October 2017<sup>xxxix</sup>, instructed the Permanent Secretary to ensure that the Scottish Government had policies that were “fit for purpose”. Following the Cabinet commission, the Executive Team noted that it should “take a fresh look” at the Scottish Government’s approach to dealing with harassment to make sure that it was “well placed” to “respond effectively to any complaints from staff about sexual harassment”.<sup>xl</sup> The Permanent Secretary told the Committee that the matter of former Ministers was not specifically discussed at Cabinet.<sup>xli</sup>

185. It is clear that the commissioned review had two elements to it: making sure that there were effective policies in place and creating a safe space in which individuals felt able to raise concerns. The Head of Cabinet, Parliament and Governance at the Scottish Government told the Committee that—

“The commission from the Cabinet was effectively without limits. It was to review all policies and procedures and to identify how they could be made fit for purpose. I interpreted that to also mean asking whether anything that was not covered needed to be covered, which is why I identified the gap in relation to former ministers.”<sup>xlii</sup>

186. On 3 November 2017, [Sir Jeremy Haywood, Head of the UK Civil Service, wrote to all Permanent Secretaries](#) about the civil service’s response to misconduct or misbehaviour. The letter reminded colleagues of the policies in place and instructed all Permanent Secretaries “to satisfy yourselves that they are working well in practice in your departments and agencies”.

187. The review did not appear to have a set timescale but was undertaken at pace. The Permanent Secretary told the Committee that—

“A Cabinet commission, as you will know, is an important piece of work. A commission that has come directly from Cabinet has a particular status associated with it. That was endorsed and enforced by a letter from my line manager and head of the UK civil service, Sir Jeremy Heywood, who asked all permanent secretaries to satisfy themselves rapidly that processes were in place.”<sup>xliii</sup>

188. In tandem with the work to fulfil the Cabinet commission, the Permanent Secretary and HR worked to inform staff of the commission and of the Scottish Government’s wider response to the #MeToo movement and concerns around sexual harassment and misconduct. For example, the Permanent Secretary issued a number of all staff messages<sup>xliv</sup> and wrote a blog<sup>xlv</sup> on the internal intranet site seeking to assure staff that the organisation would support anyone who wished to come forward to speak about their experiences.

189. The [Scottish Government’s written statement on the development of the procedure](#) to the Committee mentions that on 4 November 2017 – during the period between the Cabinet commission and the first draft of the procedure, therefore – a

Scottish Government Minister resigned as a result of alleged inappropriate behaviour. The Scottish Government indicated that this “reinforced for the Scottish Government the importance of making sure that it has policies and procedures in place which were capable of responding appropriately to such allegations should they arise within the Scottish Government.”

190. The first iteration of a new procedure was, according to the Scottish Government’s written statement, created on 7 November 2017 and circulated on 8 November 2017<sup>xlvi</sup>. This draft only dealt with complaints against former Ministers, noting that the Fairness at Work policy “does not deal directly with the handling of complaints raised by staff in relation to former ministers”. This first version of a procedure was not in itself a full procedure but rather a note setting out “how complaints of this sort should be handled”.

191. During the course of the drafting process, around the middle of November 2017, the decision was taken to include current Ministers so there would be a single procedure dealing with both serving and former Ministers<sup>xlvii</sup>. In evidence to the Committee, the Head of Cabinet, Parliament and Governance explained how the procedure developed significantly at this stage, saying—

“By ... 17 November, we had moved the procedure on from dealing with former ministers to include current ministers and former ministers of other parties. Through the iterative process, the procedure had developed quite a bit further.”<sup>xlviii</sup>

192. The First Minister’s Chief of Staff had some involvement in the drafting of the procedure at this point<sup>xlix</sup>. The emails relating to this meeting include a draft of the procedure, part of a draft letter from the First Minister to the Permanent Secretary (the letter issued on 22 November 2017) and a note from ‘Private Secretary 1’ to the Chief of Staff saying—

“I’ve attached were we have got to with a draft policy which [the Head of Cabinet, Parliament and Governance] has been leading given ministerial code aspects. Still some tricky questions and not agreed with Leslie yet. But would be good to get your take at this stage.”

193. In [written evidence to the Committee](#) the First Minister’s Chief of Staff states that she did not have sight of the draft procedure until 17 November 2017. Her written submission explains the reason for her being involved at that point in the procedure’s development—

“The inclusion of current ministers in the draft policy shared with me on the 17th November created an interaction with the ministerial code for which the First Minister is responsible. This was brought to my attention by a private secretary and we agreed that we should discuss the appropriate allocation of roles and responsibilities between a Permanent Secretary and a First Minister.

Given the interaction with the ministerial code, we also agreed that a note should be put forward that could be sent from the First Minister to the Permanent Secretary to provide clarity that consideration of a policy relating to

ministers and former ministers was within the scope of the original cabinet commission.”

194. On 22 November 2017 the Permanent Secretary had her mid-year review with Sir Jeremy Haywood. The note of the meeting indicates that there was a discussion about harassment and processes and reference is made to the Permanent Secretary’s ‘dilemma’—

“We spoke about harassment and process and my dilemma – and that we are including past Ministers in our refresh. He has issues too.”<sup>l</sup>”

195. The First Minister’s Chief of Staff attended a meeting with the Head of Cabinet, Parliament and Governance on 24 November 2017 along with a member of the Permanent Secretary’s office and a member of the First Minister’s office to consider “the issues that needed resolved regarding the appropriate allocation of responsibilities in relation to a First Minister and a Permanent Secretary, particularly in relation to current ministers.”<sup>li</sup>

196. In oral evidence to the Committee the Head of Cabinet, Parliament and Governance added that changes were made as a result of the meeting to remove the First Minister from the process where complaints are brought against a current Minister, stating in relation to his exchanges with the Chief of Staff—

“at a meeting on 24 November, she indicated that the procedure should be developed further to remove from the First Minister the role to decide how to investigate complaints against current ministers in particular. As a result of that, the drafting moved to indicate that the permanent secretary would, if she felt there was a case to answer regarding a complaint against a current minister, automatically trigger the investigation without recourse to the First Minister.”<sup>lii</sup>

197. This view of events is also set out by the Chief of Staff in her [submission](#)—

“my view in that meeting was that to enhance the independence of the policy no First Minister should be able to prevent a Permanent Secretary investigating a sexual harassment complaint made by one of their employees against a minister, if the Permanent Secretary judged there was something to investigate. This was because a Permanent Secretary has a duty of care to civil servants and I expected that to be the position the First Minister would think was appropriate. It was also my view that it would be essential that a First Minister is made aware of an investigation or allegation into a serving minister, in order to determine if, under the ministerial code, that minister could remain in post whilst an investigation was conducted.”

198. In mid-December 2017, the procedure was amended to cover all forms of harassment, not just sexual harassment<sup>liii</sup>.

199. The policy was agreed by the First Minister on 20 December 2017 and it was published on the Scottish Government’s intranet on 8 February 2018.



200. A detailed timeline of the work of the Scottish Government on what would become the new procedure is in Annexe B. This timeline includes details of when individuals within the Scottish Government came forward with concerns. This shows that the development of the procedure was being run in tandem with concerns being raised by individuals about the conduct of the former First Minister. The handling of those concerns is covered in the next section of this report.

201. We note that a representative of the UK Cabinet Office indicated in an email to a Scottish Government official that it “feels very uncomfortable to be highlighting a process for complaints about Ministers and former Ministers”.<sup>liv</sup> It is clear from oral evidence that these concerns were not discussed further with UK Cabinet Office.<sup>lv</sup>

202. The Scottish Parliament was also taking forward work on addressing harassment. This work resulted in an overarching policy applying to everyone working in or for the Parliament and changes to the MSP Code of Conduct to ensure all formal complaints about an MSP’s behaviour could be investigated by the Standards Commissioner, regardless of who made them (such complaints from an MSP’s own staff or from parliamentary staff were previously excluded).

203. A number of changes were made through guidance, but others had to be taken forward through legislation. The Scottish Parliament has now passed the [Scottish Parliamentary Standards \(Sexual Harassment and Complaints Process\) Bill](#) making changes to the [Scottish Parliamentary Standards Commissioner Act 2002](#) which would allow the Commissioner for Ethical Standards in Public Life in Scotland to investigate complaints that an MSP’s staff member was sexually harassed by that MSP – before 7 January 2020 when the Code of Conduct was updated to cover MSPs’ own staff. The Bill also removes a time-limit, so that the Commissioner can investigate historic complaints about an MSP’s conduct without having to be directed by the Parliament to do so.

204. It is clear from this and from the work undertaken in the House of Commons that issues such as time limits and to whom policies and procedures should apply were being wrestled with in a number of institutions. Such issues have an added complexity in Governments and Parliaments where Members and Ministers are elected rather than employed and because of the different employment relationships of staff groups, such as those employed by the organisation or contractors and those employed by elected Members.

205. In evidence to the Committee, the former First Minister questioned the origins of the procedure and the evidence heard to date, in particular from the Head of Parliament, Cabinet and Governance, that it was his decision to include former Ministers—

“the more interesting question is why it suddenly emerged on 7 and 8 November, and why, of two civil servants, one said that he was starting with a blank sheet of paper while, simultaneously, the other was thinking of another document.”<sup>lvi</sup>

206. There was also discussion between the Committee and the former First Minister on the retrospective nature of the procedure. Two points were raised in regard to the

procedure being retrospective – the principle of allowing historic complaints to be investigated, and the legality of such a process.

207. The legal arguments raised by the former First Minister in his petition for judicial review are detailed in the judicial review section of this report. The view of counsel for the Scottish Government was that the retrospective effect of the procedure was not unlawful being that “The Procedure does not purport to render subject to investigation conduct that would not previously have been understood to be unacceptable. What has changed is the process by which such conduct is investigated”. Counsel also noted the view of Tom Linden QC on pre-scheme cases for the UK Parliament Independent Complaints and Grievance Scheme Delivery Report which stated that the proposed scheme was voluntary and that an individual against whom a complaint was made would be at liberty not to participate<sup>lvii</sup>.

208. The Committee sought to understand whether the former First Minister was against the principle of a retrospective procedure. The former First Minister told the Committee—

‘Legally, I have been informed that you could perhaps try that argument pre-2010 when there was no such policy, but it would be very difficult to make that argument and to make it legal or lawful.’<sup>lviii</sup>

209. Later, he said—

“I accept that there is a good debate to be had about retrospectivity, but if you are going to do something, you should do it properly and from a legislative base<sup>lix</sup>.”

210. When asked about this, the First Minister said that—

‘Perhaps more than in any other walk of life, people in positions of political power are powerful and, therefore, presumably, it is more difficult—although not impossible—for people to bring forward complaints<sup>lx</sup>’.

211. She went on to say—

‘He [the former First Minister] seemed to be saying—although he qualified it a little bit—that the complaints against him should not have been investigated and should not have been capable of being investigated, because there should have been no retrospective policy in place. I fundamentally disagree with that’<sup>lxi</sup>

212. Given how difficult it is for people to come forward with complaints of sexual harassment and if the aim of all of this work is to instill confidence that such issues will be taken seriously, then the Committee’s view is that policies must allow for people to make historic complaints. The Committee notes that the ability to take a retrospective complaint is a feature of both Scottish Parliament and House of Commons policies. Further information on policies in other legislatures is shown in Annexe I.



## **Interaction between Fairness at Work policy and the procedure**

213. The Fairness at Work policy is (and remains) an overarching policy dealing with staff complaints on bullying and harassment, and it still includes a section advising staff who to go to should they have a bullying complaint against a serving Minister<sup>lxii</sup>. The new procedure specifically relates to complaints of harassment by current Ministers and it allowed, for the first time, complaints to be taken against former Ministers.

214. The Director of People indicated that at least two Ministerial issues have been handled under the Fairness at Work policy.<sup>lxiii</sup>

215. As outlined above, the Scottish Government had identified in February 2017 that it wanted to develop a separate procedure for dealing with harassment involving current Ministers. It is unclear how far developed associated work on such a procedure was.

216. The documents received by the Committee, and the oral evidence of the Head of Cabinet, Parliament and Governance at the Scottish Government, indicate that a “blank sheet of paper” approach was taken to writing the procedure.<sup>lxiv</sup>

217. It is unclear why this approach was taken if work was already under way to set out a process for harassment complaints involving serving Ministers. The Committee, therefore, questions how far advanced work on a policy for current Ministers was. The Committee notes that it has received no documented evidence that the issue of former Ministers had been identified as a gap in complaints policies prior to November 2017.

## **Consultation and engagement and speed of drafting process**

218. The first draft of the procedure was shared by the Head of Cabinet, Parliament and Governance on 8 November 2017<sup>lxv</sup>. The final draft was completed on 20 December 2017 and was sent to the First Minister and signed off on the same day. The procedure was published on the Scottish Government’s intranet on 8 February 2018 and highlighted by the Permanent Secretary in her weekly blog on 12 February 2018<sup>lxvi</sup>.

219. The Committee appreciates there was a need for the Scottish Government to respond timeously to important issues raised by the #MeToo movement. However, we questioned witnesses about the pace at which the procedure was developed given that it was under two months from the Cabinet commission to the First Minister signing off the procedure.

220. Formal consultation with the trade unions took place as would be expected with new procedures such as this. In addition, the Permanent Secretary sent a number of messages to staff about the work being undertaken, but it does not appear there was any wider staff engagement beyond this.

221. In evidence, trade unions suggested that the speed at which the procedure was produced was not an issue for them. They noted that the procedure was one small element of the overall framework for dealing with complaints about misconduct in the

workplace. This included the Fairness at Work policy. Furthermore, they indicated that they had the opportunity to provide comment on the draft<sup>lxvii</sup>.

222. The Committee heard that in drafting the procedure the Head of Cabinet, Parliament and Governance looked to internal legal and HR advice and to Advisory Conciliation and Arbitration Service (ACAS) guidance to ensure that the procedure followed current best practice.<sup>lxviii</sup>

223. The Committee was provided with a copy of an ACAS newsletter dated 5 December 2017 which appears to have provided a weblink to new ACAS guidance on sexual harassment. The email which is provided with the newsletter is redacted in its entirety<sup>lxix</sup>. It is unclear therefore to what extent this guidance was reflected in the procedure or whether external expertise from organisations such as ACAS was sought. In response to a question on the matter of external advice, the Director of People told the Committee—

“Most of the advice related to lessons learned. Many organisations were in a similar position and needed to look at their own policies and ensuring that they were engaging effectively with staff.”<sup>lxx</sup>

224. There was involvement of Police Scotland during the process for developing the procedure. A [letter from Police Scotland](#) to the Committee sets out the extent of this interaction. The letter explains what advice was sought and given on the development of the procedure and the general approach that the Scottish Government should take—

“the Deputy Director was provided with advice that any potential victim or complainer should be provided with details of support and advocacy services. This would allow concerns to be discussed with an experienced advocacy worker with knowledge of the criminal justice process and support the individual to report matters to the police.”

225. The letter says Police Scotland advised that where criminality was suspected, individuals should be directed to support and advocacy services, to enable them to make informed decisions about whether or not to report matters to the police. The letter also details how Police Scotland was asked questions around hypothetical situations on criminal justice procedure and their concerns about such questioning—

“It was further emphasised that individuals should be directed to the relevant support services as it appeared that the hypothetical questions were predicated upon a specific set of circumstances and the SG response to that set of circumstances, rather than development of a generic procedure. The hypothetical questions suggested more than one victim of potential criminality and as such, it was stressed that, without knowledge of the detail, any risk that a suspect might present, could not be properly assessed or mitigated. It was highlighted that SG staff were not trained to undertake such investigations, or to engage with victims.”

226. The Permanent Secretary concluded that the process was not rushed but that it was “an intense and focused piece of work” undertaken at pace and with some status because it was a Cabinet commission. She said—

“I would hesitate to say that the work was rushed. I do not think that that is accurate. It was an intense and focused piece of work, which was located in the right part of the Scottish Government, in the heart of the propriety and ethics and ministerial code team. It was also iterative.”<sup>lxxi</sup>

227. The Director of People highlighted to the Committee that a procedure is not required in order for an individual to make a complaint, saying—

“it is also important to recognise that someone can raise a complaint at any point, whether or not you have a process. If you do not have a process, you then need to work out what to do about that complaint.”<sup>lxxii</sup>

228. In his evidence to the Committee, the former First Minister gave a different opinion on the matter, stating that—

“You cannot proceed when there is no policy and no lawful way to do it...you cannot proceed on the basis of there being no policy to proceed on.”<sup>lxxiii</sup>

229. When asked by the Committee in oral evidence about the timing of the concerns relating to the former First Minister progressing to a formal complaint, the Head of People Advice confirmed that—

“It would have been more ideal if the procedure had been finalised.”<sup>lxxiv</sup>

230. The Head of People Advice also appeared to be aware that it was preferable to have an agreed procedure in place before receiving formal complaints. A ‘OneNote’ record from the Head of People Advice stated—

“Better to get policy finalised and approved by Perm Sec and FM - before formal complaint comes in”<sup>lxxv</sup>

231. In oral evidence to the Committee, the former First Minister attributed what he considered to be the failings of the procedure to the speed at which it was developed—

“Why were many things wrong with the policy? It was developed at pace, as the civil service says, spatchcock, as I would say, over a period of six weeks, and in an apparent panic—for reasons that I hope that the committee can try and determine.”<sup>lxxvi</sup>

232. The Committee’s view is that the Government was right to review its procedures at the time that it did and understands why there was a desire to have a new policy in place as soon as possible

233. However, the Committee considers that the procedure would have benefitted from more consultation and this was not undertaken in the time allowed for the drafting

of the procedure. For example, there could have been more wide-ranging engagement with staff, in addition to further formal consultation with trade unions.

234. The Committee is of the view that the speed at which the procedure was developed, however laudable the intentions, could have had a detrimental impact on the procedure in terms of its clarity and robustness. The Committee notes that there was no time taken to ‘stress test’ the procedure to fully think through how the procedure might work in practice and the scenarios which may arise.

235. It is evident that there were concerns surfacing from civil servants about the former First Minister in November 2017 in the wake of #MeToo. Though the procedure was clearly created in light of #MeToo, not in light of any specific incidents, concerns or persons, the Committee is concerned that the awareness of these, and the possibility they could become formal complaints, may have hastened, if not driven, the speed with which the new procedure was finalised.

236. The Committee is of the view that taking more time over the drafting of the procedure would also have allowed time to develop supporting guidance to sit behind it so that it was clear how it should be applied. Such guidance would have provided more support and information for those involved in the process including complainers, those complained about and witnesses, as well as providing clarity for those charged with applying the procedure to the investigation of a complaint. As will be detailed in the next sections of the report, paragraph 10 of the procedure on the prior involvement of the Investigating Officer was critical to the ultimate concession of the judicial review. Therefore, further guidance on that paragraph could potentially have helped with this but it is certainly critical to have this going forward.

237. In light of the report from Laura Dunlop QC reviewing the Scottish Government’s harassment policy, the Committee believes that had the Scottish Government obtained specialist advice at the beginning of the process then the Government might not have been in the position of conceding a judicial review in relation to decisions made under that procedure.

238. The issue of referral of complaints to Police Scotland is discussed in more detail in the next section of the report. However, on the basis of Police Scotland’s advice during the development of the policy, taken together with the experience of the two complaints being referred to the police, the Committee believes there should be and could have been more guidance around how to identify at the earliest stage possible, potential criminality and how to support and manage complainers’ expectations around possible referrals to the police.

### **Involvement of individuals who raised concerns**

239. In her evidence, the Permanent Secretary indicated that a number of people raised concerns as a result of her staff communication on harassment.<sup>lxvii</sup>

240. It would appear from evidence that these related both to Ministerial behaviour and that of staff. The Director of People told the Committee that—

“In response to the Permanent Secretary’s staff messages that came through at the time – in the October to December period – around 10 people came forward to raise issues. Most of these were about civil servants, and were issues around harassment and sexual harassment. Some of those were formalised during that time, and would have been dealt with under the fairness at work policy and followed through. Some were dealt with through an informal resolution, and individuals decided not to proceed with some of them. No formal complaints were received under the procedure before January.”<sup>lxxviii</sup>

241. As the procedure was being developed in November 2017, the Committee is aware that at least three individuals raised concerns about the former First Minister, two of which translated into the formal complaints that are the subject of its inquiry.<sup>lxxix</sup>

242. One of the individuals who had raised concerns was Ms A. Ms A had responded to the Permanent Secretary’s all-staff message of 2 November 2017 on 3 November 2017.<sup>lxxx</sup> At this time, she did not raise any specific concern but made a general suggestion that the review should consider an independent point of contact to the complaints process in addition to the existing routes. Ms A first raised her concern on 20 November 2017 and agreed to speak to HR about the matter on 29 November 2017.<sup>lxxxi</sup>

243. On 14 December 2017, Ms A was sent a copy of the draft procedure before it was finalised.<sup>lxxxii</sup> The Committee heard conflicting evidence about the reason for the sharing of the draft procedure with an individual who had raised a concern.

244. The Permanent Secretary stated this was to ensure the procedure reflected “lived experience”.<sup>lxxxiii</sup>

245. The Permanent Secretary also said that, although a draft procedure had been shared, it was her understanding that no changes to the policy were made as a result.<sup>lxxxiv</sup>

246. The Director of People went further and said there were a number of reasons the policy was shared at that point: it was shared “with an understanding, having taken advice, that the view of the person in that situation might not be objective” and that “it was not about accepting drafting changes that would have shaped the application of the policy should that person have decided to make a formal complaint.”<sup>lxxxv</sup>

247. The Director of People also told the Committee that the basis for sharing the draft procedure with a potential complainer was after consideration that, if they were going to proceed, they should understand the policy that was likely to be applied so that they could make an informed decision.

“The individuals had already come forward to the confidential sounding board, so support had already been offered through that route. The sharing of the procedure was really just part of a wider discussion with the individuals on the options that were open to them and their wishes.”<sup>lxxxvi</sup>

248. The Director of People also commented on the need to “learn lessons quickly”. Scottish Government officials noted that the route set out in the draft procedure was

one of a range of options presented to individuals who had raised concerns, one of which was not to make a formal complaint<sup>lxxxvii</sup>. We understand from Ms A that she came forward initially because she wanted to share her experiences to help inform the Scottish Government's review.

249. From the documents received by the Committee, it appears that Ms B was not given a full version of the draft procedure, but that the general sense of it was conveyed to her by email so that she could consider her next steps.

250. The limited sharing of the draft procedure and the contradictions in evidence as to the purpose of it being shared make it difficult for the Committee to come to a firm conclusion on the reason for the draft policy being shared. If the intention was to ensure that the procedure was shaped by wider lived experience, the question of why there was no wider staff engagement is an obvious one.

251. The Committee recognises the merit in including lived experience in policy making, and indeed the necessity to provide people raising concerns with some idea of what would be required of them if they were to make a formal complaint. The Committee does not question the motives of those involved and we believe there was a genuine desire to ensure the procedure could be improved by listening to real life experiences. However, we are surprised that those involved did not recognise the potential for there to be a perceived conflict of interest if formal complaints went on to be made (as in fact was the case). Likewise, if the purpose of sharing the document was to ask those with lived experience whether having such a procedure would have helped them at the time, the Committee feels that this would have been an exercise better undertaken on a formalised basis.

252. The Committee believes that more should have been done to ensure that the manner in which the procedure was developed was beyond reproach. This is central to confidence in any formal workplace procedure, but it may be even more important in the case of the procedure given the high-profile nature of the potential complaints. A more robust approach to the methodology for developing the procedure would, the Committee believes, have served the complainers better by minimising the opportunity for challenge.

## **Independence of process**

253. There are three distinct elements in the raising of concerns and complaints where the Committee believes independence is important. These are—

- Support to people seeking advice and guidance
- Investigation of formal complaints
- Decision making in relation to the complaints

### *Support to people seeking advice and guidance*

254. The Committee is aware that one of the individuals who went on to make a formal complaint raised the idea on 3 November 2017 of there being an independent route for staff members to raise concerns<sup>lxxxviii</sup>. The email from Ms A was in response to the Permanent Secretary's all-staff email of 2 November 2017.<sup>lxxxix</sup>

255. The Scottish Government procedure does not provide for an independent route for staff to raise concerns around harassment. As part of its organisational response in November 2017, the Permanent Secretary did, however, ask a senior civil servant to take on the role of confidante or confidential sounding board. This role was agreed to be taken on by the then Director for Safer Communities on 10 November 2017 and was highlighted to staff in a message of 13 November 2017. The Director of Communications, Ministerial Support and Facilities was separately asked to take on a pastoral care role on 10 November 2017. This was to provide support specifically to staff who worked in Ministerial private offices or in the communications function and/or staff who had been contacted by the press<sup>xc</sup>.

256. The Director for Safer Communities in 2017, who was asked to take on the role, stated to the Committee that there were limits to the independence of her role, saying—

“people were coming to me as someone in a quasi-independent role with a certain expectation that I would hold things in confidence in an informal, private space but, at the end of the day, I still had obligations as a senior civil servant.”<sup>xc</sup>

257. The Director for Safer Communities continued to tell the Committee that she had raised her own thoughts on the limit of independence of her role with the Director of People in late 2017—

“I told her that one of the issues in my mind was whether the role was sufficiently independent and whether consideration might be given to the idea of having someone in a truly independent role rather than somebody who was a senior civil servant doing the work. That was certainly one of my reflections about the role.”<sup>xcii</sup>

258. The Committee heard from Ms A and Ms B that an independent route through which to raise complaints would be valuable. One of the witnesses told the Committee—

“it could be really valuable to have a truly independent contact point, or at least the option of that, because the more sensitive a matter is, the more likely it is that somebody will not necessarily feel comfortable bringing it up with somebody internally.”

259. The Committee heard that although the details of the confidential sounding board are still on the Scottish Government intranet, the post has not been highlighted to staff recently.<sup>xciii</sup> It appeared that this may have been because of caution in the Scottish Government once the Police Scotland investigation into the conduct of the former First Minister began.

260. The Scottish Parliament and the House of Commons have independent support services that people can use on a confidential basis to seek advice on harassment issues.

261. It can be very difficult for people to come forward with complaints and this can be made more difficult if they feel they have to share personal experiences with people who work for the same organisation (no matter how suitable the person is for the role). Therefore, the Committee believes the Scottish Government should introduce an independent support service such as that provided by the Scottish Parliament.

### *Investigation of formal complaints*

262. In cases involving both former and current Ministers, the procedure provides that there will be an investigation carried out by a senior civil servant appointed as Investigating Officer by the Director of People.

263. The Permanent Secretary is provided with a copy of the report as the Deciding Officer under the procedure. It is the Deciding Officer who makes the decision as to whether the initial report gives cause for concern and then whether a complaint is well founded.

264. One of the key pieces of advice given to the Scottish Government by trade unions was that the procedure for considering complaints should be more independent from the Scottish Government. The FDA, for example, said that there needed to be independent investigation and decision making. The Committee notes that the Permanent Secretary rebuffed this in oral evidence to the Committee, saying that independence of process was not one of the main asks of the union around the procedure—

“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”<sup>xciiv</sup>

265. The Director of People at the Scottish Government told the Committee that, at the time of the development of the procedure, a full independent process was not deemed best practice, explaining to the Committee that—

“all the advice that came together at the time, including the legal and other views, was that there are things such as employment tribunals for people to go to for independence in an employment process. In most circumstances, the expectation is that people will have exhausted all internal routes for resolving issues before going externally and, given the risk to confidentiality, the view was that an internal process was needed. As I say, it might be that practice has



moved on and that the thinking around having a fully independent process is now in a different place, but that was not the view that was reached at the time.<sup>xcv</sup>"

266. At the Scottish Parliament and the House of Commons, formal complaints against Members are investigated independently by the relevant Standards Commissioner and formal complaints against staff in those bodies are also investigated independently of the organisation. If the relevant Standards Commissioner recommends that a breach has occurred, complaints in the Scottish Parliament are referred to the Parliament's Standards, Procedures and Public Appointments Committee. In the House of Commons, they are now referred to an Independent Expert Panel (previously they were referred to the Committee on Standards). Those bodies make the final decision based on the Commissioner's report and any representations received from the elected member involved.

### *Sanctions and interplay with Codes of Conduct*

267. Under the procedure, where cases involve current Ministers, the First Minister is informed and has a role to play in deciding whether there should be sanction under the Ministerial Code as arbiter of the Code.

268. In cases involving a current First Minister, the Permanent Secretary can seek the advice of independent advisers on the Ministerial Code to decide if there has been a breach and can also take any action necessary to protect staff.

269. In cases involving former Ministers, the First Minister is informed if the former Minister was part of the party of the current administration. If the Minister was a member of an administration formed by a different party, the current party leader is informed.

270. Scottish Ministers are considered personally responsible for ensuring that their actions and affairs are in line with the standards required by the Scottish Ministerial Code. The Permanent Secretary can provide Scottish Ministers with advice on matters covered by the Code and is expected to ensure that procedures are in place to support compliance. However, the Permanent Secretary and other officials are not responsible for enforcement. That responsibility rests solely with the First Minister who is considered the ultimate judge of the standards of behaviour expected of Scottish Ministers and of the consequences that follow from breaching those standards.

271. In the Scottish Parliament where a breach of the MSP Code of Conduct is found to have occurred, the Standards, Procedures and Public Appointments Committee proposes sanctions to be considered by the Parliament as a whole. The Independent Expert Panel performs this role at the House of Commons.

272. The Committee considers that an independent process is likely to enjoy a greater degree of confidence amongst those who make complaints and against whom complaints are made. The Committee believes that there are models, such as those of the Ethical Standards Commissioner for Scotland, which already enjoy such confidence, and which provide a benchmark for best practice.

273. The Committee believes the Scottish Government should give serious consideration to introducing a system similar to the independent systems for reporting and investigating complaints at the Scottish Parliament and the House of Commons. The Committee was pleased to note recommendation 10 made by Laura Dunlop QC on independent investigation and adjudication of complaints against former Ministers<sup>x cvi</sup> The Committee believes consideration should also be given to an independent process for complaints against current Ministers.

# **The Handling of the Complaints**

## **Introduction**

274. Two formal complaints were made under the procedure. This section of the report looks at the timeline of events, the process that was followed and the roles played by different officials, including the Permanent Secretary, within that process. Annexe D provides an overview of the senior civil servants involved. There are also sections on matters which the Committee considers to be of significance to the handling of the complaints, such as transparency and confidentiality.

275. Concerns about the former First Minister were raised in November 2017, two formal complaints were then made in January 2018 and these were investigated using the procedure which had been finalised in December 2017 and published on the Scottish Government intranet for staff on 8 February 2018.

276. On 26 February 2018, the Permanent Secretary decided, after an initial investigation had been carried out and report prepared, that the report gave cause for concern over the behaviour of the former First Minister towards the civil servants Ms A and Ms B. As per the procedure, the former First Minister was told of the complaints and the investigation on 7 March 2018 and was asked for his response. Following consideration of a revised report, on 21 August 2018, the Permanent Secretary decided that the complaints were well founded. That same day, following contact by the Scottish Government with the Crown Office and Procurator Fiscal Service the matter was referred to Police Scotland. The outcome was communicated to the former First Minister and the First Minister on 22 August 2018. The Permanent Secretary also spoke to Ms A and Ms B.

277. Annexe B provides a detailed timeline covering the period from 31 October 2017 to 31 August 2018 and includes—

- the key dates in relation to the drafting of the procedure, its finalisation, and its publication on the Scottish Government intranet
- details of when Ms A and Ms B highlighted their concerns to senior members of staff within the Scottish Government and the dates that Ms A and Ms B made formal complaints
- dates on which the Investigating Officer was appointed to each complaint.

## **Overlap of development of procedure and raising of concerns**

278. The Permanent Secretary's messages about the work being undertaken to build confidence around challenging inappropriate behaviour and encouraging individuals to speak out is likely to have had a bearing on Ms A and Ms B deciding to come forward at this point. The Head of Communications, Ministerial Support and Facilities Services told the Committee that—

“I understand that both contacts were a result of the permanent secretary's staff message on 2 November, when she put out a note to all staff about cultures and behaviours, and ensuring that people felt that they were supported to come

forward, and so on My understanding is that both individuals came forward as a result of that.”<sup>xcvii</sup>

279. When Ms A and Ms B came forward with concerns in November 2017, it was in advance of the procedure being finalised.

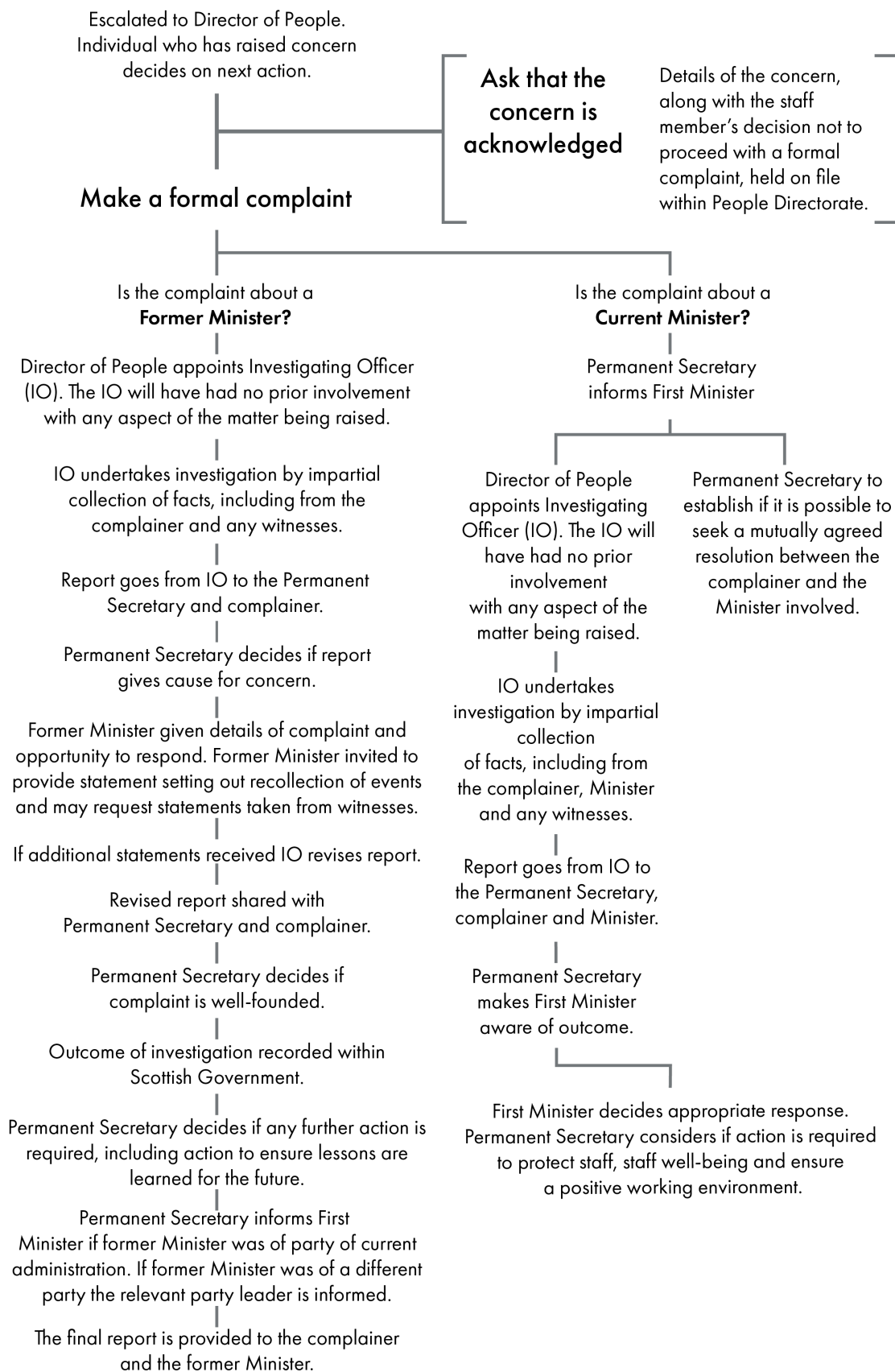
280. It is important to highlight the distinction which the Scottish Government drew between the raising of a concern and the making of a formal complaint. The Permanent Secretary told the Committee that—

“There is a distinction between concerns and people deciding that they want to trigger a formal process by making a complaint. We may come back to that in discussing the other procedure.”<sup>xcviii</sup>

281. The procedure seems to allow for informal resolution of concerns which have been raised. There are differences in the procedure for dealing with formal complaints depending on whether this is against a current or former Minister. In the case of a current Minister, the Investigating Officer interviews the Minister as well as the complainer and witnesses and the report is shared with the Permanent Secretary, the complainer and the Minister. There is a two-stage process for former Ministers, with the Investigating Officer preparing an initial report for the Permanent Secretary. This report is shared with the complainer. If the Permanent Secretary decides there is a cause for concern, details of the complaint are given to the former Minister, who is given an opportunity to respond. The final report is shared with the complainer and the former Minister.

**Figure A shows the process to be followed under the procedure**

## Concern is raised with a senior manager, HR or a trade union



282. Ms B raised her concern on 7 November 2017. She approached the Director of Communications, Ministerial Support and Facilities. It is unclear whether this was in the Director's role as pastoral support to staff in ministerial private offices and communications or in another capacity. The Director for Safer Communities did not have contact with Ms B at any point, telling the Committee—

“I make it clear that I had no contact at all with Ms B and have never had any engagement with her.”<sup>xcix</sup>

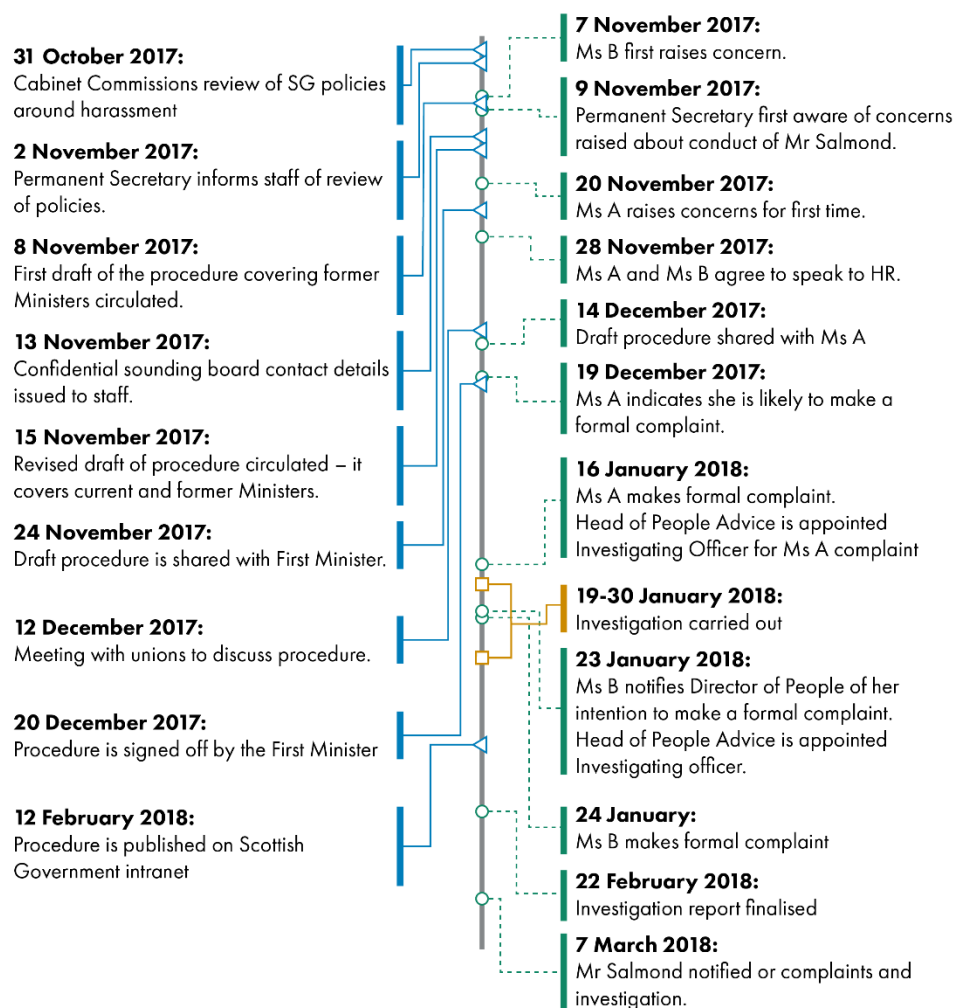
283. Ms A raised her concerns on 20 November 2017. Ms A initially raised her concern with the First Minister's Principal Private Secretary. The first meeting took place on 20 November 2017 after which, with Ms A's permission, the Principal Private Secretary to the First Minister spoke to his line manager, the Director of Communications, Ministerial Support and Facilities. On 21 November 2017 the Principal Private Secretary to the First Minister met Ms A again and referred her to speak to the Director of Communications, Ministerial Support and Facilities and the Director for Safer Communities. The Principal Private Secretary to the First Minister told the Committee—

“At the end of the second meeting, I said that, if she felt that she was not being taken seriously and that no one was listening to her, she should come back to speak to me and that, if she wanted to meet with the First Minister, I would set that up.”<sup>c</sup>

284. On 29 November 2017, Ms A and Ms B agreed that they would be prepared to speak to HR to share their concerns<sup>ci</sup>. As a result, the Director of People and the Head of People Advice made contact with Ms A and Ms B. This contact continued throughout December.

285. It is worth noting that, at this time, the procedure was still under development. It is apparent, therefore, that the discussions around the concerns raised by Ms A and Ms B during November and December 2017 were not being dealt with under a formal policy. An overview of key dates is, however, provided below as figure B. This shows how the development of the procedure coincided with Ms A and Ms B raising concerns.

**Figure B: a timeline of key dates in the development of the procedure and the handling of complaints**



286. The Committee does not dispute the fact that Ms A and Ms B were able to raise a concern and notes the Director of People's comment in evidence that there does not need to be a policy in place for an individual to raise a complaint with an organisation.<sup>cii</sup>

287. It is well understood that the Director of People and the Head of People Advice, as the Scottish Government's most senior HR advisers, were heavily involved in the drafting of the procedure. At the same time, they were discussing with Ms A and Ms B the specific concerns which they had raised, including trying to guide them as to what the route would be should they wish to continue the concern to the point of making a formal complaint. The same senior officials were also working with the Permanent Secretary in order to shape the Scottish Government's organisational response to the #MeToo movement and the allegations of misconduct by elected officials.

288. The documents provided to the Committee by the Scottish Government show that, during December 2017, Ms A and Ms B were being given information on what would happen if they decided to make a formal complaint. The information provided to the individuals set out a process which was later formalised by the adoption of the procedure. Ms A and Ms B were also told that it was likely that the Head of People

Advice would be appointed as Investigating Officer should they wish to formalise a complaint<sup>ciii</sup>.

289. In mid-December it was also suggested that “it may be best to take stock and reconvene on decisions in the New Year.”<sup>civ</sup>

290. The First Minister approved the procedure on 20 December 2017.

291. The Committee does not question the motives of Scottish Government officials in trying to find a route by which Ms A and Ms B could raise their concerns formally.

292. It is, however, evident to the Committee that, in the absence of a policy in place to deal with historic allegations of harassment at the time that the concerns of Ms A and Ms B were raised, senior civil servants had to make decisions about how to manage the concerns in tandem with the development of the new procedure. The Committee questions the robustness of this approach.

293. In particular, the Committee is concerned that the tripartite nature of the roles of the Director of People and the Head of People Advice during November and December 2017 created a situation in which the concerns raised by Ms A and Ms B became indistinguishable from the development of the procedure.

294. The Committee believes that a clear separation of roles and responsibilities would have helped to create space between the development of the procedure and the discussion of the concerns raised by Ms A and Ms B. The Committee is also cognisant of its recommendations made earlier in this report around independent reporting and investigation of concerns about harassment.

295. Finally, the Committee appreciates that a number of people need to be involved in any investigation, for example having note takers at meetings. However, this also has the potential to make complainers feel uncomfortable if they believe a number of people in an organisation are aware of their personal circumstances. The Committee believes this underlines the need for an independent investigatory process as outlined in the previous section.

### **Formal complaints: roles and responsibilities**

296. For entirely sound reasons of confidentiality, the Committee has not received the detail of any of the complaints made. The Committee’s focus is not on the complaints themselves, but on the manner in which the investigation of them was conducted.

297. A key part of the Committee’s work has, therefore, been to seek to understand the roles and responsibilities of the Permanent Secretary as Deciding Officer and of the Head of People Advice as Investigating Officer under the procedure.

298. It is also the case that the Committee has been provided with evidence of the role of the Director of People in the process.



299. The Committee explored the extent to which the roles and responsibilities of the individuals involved in the complaints handling process were properly defined. In particular, the Committee looked at whether there was a proper and clear separation of roles held by individuals under the procedure with their roles in the wider organisational response to the #MeToo movement and the concerns being raised. The Committee was struck by one particular comment from the Director of People who told the Committee—

“That is the nature of our roles, which is probably part of the difficulty. Inevitably, in my role, lots of roads come to you and you have to take a view and provide support over a range of issues. Obviously, for the permanent secretary, it is even more intense in that everything eventually flows in that direction, albeit that her day-to-day involvement may not be so close<sup>CV</sup>.”

300. Ms A made a formal complaint on 16 January 2018 and Ms B on 23 January 2018. These were made to the Director of People.

301. At the point that Ms A and Ms B made their formal complaints in January 2018 it triggered the formal process set out from paragraph 10 of the procedure. Initial contact is set out earlier in the procedure. It appears to the Committee that the initial contact was taken as having been fulfilled because of contact in November and December 2017.

302. The Director of People appointed the Head of People Advice as the Investigating Officer under the procedure. This appointment was made on 16 January 2018 in relation to Ms A’s complaint and on 23 January 2018 in relation to the complaint made by Ms B. With the knowledge of the outcome of the judicial review, the decision to appoint the Head of People Advice as Investigating Officer becomes a critical point (because of the interpretation of the prior contact and paragraph 10 of the procedure, which states that the Investigating Officer will have had no prior involvement with any aspect of the matter being raised). However, the implications of the appointment for the judicial review are not discussed here but are explored in the judicial review section of this report.

303. The initial investigations into the complaints of Ms A and Ms B were carried out between 19 and 30 January 2018. It is understood that four witnesses were interviewed during this period.

304. Under the procedure, the Investigating Officer is responsible for the investigation of the complaints by collating an impartial overview of the facts and presenting such facts in a report.

305. In order to prepare a report, the Investigating Officer formally interviews the person making the complaint and then conducts interviews with any witnesses.

306. As outlined above, the Director of People and the Head of People Advice provided support to Ms A and Ms B throughout November and December 2017, ahead of the formal complaints being made. Once the formal complaints were made, there could reasonably be an expectation that roles would be re-defined and complainers be made aware of this – i.e. that complainers would be informed about who would be

conducting the formal procedure and who would be available to answer any general questions they had, keep them up-to-date and provide support if necessary.

307. The Committee found no evidence that this had been the approach taken by the Scottish Government. Rather, it was evident to the Committee that the Investigating Officer continued to be the main point of contact for the complainers during the investigation.

308. The Committee notes that in early legal advice to the Scottish Government from counsel the issue of prior contact is not discussed. The Committee is aware that the argument around prior contact was not made in the former First Minister's original petition for judicial review. The fact that the role of the Investigating Officer and contact with complainers is not mentioned in initial legal advice may point towards the Scottish Government not identifying this early on as a risk to the defence of the judicial review. A Scottish Government [email of 30 October 2018](#) indicates that their interpretation of paragraph 10 of the procedure was that the person investigating should have no "prior involvement with any aspect of the matter being raised" was that the "matter" is the substance of the complaint. This issue is explored more in the next section of the report on the judicial review.

309. It was apparent to the Committee that, whilst under the procedure the Investigating Officer is required to prepare a report for the Deciding Officer, the investigation is its own process. From that, the Committee understands that the Investigating Officer acts independently and is not accountable to any individual. In response to the question "As part of your work as investigating officer, did you have any direct involvement or contact with the Permanent Secretary?", the Head of People Advice told Committee—

"No, I did not, during the investigation."<sup>cv</sup>

310. In contrast, the Director General of Organisational Development and Operations at the time of the investigation told the Committee that—

"Because the complaint was being investigated under the permanent secretary's procedure, the decision was taken—I assume by the permanent secretary, although it was not something that I ever discussed with her—that she would take the lead, in being the person to whom the investigating officer reported."<sup>cvii</sup>

311. The Committee understands that on day-to-day matters the Head of People Advice reports to the Director of People. It is apparent that the Director of People had a good awareness of how the investigation was progressing. The Head of People Advice told the Committee—

"I sought legal advice all the way through the investigation, and I updated my line manager regularly on progress; for example, in relation to numbers of witnesses and seeing X witnesses the next week. I updated my line manager on the progress of the process."<sup>cviii</sup>

312. The Committee believes that there was an opportunity at the point at which Ms A and Ms B made formal complaints to pause in order to fully think through the process which would need to be followed under the procedure. The consequences of failing to take that opportunity were significant in terms of the application of the procedure which was new to officials and which had no guidance to support it.

313. The Committee is concerned that there was no clear articulation of roles under the procedure at the point when formal complaints were received. This led to the Head of People Advice seeming to have two roles: one as the Investigating Officer and one as a source of support to the complainers.

314. It is evident that the Head of People Advice had, by the time of her appointment, built up a rapport and relationship of trust with Ms A and Ms B. The Committee therefore finds it astonishing that the potential for challenge around the perception of impartiality of the Investigating Officer was not identified at this point. The Committee was given no evidence that a risk had been identified around the suitability of the Head of People Advice to take on the role of Investigating Officer. As will be explored further in the Judicial Review section, the Scottish Government appears not to be concerned because it interpreted paragraph 10 of the procedure as meaning the Investigating Officer will have had no involvement with the subject matter of the complaints rather than having no prior involvement in any aspect of the complaints.

315. The Committee does not question the need to provide the complainers with support, nor the forms of support offered. It does, however, question whether this role should have been embodied by the Investigating Officer. One way to ensure complete separation is for any investigation to be undertaken independently of the Scottish Government as employer. As highlighted in the previous section, this is a feature of harassment procedures in some other areas.

316. The Committee believes that line managers have a role to play in enabling and supporting staff to raise complaints. The Committee considers that line managers should fulfil this role effectively and with the sensitivity required.

317. The Committee is unclear as to whether the Investigating Officer was acting wholly independently in the initial investigation or whether her actions were directed to some extent by a line of accountability to the Permanent Secretary as Deciding Officer.

### **The role of the Permanent Secretary**

318. The prominent and cross-cutting nature of the Permanent Secretary's role in the handling of complaints against the former First Minister is clear to the Committee. Indeed, over the course of the Committee's investigations, the Permanent Secretary's key role in a number of the phases of the Committee's inquiry has become clear.

319. The Committee recognises the commitment of the Permanent Secretary to drive organisational change at the Scottish Government. That is an ambition which the Committee wholly supports

320. As set out in the first part of this report, the Permanent Secretary was central to the organisational response to the #MeToo movement. This involvement is demonstrated in the all-staff messages which went out in the Permanent Secretary's name and actions such as the appointment of the Director for Safer Communities and the Director of Communications, Ministerial Support and Facilities in informal staff support roles which were highlighted in the first section of this report.

321. The Committee also received evidence that the Permanent Secretary was being made aware of the nature of specific concerns being raised, presumably because of their gravity for the organisation. The Committee tried to gain an understanding of what knowledge the Permanent Secretary had and at what points she had such knowledge. Our conclusion is that the Permanent Secretary was aware of the concerns being raised about the conduct of the former First Minister from early November 2017<sup>cix</sup>.

322. It is clear to the Committee that the Permanent Secretary also played a part in the development of the procedure. The Permanent Secretary told the Committee that she "was not close to the procedure development"<sup>cx</sup>, but the documents which the Committee received show that the Permanent Secretary and the Permanent Secretary's office received regular information on its drafting. The Permanent Secretary is also central to related issues, such as whether letters about the development of the procedure should be sent to party leaders and former First Ministers<sup>cxii</sup>.

323. Finally, there is the role of the Permanent Secretary in the procedure. Under the procedure, the Permanent Secretary is the Deciding Officer. The extent of the Deciding Officer role as provided for in the procedure appears to be making two decisions.

324. The first is made on receipt of an initial report from the Investigating Officer after the complainant and witnesses have been interviewed. Upon receipt of that initial report the Deciding Officer is required to decide whether the "report gives cause for concern over the former Minister's behaviour". If the Permanent Secretary as Deciding Officer believes that there is a cause for concern, then the former Minister "should be provided with details of the complaint and given an opportunity to respond."

325. The procedure goes on to provide that the "former Minister will be invited to provide a statement setting out their recollection of events to add to the record. They may also request that statements are taken from other witnesses.<sup>cxiii</sup>" If witnesses are interviewed, the Investigating Officer revises the initial report and shares this with the Deciding Officer and the individual who made the complaint.

326. It is at this point that the Deciding Officer is tasked with taking a second decision on whether the complaint is 'well-founded'.

327. The Committee tried to build a picture of the Permanent Secretary's involvement from the instigation of the formal complaints in January 2018 to the point at which the outcome of the investigation was communicated on 22 August 2018.

328. It is evident that, from the point of taking a decision that there was a cause for concern around the behaviour of the former First Minister under the procedure, the

Permanent Secretary was acting in two capacities – as Deciding Officer and as the Permanent Secretary. An undated note which sets out various actions for the Permanent Secretary at the time that she was provided with the investigation report, witness statements and legal advice highlights this<sup>cxiii</sup>. It is also clear from the evidence received by the Committee that in her consideration of the findings of the report, the Permanent Secretary has an eye to the wider organisational ramifications<sup>cxiv</sup>.

329. The Permanent Secretary had contact with Ms A and Ms B in early March 2018 to inform them of her initial decision. Evidence received by the Committee shows the background to this contact between the Permanent Secretary and the complainers<sup>cxv</sup>.

330. It is the Committee's belief that this contact between the Permanent Secretary and the complainers was undertaken by the Permanent Secretary acting in that role rather than in her role as Deciding Officer as argued by the Scottish Government.

"The purpose of this contact was for the Permanent Secretary to explain her role and the Scottish Government's duty of care to them, explain her consideration of the initial Investigation Report, and to inform the complainers of her decision and what this meant in terms of the next steps in the Procedure. The meeting also provided an opportunity for the Permanent Secretary to repeat the options for further support and assistance available to the complainers."<sup>cxvi</sup>

331. On 7 March 2018, as Deciding Officer, the Permanent Secretary made the former First Minister aware of the complaints of Ms A and Ms B and the investigation. It is evident that the Permanent Secretary was herself involved in shaping this contact and that it was not a task undertaken by her office<sup>cxvii</sup>.

332. From this point, the Permanent Secretary became the primary point of contact for the former First Minister. The extent of this contact between the Permanent Secretary and the former First Minister was significant and centred on a series of letters exchanged between the former First Minister's solicitors and the Permanent Secretary. In these letters the former First Minister challenges the lawfulness and the fairness of the procedure on a number of grounds whilst the Permanent Secretary repeatedly requests the former First Minister's account of the complaints<sup>cxviii</sup>.

333. The investigation under the procedure was protracted from the point at which the former First Minister was asked for his response to the complaints in March 2018. Documents provided to the Committee show that from April to August 2018 the former First Minister made representations to the Permanent Secretary through his solicitors. By July 2018, senior officials including the Director of People and the Director of Communications, Ministerial Support and Facilities were actively involved in the coordination of the work to respond to the former First Minister<sup>cxix</sup>.

334. During this time, the Permanent Secretary also became involved in the detail of the investigation. The Committee notes, for example, contact between the Investigating Officer and the Permanent Secretary's Office where the Investigating Officer asked for a steer on whether to interview someone the former First Minister suggested. The steer was requested because the individual was seeking to rearrange their interview to a later date and the Investigating Officer asked whether a written

response should be sought to prevent the progress of the complaints process being pushed back further<sup>cxx</sup>. The Permanent Secretary told the Committee that—

“I specifically and personally instructed that the investigating officer’s report should not be finalised until Mr Salmond had been given a further opportunity to present his position as fully as possible.<sup>cxxi</sup>”

335. The Investigating Officer’s revised report was prepared and sent to the Permanent Secretary as Deciding Officer on 18 July 2018. A second revised report was prepared and submitted to the Deciding Officer on 23 July 2018 after further representations from the former First Minister. The Deciding Officer’s report was dated 21 August 2018<sup>cxxii</sup>.

336. On the 20 August 2018 a letter was drafted by the Director of People to be sent to the Crown Agent. The letter indicated that two complaints had been investigated under the procedure and that the investigation had ‘raised concerns that criminality may have occurred’. The letter asked that the matter be referred to Police Scotland<sup>cxxiii</sup>. The police referral is discussed in the next section of this report.

337. The Committee notes that the Permanent Secretary as Deciding Officer has two decision points under the procedure. The first is determining, following an initial investigation of the complaint, whether there is cause for concern and the second is, following the final investigation, whether the complaint is well-founded. The Committee does not believe it is appropriate for both decisions to rest with the Permanent Secretary as Deciding Officer. If the same person is making both decisions, the question that has to be asked is whether they can be sufficiently independent to judge whether a complaint is well founded given they have already determined there is cause for concern. The Committee believes there is a case to amend the procedure to allow for the first decision to be taken by a senior civil servant of Director General level to ensure the person taking the final decision has not been previously involved in the complaint. The Committee notes recommendation 6 of the Dunlop review<sup>cxxiv</sup>.

338. The Committee notes that the scope of the Deciding Officer’s role outside of taking the two decisions in relation to the complaints is not clear from the procedure. The extent of contact, whether with the complainers or the former Minister against whom the complaint is made, is similarly absent from the procedure. The Committee is mindful of the evidence received and cited earlier in this report, that the pace of development of the procedure meant that there was no guidance attached to it. The Committee considers that the arrangements for contact should be clarified in the procedure in supporting guidance to ensure there is sufficient separation of roles.

339. It is essential that contact is made with individual complainers by their employer in exercising that duty of care by informing them of what is happening and letting them know what are the next steps. However, because the Permanent Secretary contacted the complainers and because she was also the Deciding Officer, this left her open to accusations of having had inappropriate contact. The Committee is therefore sympathetic to the idea that contact with complainers and former Ministers should be delegated to a senior member of staff who does not hold a formal role within the procedure. The Committee believes that this has the potential to remove any

perception that contact with those involved in the complaint could influence the Investigating Officer or the Deciding Officer. The Committee notes recommendation 8 of the Dunlop review in relation to impartiality<sup>cxv</sup>.

340. The Committee is also concerned at the influence which the Permanent Secretary, as Deciding Officer, had over elements of the investigation, for example in relation to the interviewing of witnesses requested by the former First Minister.

341. The Committee believes that, like the Investigating Officer, the Deciding Officer should have had no prior involvement with the complaints they are deciding upon. As outlined above, the multiple roles of the Permanent Secretary, who was the Deciding Officer, in the development and ultimately the implementation of the procedure, could lead to the perception that there wasn't sufficient distance and independence in the decision making process.

342. The Committee is clear on the central role which the Permanent Secretary had in much of the work being undertaken in the period between 31 October 2017 and 22 August 2018. This includes the corporate response to the #MeToo movement, the development of the procedure and the investigation of the complaints of Ms A and Ms B under the procedure. The Committee is concerned that the lines between these workstreams became blurred to the extent that the complaints themselves could not be viewed without reference to that wider context.

343. The Committee is of the view that the multiple roles being fulfilled by the Permanent Secretary should have been identified as a significant organisational risk. The Committee believes that the Permanent Secretary, and senior civil servants supporting her, should have been alive to these risks and should have actively taken steps to mitigate them. No evidence of a risk management approach has been provided to the Committee. It is also essential to ensure there are sufficient HR specialists involved in advising and guiding the Permanent Secretary and others through this process.

344. Ultimately it was the First Minister who signed off the procedure and it was the Permanent Secretary who had the responsibility to ensure its implementation was robust and to minimise the risk that the procedure itself could be challenged. Ultimately it was the prior involvement of the Investigating Officer which led to the Scottish Government conceding the judicial review but the Committee believes the degree of involvement of the Permanent Secretary and her actions as Deciding Officer also places a question mark over the process. The Committee is also concerned by the Permanent Secretary's decision to make public comment when the investigation was concluded. This is explored in more detail later in the report.

## **Referral of matters investigated under the procedure to the Crown Agent and Police Scotland**



345. In seeking to understand the referral made by the Scottish Government, the Committee first sought to understand the provisions of the procedure in relation to the police.

346. The procedure is clear that an individual is free to make a complaint directly to the police at any time. The procedure makes it similarly clear that the Scottish Government will cooperate with any police investigation whilst supporting the individual who has raised a complaint<sup>cxxvi</sup>.

347. The Head of People Advice told the Committee that she had contacted Police Scotland to seek advice on the handling of sexual harassment cases, and that she had a meeting with Police Scotland in December 2017. The December meeting was described as “a generic meeting about a person centred approach” that “did not include reference to any specific concerns, complaints or individuals.”<sup>cxxvii</sup>

348. [Written evidence from Police Scotland](#) set out the specific contact with the Scottish Government as—

“Police Scotland was contacted in the first instance on 5th December 2017. This contact was via email. Following this, there was a single physical meeting on 6th December 2017 and thereafter, email and telephone contact on 30th January 2018; 31st January 2018; 18th April 2018; 19th April 2018; 1st August 2018; 2nd August 2018 and 3rd August 2018.”

349. The evidence from Police Scotland continued to explain the guidance that had been provided to the Head of People Advice—

“The initial email contact indicated that advice was sought on the SG approach to sexual harassment procedures following the #metoo movement, and, SG obligations in response to allegations made by staff or former staff which may constitute a criminal offence...the Deputy Director was provided with advice that any potential victim or complainer should be provided with details of support and advocacy services.”

350. In complaints processes, the duty to report suspected criminality can be a legislative requirement. In relation to complaints against MSPs for example, the Ethical Standards Commissioner for Scotland is under a duty to alert the Crown Office and Procurator Fiscal Service if there is something which would constitute a criminal offence. Directions made under the Scottish Parliamentary Standards Commissioner Act 2002—

“Criminal offences

(15) If the Commissioner is satisfied in relation to any complaint that the member has committed the conduct complained about and that the conduct would, if proved, constitute a criminal offence, the Commissioner shall—

- (a) suspend investigation and consideration of the complaint;
- (b) submit a report to the Procurator Fiscal; and
- (c) notify the Committee.



(16) The Commissioner shall resume investigation and consideration of a complaint in respect of which investigation and consideration has been suspended under subparagraph (15)(a)—

- (a) at the conclusion of any criminal proceedings instituted in consequence of the report by the Commissioner;
- (b) on receipt of confirmation from the Procurator Fiscal that no such proceedings will be raised; or
- (c) on receipt of confirmation from the Procurator Fiscal that the Commissioner may do so.”

351. The Code of Conduct for MSPs also requires them to go to the police in certain circumstances. Section 8 paragraph 7 of the Code of Conduct requires members to “respect individual privacy, unless there are overwhelming and lawful reasons in the wider public interest for disclosure to be made to a relevant authority, for example, where member is made aware of criminal activity.”

352. The [ACAS guidance](#) on dealing with grievances and disciplinary proceedings states that “If the grievance could be a criminal matter (for example, it’s related to an assault), the police might need to be involved. Employers and employees should use their own judgement about when to involve the police”. As such, it is clear that employers cannot always keep matters raised with them confidential if they suspect criminality.

353. In relation to the two complaints investigated under the procedure, the Committee heard evidence that Ms A’s first disclosure potentially raised issues of a ‘criminal nature’. The former Director for Safer Communities who also took on the role of confidential sounding board said—

“In the statement that I took from Ms A when I spoke to her on 22 November, she raised a series of very significant issues with me. I found what she said to me to be profoundly difficult; I just want to be honest about that. In response, we discussed issues that she would want to think about in taking matters forward. I do not want to go into too much detail, but you have asked specifically about the police. I recorded at the time that it potentially raised matters of a criminal nature<sup>cxxviii</sup>.”

354. Evidence received by the Committee highlights that in November 2017 the Director of Communications, Ministerial Support and Facilities suggested to the then Director for Safer Communities that it was ‘not appropriate to be proactive’<sup>cxxix</sup>.

355. Documents provided in evidence to the Committee show that the issue of a police referral was not considered again until July 2018<sup>cxxx</sup>. At this stage both Ms A and Ms B were reluctant to refer the matter to the police.

Ms A:

[Redacted]

“I don’t feel comfortable committing to a process that would culminate in me – or anyone else - being required to ‘face off’ against the FFM in court. I’m

extremely grateful that colleagues have cooperated with the SG internal investigation, but it's a very different thing to put anyone in that position, and I'd absolutely understand if they weren't willing to do it, but equally think I would find it a very difficult thing to feel I was pursuing alone – particularly given that, as I say, a criminal process has never been an outcome I was actively seeking."

Ms B:

[Redacted]

"I have been reassured by the level of anonymity of the internal process and while I am uncomfortable that this will can [sic] no longer be guaranteed when this comes into the public domain through the FOI, the risk is at a level that feels acceptable to me. However, if the police were to become involved, I would no longer be afforded this level of anonymity – particularly if this went to court. I feel that to me, the risks of police involvement outweigh what could be achieved".<sup>cxxxix</sup>

356. As late as 3 August 2018 the Director of People states in an email to Ms A when consulting her on referral to the police—

"I did want to make it completely clear that it is perfectly OK for you to say that it is not your preference that the police are involved. You have already taken a courageous step in coming forward."<sup>cxxxix</sup>

357. Ms A and Ms B said to us that they felt it was the right thing for the Scottish Government to do, even if it was not their preference. They, both later agreed that they would cooperate with a police investigation if the Scottish Government were to refer the matter.

358. Ms A and Ms B also addressed specifically comments which had been made in other evidence that the Lord Advocate had directed them to make police statements. Addressing this point, one of the witnesses told the Committee—

"For the avoidance of doubt, the Lord Advocate did not direct us to make statements to the police—in fact, we had no communication from him. No message was passed on on behalf of the Lord Advocate, and nobody in the Scottish Government instructed me to make a statement to the police."

359. [Paragraph 33 of the Scottish Government's written submission to the Committee](#) provides the Scottish Government's rationale for the referral which was made to the Crown Agent on 21 August 2018<sup>cxxxix</sup>.

"Consideration was at this stage given by the Scottish Government as to whether the allegations constituted offences sufficiently serious to warrant review by Police Scotland. The views of the complainers were sought so that their wellbeing could be considered as part of the decision. It was concluded that as the alleged conduct could have amounted to potential criminality, there was a significant public interest in referring the matter to the relevant authorities to be investigated. Having regard to all relevant advice received, in accordance with the process set out at paragraph 9 and as set out in evidence to the Committee on both 18 August and 8 September 2020, the Permanent Secretary

decided on behalf of the Scottish Government that 3 of the incidences should be referred to the Police.”

360. The Committee noted with interest evidence from Police Scotland about further contact with the Head of People Advice. Police Scotland indicated that contact had occurred on several occasions and that such contact raised ‘hypothetical questions’—

“A number of hypothetical questions were posed during email and telephone contact around the criminal justice process. Police Scotland advised that, without specific details, no appropriate response could be given and no assessment of risk could be made. It was further emphasised that individuals should be directed to the relevant support services as it appeared that the hypothetical questions were predicated upon a specific set of circumstances and the SG response to that set of circumstances, rather than development of a generic procedure. The hypothetical questions suggested more than one victim of potential criminality and as such, it was stressed that, without knowledge of the detail, any risk that a suspect might present, could not be properly assessed or mitigated. It was highlighted that SG staff were not trained to undertake such investigations, or to engage with victims.”

361. The Committee has been provided with [a statement from the Detective Chief Superintendent](#) who, together with the Chief Constable, met with the Crown Agent on 21 August 2018 to discuss the handling of the referral by the Scottish Government. The Detective Chief Superintendent statement sets out the information the police received from the Crown Agent, noting that “I was informed that while two individuals had made a complaint to Scottish Government there may be other potential complainers who had not engaged in the Scottish Government internal conduct investigation”. It goes on: “Mr Harvie was in possession of a copy of the Scottish Government’s internal conduct conclusion report and offered to provide with a copy. I refused this offer and neither I, nor the Chief Constable, viewed this document.”

362. In evidence to the Committee, the Crown Agent was asked about the Permanent Secretary’s Decision Report. He noted that he had received a bundle of documents from Scottish Government that morning but had not read the copy of the Decision Report. He raised the report in the meeting with the police and there was a discussion about what to do with it and what its status was. The Crown Agent indicated that “During that discussion, the detective chief superintendent suggested that the police not take it at that time. Everyone was comfortable with that and we moved on to discuss other arrangements...”<sup>cxxxiv</sup>

363. The Committee supports individuals coming forward with their concerns and experiences. Nothing should be done to dissuade people from speaking out about sexual harassment. The Committee also notes that Ms A and Ms B said they had both been made aware from the outset that a police referral may follow, because of the Scottish Government’s duty of care to staff. Nevertheless, the impact on them was profound. They were also clear that it would have been helpful for them to have had specialist support throughout this period, rather than such support being filtered through HR. The Committee agrees it is essential for such support to be made available if matters as referred to the police.

364. The Committee understands that it is difficult for an employer to strike the right balance between allowing an individual to decide whether to refer a complaint to the police and fulfilling its duty to refer should there be evidence of criminality. That is why its policy and processes around such referrals must be unambiguous. Having clarity is imperative if individuals are to have confidence in raising concerns and making formal complaints.

365. Whilst the Committee appreciates that the timing of the referral to the Crown Agent was made at the conclusion of the investigation under the procedure, it questions whether full consideration should have been given to whether there was evidence of criminality earlier in the process.

366. The Committee recommends that the Scottish Government should reflect carefully on the referral process and the decision points leading up to a final decision on referral in this case so that it learns lessons for the future. The Committee notes the view of Laura Dunlop QC on the clarity required in the procedure on this matter<sup>cxxxv</sup>.

### **Transparency and access to information**

367. The Committee does not propose to set out again here the process which the Scottish Government followed in detail, but rather make some observations on the process which was followed.

368. The procedure provides no detail on the exact process to be followed during the investigation of a complaint. Rather, it is stated that “the role of the Investigating Officer will be to undertake an impartial collection of facts, from, the member of staff and any witnesses, and to prepare a report for the Permanent Secretary.”<sup>cxxxvi</sup>

369. This lack of transparency in the detail of the process was contrasted with what the Committee considers to be an example of best practice in the office of the Ethical Standards Commissioner for Scotland. The Committee noted that the office of the Commissioner provides step by step guidance on how investigations, including interviews, will be conducted. A witness policy is also available<sup>cxxxvii</sup>.

370. The Committee noted the opportunities which the complainers were given to make comments during the investigation, including commenting on the Investigating Officer’s initial report. Complainers were also able to comment on the information provided to the former First Minister as well as being afforded the opportunity to comment on his account of events.

371. The procedure states that former Ministers should be provided with details of the complaint and given an opportunity to respond. From correspondence from the former First Minister’s lawyers, it appears that when the former First Minister was informed of the complaints against him on 7 March 2018, he believed he was not provided with key information.

372. The former First Minister's response through his legal advisers, Levy & McRae, on 16 March 2018 was to note receipt and that he would need time to consult counsel. A [letter dated 30 March 2018](#), raised issues regarding his ability to respond properly, citing—

- a short time period in which to respond;
- the fact that he did not have access to witnesses and documents as the Investigating Officer did; and
- that the complaints contained little or no specification of those involved or the times or places of the alleged incidents.<sup>cxxxviii</sup>

373. The Scottish Government told the Committee that the letter from the Permanent Secretary to the former First Minister of 7 March 2018—

- provided a copy of the Procedure;
- notified the former First Minister that the Permanent Secretary had considered the initial investigation report;
- invited him to give a statement of his recollection of events either in writing or by speaking directly to the Investigating Officer;
- invited the former First Minister to identify additional witnesses to be interviewed; and
- set out further steps.<sup>cxxxix</sup>

374. The Committee notes the former First Minister highlighted that the Scottish Government did not provide him with access to documentation that he would have had access to as a minister. For example, he indicated that he had to obtain access to his ministerial diaries via a subject access request, as he was not provided with access to the First Ministerial Diary and did not recognise the purported incidents in the case of Ms B<sup>cxl</sup>.

375. The Committee further notes that the former First Minister's solicitors suggested that the issues with the complaints process, including the amount of information provided to him, amounted to an "inequality of arms".<sup>cxli</sup>

376. In contrast, the Permanent Secretary told the Committee that she considered the information provided to the former First Minister to be 'sufficient' to enable him to answer the substance of the complaints in full.

"in highly sensitive cases such as this, we need to protect, as far as we can, the confidentiality of the complainers and the witnesses but, as you point out, we should also ensure that the subject of the complaint has sufficient information to allow them to respond reasonably and manage the risk of potential legal challenge. The advice that was taken to that effect followed both of those things. With regard to what we were able to share, we knew, for example, that Mr Salmond was likely to know the individuals' identities, and we needed to ensure that there was sufficient specificity to allow for the events to be clearly understood; we also had a responsibility to protect appropriately the sensitive issue of identification of individuals."<sup>cxlii</sup>

377. The Committee understands that there is a delicate balance to strike in terms of access to information between the rights of individual complainers and the right of the person who is subject to a complaint. Nevertheless, this balance must be struck in such a way that respects the principles of fairness and natural justice.

378. The Committee has, rightly, not been privy to the documents that relate to the substance of the complaints. As a result, we cannot draw firm conclusions on the quality of the information provided to the former First Minister and whether it provided him with the opportunity to provide a full response to the complaints.

379. The Committee does, however, question whether at present there is sufficient clarity, transparency and specificity on what information will be shared and when for either complainers or the person against whom a complaint is made to have confidence in the procedure. The Committee believes that the information available to both the complainer and the person against whom a complaint is made should contain a comparable level of detail.

380. Our view is that a key principle of any complaints process is that the complainer and the person being complained about should each receive all the necessary information to set out their accounts of events. Similarly, both parties should be provided with the same opportunity to comment on the information being provided to the Deciding Officer.

381. The Committee is of the view the lack of detail on the process to be followed in the case of an investigation under the procedure also has the potential to undermine confidence in its fairness. The Committee notes the detail which the office of the Ethical Standards Commissioner for Scotland provides on the process followed in the investigation of complaints made to the Commissioner. It is the Committee's recommendation that the Scottish Government give serious consideration to adopting a similarly robust approach.

382. The Committee was struck by the guidance available for witnesses from the office of the Ethical Standards Commissioner. The Committee believes that such guidance is important to provide to witnesses so that they have a clear understanding of their role in the process.

### **The conclusion of the procedure and issues of confidentiality**

383. On 21 August 2018 the Permanent Secretary finalised her decision report. The report included the finding that a number of the causes for concern forming the complaints from Ms A and Ms B were well founded.

384. On 22 August 2018, in line with the procedure, the Permanent Secretary informed the complainers of the decision, as well as the former First Minister. The former First Minister's legal advisers responded in letters to the Permanent Secretary and the First Minister. The letters sought to remind the Scottish Government of the duty of confidentiality around the investigation which should be maintained "now and in the future"<sup>cxlili</sup>.

385. The First Minister was also informed of the outcome of the procedure by the Permanent Secretary on 22 August 2018. The procedure allowed for this sharing on a dual basis - as the current First Minister of the administration to which the former First Minister was a Minister and as party leader.

386. On 23 August 2018 the Scottish Government made the decision to release a response to an FOI request made by a journalist<sup>cxliiv</sup>. The release of information under FOI would confirm that there had been complaints made about the behaviour of the former First Minister. A statement was planned to coincide with the release of the FOI response<sup>cxlv</sup>.

387. The FOI request had been received in June 2018 and, in line with legal requirements under the Freedom of Information (Scotland) Act 2002 ("FOISA") had been due for reply on 16 July 2018<sup>cxlvi</sup>. A letter to Levy & McRae dated 4 July 2018 references the FOI request<sup>cxlvii</sup>. In response, on 9 July 2018, Levy & McRae expressed their view on applicable exemptions in FOISA, including that the whole subject matter of the request was personal data within the scope of the exemption in section 38 of FOISA and that that the public interest in preserving confidentiality in this and any similar future cases required a response in terms of section 18 of FOISA, which does not confirm or deny the existence of the information falling within the scope of the request. An email from the Head of People Advice to Ms A on 11 July 2018 indicates that the Scottish Government had by this date decided to respond to the FOI request acknowledging the existence of the complaints. The email stated "will let you know when it is going to be issued."<sup>cxlviii</sup> However a further email to Ms A dated 18 July 2018 states that—

"The response to the FOI I mentioned to you recently was officially due to be released on 16<sup>th</sup> July, however it hasn't been issued whilst we consider the handling and implications of the investigation report going to the Perm Sec."<sup>cxlix</sup>

388. The Crown Agent told the Committee in evidence that at a meeting with Police Scotland on 21 August 2018, the Detective Chief Superintendent who was present voiced concerns about the Scottish Government making a public statement about the outcome of its investigations. The Crown Agent stated—

"There was going to be some message [from the Scottish Government] which was, at that stage, undefined. There was a clear preference in the room for there to be no reference made at all in any announcement to the matter being remitted to the police"<sup>cl</sup>

389. At 2.06pm on 23 August 2018, the Permanent Secretary confirmed to the former First Minister's legal advisers the Scottish Government's intention to release the response to the FOI request that afternoon confirming the existence of complaints<sup>cli</sup>. The Permanent Secretary's correspondence also indicated her intention to make a public statement at 5pm, which was—

"Last November, I agreed with the First Minister that, in light of wider concerns about harassment in Westminster and the Scottish Parliament, an internal review would be carried out into the Scottish Government's procedures for



handling complaints in the workplace. As part of that review, a new procedure on handling harassment complaints involving current or former ministers was introduced [insert link to procedure]’.

At this time I can confirm that the Scottish Government has received two complaints in relation to Alex Salmond under that procedure. I recognise the public interest in this matter, and the importance of maintaining the integrity of public life, and would wish to be in a position to provide further information.

However, due to legal restrictions no further information can be provided. As and when more information can be made public, it will be.

The First Minister has no role in this process, but I have updated her in advance of confirming these complaints.

As the head of the Civil Service supporting the Scottish Government, I have been consistently clear that there is no place for harassment of any kind in the workplace.

In line with work already underway in the organisation to tackle inappropriate behaviour, I will consider carefully any issues about culture and working practices highlighted by these complaints.”

390. The former First Minister moved to ask the court for an interim interdict to prevent the Scottish Government from publication of the FOI response and the statement. Given the interdict being sought, the Scottish Government paused its release of the FOI response and the Permanent Secretary’s statement. The court was unable to hear the petition for the interdict on the evening of 22 August 2018<sup>clii</sup>.

391. On 23 August 2018 reports circulated online that the former First Minister was subject to sexual harassment complaints<sup>cliii</sup>. On the evening of 23 August 2018 the former First Minister was approached for comment on a story the Daily Record intended to run on 24 August 2018 which included numerous details of the specifics of the complaints.<sup>cliv</sup>

392. The former First Minister prepared and issued a press statement indicating that he had launched a judicial review in the Court of Session<sup>clv</sup>.

393. The story was published in the Daily Record the following day and another article was published in the days that followed in the Sunday Post.<sup>clvi</sup>

394. On 27 August 2018 the former First Minister’s legal advisers wrote to the Permanent Secretary detailing their concerns about how the information relating to the complaints had entered the public domain.

“Our client is extremely concerned at the level of detail which the Daily Record appeared to have acquired on the story and is strongly of the view that the detail can only have been provided by a member of the Scottish Government.<sup>clvii</sup>”

395. The former First Minister subsequently asked the Information Commissioner's Office (ICO) to investigate possible breaches of section 170 of the Data Protection Act 2018. The decision of the Criminal Investigations Team at the ICO to discontinue the investigation was then subject to review by the ICO. The former First Minister provided the ICO's review report in his [submission on the judicial review phase of the inquiry](#). The review report states at paragraph 4.6—

"I have sympathy with the hypothesis that the leak came from an employee of the SG and agree that the timing arguably could raise such an inference. It was still necessary to identify a suspect."

396. It continues at paragraph 4.8—

"There remains the possibility that the leak came from elsewhere. The list of stakeholders who had access to the internal misconduct investigation report includes the original complainants, the QC, the First Minister's Principal Private Secretary, the Crown Office & Procurator Fiscal Service and Mr Salmond and Levy & McRae, as well as the relevant staff members of the SG."

397. Ultimately, no suspect could be identified for the breach and paragraph 4.10 of the report reads—

"Following investigation, there was no evidence to identify any specific individual within these lists, or any member of staff working for anybody within these lists, as a potential suspect."

398. The Permanent Secretary was asked whether the Scottish Government had investigated the leak of this information and she replied that she found "No evidence of any civil servant leaking the information".<sup>clviii</sup>

399. The former First Minister told the Committee that the Daily Record had received a copy of the Permanent Secretary's Decision Report<sup>clix</sup> and that he believed the leak was politically motivated, saying—

"I am not saying that civil servants never leak; actually they seldom leak, and if they do leak, they do not leak to the political editor of the Daily Record. Therefore, I think that the leak was politically inspired<sup>clx</sup>"

400. In her evidence to the Committee, the First Minister stated that she did not know where the information given to the Daily Record had come from, telling the Committee—

"I do not know where the leaks came from. I can tell you where I know they did not come from: they did not come from me and they did not come from anybody acting on my authority, on my instruction or at my request. I am as certain as I can be that they did not come from anybody within my office. As you said, the second story had considerable detail. I heard Alex Salmond say that that detail could have come only from the decision report. I was never sent a copy of the decision report.<sup>clxi</sup>"

401. The First Minister went on to explain that her office had not been sent a copy of the Decision Report, citing in particular the evidence given to the Committee by her Principal Private Secretary. The First Minister went on to explain that the Permanent Secretary had written to her on 22 August to inform her that the investigation was concluded.<sup>clxii</sup>

402. The Committee notes that in the evidence it has received, the Permanent Secretary sent the First Minister an earlier note, dated 17 August 2018 indicating that the First Minister would be informed of the outcome and next steps once the complainers and the former First Minister had been notified.<sup>clxiii</sup> A follow up email of 20 August 2018 indicates that the Permanent Secretary informed the former First Minister's representatives and the complainers that she intended to write to them the next morning about the outcome of the investigation and next steps.<sup>clxiv</sup>

403. The Committee also heard from the former First Minister that, prior to his meeting with the First Minister on 2 April 2018, the name of one of the complainers was revealed to his former Chief of Staff, Geoff Aberdein, by a senior Scottish Government employee<sup>clxv</sup>. The Committee has received evidence from [Kevin Pringle](#) and [Duncan Hamilton](#) that states Mr Aberdein spoke to them hours after the name of a complainer had been provided to him.

404. In his evidence Mr Hamilton stated that Mr Aberdein had been given the name of a complainer early in March 2018, shortly after the former First Minister had received a letter of 7 March 2018 informing him of the complaints against him<sup>clxvi</sup>, explaining that—

“The fact that the government official had shared that information with Mr Aberdein was reported to me, and to Kevin Pringle, on a conference call.”

405. When asked about this, the First Minister said—

“the account that I have been given has given me assurance that what is alleged to have happened at that meeting did not happen in the way that has been described”

406. She went on to say—

“Alex Salmond was open with me [ at the meeting on 2 April] about the identity of one complainant. He had not been told about it and there was no suggestion that I can recall that anybody in the Government had told him. He knew the identity of one complainant because he knew about the incident, because he had apologised to the person concerned. I cannot recall whether the name of the other complainant was shared openly on 2 April in the way that the one I have just spoken about was”

“Again, I will stand to be corrected, but I think that Geoff Aberdein knew at the time about the apology to the individual concerned in 2013, so the fact that there was knowledge of the identity of the individual may well have been the case, but I can only say what I have been advised about the conversation in question. I was not party to it. It would be serious if the identity of a complainant

was revealed—I absolutely accept that, but that is not what I understand happened in the way that is being set out. As I say, it is open to the committee to take evidence, even if it is in private, from both the people who were party to that conversation.”<sup>clxvii</sup>

407. The Committee, noting the views of the complainers, considers that any breach of confidentiality is a serious matter and that confidentiality is key to any complaints process. However, the Committee is unable to reach any conclusion on the facts of this alleged breach and any investigation of the same is not for this Committee.

408. The Committee appreciates that the Scottish Government must comply with its obligations under FOISA but questions the rationale of the Permanent Secretary in acknowledging the existence of sexual harassment complaints by releasing information under FOISA accompanied by a press statement. The Committee believes that the Scottish Government should reflect on its position in relation to making public such information in the future

409. Having said that, the much more significant issue is the leak of the allegations to the Daily Record. The Committee believes that the fundamental principle of any complaints process is that confidentiality must be observed throughout. The Committee is, therefore, concerned at how details of the complaints made their way into the press via the leak to the Daily Record. The Committee’s view is that this was damaging for both the complainers and the former First Minister. The Committee notes that the former First Minister was at least able to issue a statement to the media refuting the allegations. However, the women who made the complaints had no control over this process nor a voice in it. The Committee has heard about the incredible toll that this has taken on Ms A and Ms B.

410. The Committee notes that no sanction is attached to the procedure – a decision that the complaints are well founded is only recorded within the Scottish Government. In this case, however, the existence of the complaints made its way into the public domain. This in itself could constitute a sanction on the former First Minister because of the impact on his reputation. In making this comment, the Committee notes only the failure of confidentiality and its consequence and does not make comment on the veracity of the complaints.

411. The Scottish Government has a duty to ensure the confidentiality of the process. The Information Commissioner’s Office’s response to a complaint by the former First Minister indicates that a total of 23 members of staff were identified as having knowledge of or involvement in, the internal misconduct inquiry. The ICO has sympathy with the hypothesis that the leak came from an employee of the Scottish Government and agreed that the timing arguably could raise such an inference, but noted that there remains the possibility that the leak came from elsewhere, giving a list of stakeholders with access to the internal misconduct investigation report.

412. It is not for the Committee to investigate or speculate on the source of the leak. However, the Scottish Government had responsibility for the safe custody of this information and for having in place the appropriate and sufficient technical and organisational measures to protect it. The number of people who knew about and saw

the report should have been reduced to the bare minimum. The Committee expects the Government to have undertaken a thorough review and implemented demonstrable measures, including any recommendations from the ICO, to minimise the risk of this ever happening again.

413. The Committee notes the former First Minister has said that neither he nor the complainers had shared nor had any reason to share information about the complaints with the media and the Committee is not implying anything to the contrary. The Committee is not in a position to judge how the information came to be in the public domain, however the fact is that it was made public and that is a matter of significant concern.

414. Confidentiality of an investigation is of paramount importance and the leaking of such information is extremely serious. Should the identity of the person who leaked the information ever come to light, they should be held to account for their actions.

## **Alternative Dispute Resolution**

415. Mediation and arbitration are both forms of dispute resolution which aim to allow parties to settle a disagreement. Although they are both forms of dispute resolution, mediation and arbitration are very different.

416. Mediation is a process which involves a facilitated discussion or negotiation with the hope of the parties reaching an outcome or agreement which is acceptable to both sides. Although mediation is non-binding it may lead to a binding agreement between parties. In Scotland mediation tends to be most commonly used in the resolution of family cases and neighbour disputes. Mediation is also used in workplace employment policies to settle disputes about working relationships. According to ACAS guidance,<sup>clxviii</sup> mediation is not judging who was right or wrong in the past, but rather is about looking at how to agree on working together in the future. A mediation process is voluntary and cannot therefore be used if one of the parties in a disagreement does not wish to enter into it.

417. Whilst mediation is generally used to settle disputes about working relationships, it is not always considered appropriate. For example, when considering the Parliament's approach to sexual harassment, the Standards, Procedures and Public Appointments Committee noted "paragraph 6(d) of Section 9 of the Code [of Conduct for MSPs] which states that "opportunities for conciliation will be pursued in the first instance". We [the SPPA Committee] think this provision is inappropriate in cases of sexual harassment and should be revisited."<sup>clxix</sup>

418. Arbitration involves a third-party decision maker (the arbitrator) who acts as a private 'judge'. The arbitrator considers the issues that are in contention and takes evidence from the parties. The arbitrator makes a binding determination on the dispute. Arbitration in Scotland is governed by the Arbitration (Scotland) Act 2010. The 2010 Act provides a modern arbitration framework for matters submitted to arbitration. It does not define what disputes can be submitted to arbitration. However, there is a general rule that for a dispute to be capable of arbitration it must give rise to a practical consequence with an underlying basis being money or obligation<sup>clxx</sup>. A dispute will

generally not be arbitrable if there is the presence of a sufficient element of legitimate public interest in the subject matter of the dispute to make its private resolution outside the national court system inappropriate. The Explanatory Notes to the 2010 Act detail that "...matters which affect public rights or the status of parties in law may not be referred to arbitration

419. Arbitration is considered to be particularly beneficial to commercial parties who do not wish the nature of their dispute or sensitive commercial information to be discussed openly in the courts. Unlike formal legal proceedings, the location, timing and other arrangements pertaining to an arbitration can be made by the parties involved.

420. The former First Minister made offers of both mediation and arbitration. The Committee considered the Scottish Government's decisions in regard to mediation and arbitration.

### *Mediation*

421. The former First Minister made two offers to pursue mediation to address the complaints which had been raised. These offers are referenced in a [written submission to the Committee](#) by the First Minister.

422. The first offer of mediation was made on 23 April 2018<sup>clxxi</sup> and rejected by the Permanent Secretary on 24 April 2018<sup>clxxii</sup>—

"By letter of 23 April 2018, the petitioner's solicitors wrote to the first respondent [...] (iii) offering mediation involving the petitioner, Scottish Government and Complainers A and B...By letter of 24 April 2018 the first respondent replied that mediation would not be appropriate at that time and inviting the petitioner to provide a substantive response by close of business on 25 April 2018"<sup>clxxiii</sup>

423. The Open Record states that the offer of mediation was rejected prior to Ms A and Ms B being consulted—

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

424. In evidence to the Committee the Head of People Advice said that the complainers rejected mediation—

"I know that mediation was against the wishes of both complainers. The opportunity was put to them, and they declined."<sup>clxxv</sup>

425. Documents received by the Committee show that on 26 April 2018<sup>clxxvi</sup> the former First Minister made a second offer of mediation. This offer was put to the complainers on 27 April 2018 and was rejected by both Ms A and Ms B on the same day<sup>clxxvii</sup>. In response to a question on who rejected mediation, the Director of Communications, Ministerial Support and Facilities stated that—

“I understand that the complainants were asked about mediation, at least, but I do not know the detail of who took decisions on that.”<sup>clxxviii</sup>

426. Ms A and Ms B confirmed that they were informed of the first offer of mediation after it had been rejected and that the second offer of mediation was put to them before it was declined. One of them told the Committee—

“I was clear that mediation was not something that I wanted; it would not have served any purpose, as far as I was concerned.”

427. In evidence to the Committee the former First Minister noted that under the procedure there was a mediation route available for current Ministers, but not for former Ministers, and suggested that it was therefore proper to consider this route as a means to address the complaints.

“the fact that mediation is included for current ministers but not for former ministers would lead me to believe that the word processor was not working properly—or whatever happened—but I certainly cannot believe that it was a deliberate act to exclude mediation. Mediation is missing from the policy for no understandable reason whatsoever, so it was not unreasonable to suggest that it should be looked at.”<sup>clxxix</sup>

428. The procedure states in relation to complaints against current Ministers that—

“In line with her responsibilities under the Ministerial Code, the First Minister has instructed the Permanent Secretary that complaints of this nature should be investigated using the process set out at paragraphs 6-8, and to provide a report of the facts as provided by those concerned, or to establish if it is possible to seek a mutually agreed resolution between the parties involved.”<sup>clxxx</sup>

429. In oral evidence to the Committee the First Minister explained that there was no explicit reference to mediation in the procedure for cases involving current Ministers. She also set out some concerns around the appropriateness of mediation in some cases, saying—

“There is an open question, which people will have different views on, about whether mediation is always an appropriate procedure in cases of sexual harassment and in cases where there is a significant power imbalance. I also think that, for mediation to be a reasonable process, there has to be consent to that on both sides.”<sup>clxxxi</sup>

430. The Committee is concerned that mediation could be problematic in the case of the procedure specifically because of the intrinsic power imbalance between a civil servant and a former Minister and the sensitive nature of such complaints. The Committee notes the view of Laura Dunlop QC that mediation cannot be compulsory but that it should “be referred to as an option in any process for dealing with complaints against Ministers”<sup>clxxxii</sup>.



## *Arbitration*

431. The former First Minister made offers of arbitration to the Scottish Government in advance of bringing the judicial review.

432. On 26 June 2018, following correspondence highlighting concerns with the procedure and the investigation, the former First Minister's solicitors [made an offer of arbitration](#) on their client's behalf in relation to issues of competency and illegality<sup>clxxxiii</sup>.

433. The former First Minister's pleadings set out on page 113 of the Open Record also highlights the offer of arbitration—

"The petitioner set out in detail his position on the matters raised in this petition. He offered to submit the disputes between the parties on those matters (ultra vires, competency, legality, legitimate expectation etc.) to arbitration. The reason for that offer was to enable those disputes to be resolved confidentially in a manner which protected those rights of privacy. The first respondent rejected that offer."

434. Further references to arbitration in the former First Minister's pleadings are also set out earlier in the Open Record.

"Those proceedings, that publicity and the consequential risks that the complainers and/or the petitioner would be exposed to uninformed and unfair comment or criticism would all have been avoided if the first respondent had acceded to the petitioner's offer to mediate or to go to arbitration as hereinafter condescended upon or if the first respondent had in the event made a decision which did not uphold the complaints made against the petitioner." (Open Record page 6)

"The petitioner made reasonable attempts to resolve the complaints against him by mediation. He made a reasonable offer to resolve the disputes concerning the competency and legality of the procedure by arbitration." (Open Record page 7)

435. Scottish Government [document INV284](#) (footnote 33, phase 3) is a letter dated 12 July 2018 from the Permanent Secretary to Levy & McRae. The letter indicates that arbitration had been further considered and rejected. The letter states that arbitration would be "inconsistent with the purpose of the procedure".

436. The former Interim Director of Legal Services indicated that he had been involved in the decision to reject arbitration. He told the Committee—

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

"It was rejected for a range of reasons. The view that we had taken was that, at a general level, arbitration was something that could be used in relation to



dispute resolution and the resolution of, if you like, outstanding technical and legal issues, where the parties had a desire for a quick resolution of an issue of a technical nature and an incentive to reach that. However, it is not generally regarded as being an appropriate means of resolving a dispute where there is a significant degree of factual disagreement, particularly in relation to harassment-type... [witness was interrupted]

“The view that we took was that it was not possible to completely separate out the substance of the complaints from the arguments about procedural regularity or irregularity, because the circumstances and the nature of the complaints and the fairness of that procedure.”<sup>clxxxiv</sup>

437. In evidence on 17 November 2020, the Lord Advocate set out the following—

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

438. The First Minister indicated that the former First Minister offered to pursue arbitration, when they met on 14 July 2018, as a means to settle the legality of the procedure itself. She stated in a [written submission to the Committee](#)—

“It was clear at the meeting that he was still seeking a process of arbitration around his concerns about the procedure.”

“He had formed a belief that it was me who was blocking arbitration. I told him that was not the case and I was not involved in the decision.”

439. In a [WhatsApp message](#) to the First Minister, the former First Minister indicated that he had been advised that his prospects for success in a judicial review would be “excellent”.

440. In oral evidence to the Committee the former First Minister explained his offer of arbitration, explaining that he was disinclined to take legal action against the Scottish Government and therefore made the offer—

“At that stage, there was a very firm view in my counsel that we should go ahead, but again I was reluctant, and therefore we offered legal arbitration. There was a method, as I saw it, for settling those legal arguments—nothing to do with the substance of the complaints, but settling the legal parameters with a retired judge, for example.”<sup>clxxxv</sup>

441. The First Minister indicated that the Scottish Government had considered the issue of arbitration during the course of the investigation, but that it was not clear “that arbitration would have been the right thing or would necessarily have been a quicker, cheaper or more effective way of dealing with those things.”<sup>clxxxvi</sup>

442. During her evidence to the Committee, the First Minister also set out her recollection of events around the former First Minister's offer of arbitration, saying—

“before we got to the point of arbitration, he wanted me to intervene to, in effect, persuade the permanent secretary to agree to a process of mediation. As I understood it, that would have been mediation between him and the complainers. It was later that he started to seek a process of arbitration of the procedure. The Government considered that; in terms of the process that was under way at the time, those things were considered, and the Government came to the view that they were not appropriate.<sup>clxxxvii</sup>”

443. The Committee is mindful that in any arbitration the services of the arbitrator, unlike those of a judge, have to be paid for by the parties concerned. The Committee also notes that, depending on the complexities of the case, legal representation is generally required for arbitration.

444. The Committee also notes the argument made by the Lord Advocate on the appropriateness of submitting a public law question — that is, one about whether a Government decision has breached the public law constraints that apply to Government decision making — to a private process instead of to the courts, whose job it is to determine issues of law authoritatively and in particular to supervise, through the judicial review process, the actions of the Government.

445. The Committee notes the arguments made by the former First Minister about the benefits of arbitration in his view in a [WhatsApp message](#) to the First Minister on 5 July 2017 – reiterated in his [written submission](#) to the Committee on the judicial review. The former First Minister's view was that arbitration would be able to decide the dispute between him and the Scottish Government on whether the procedure was lawful, thus providing 'legal clarity' around it, without the need to resort to a court case and the subsequent 'expense to the public purse'.

446. Given the nature of arbitration, the Committee's view is that, while it might have been seen to have some advantages, such as securing confidentiality, it was reasonable for the Scottish Government to conclude that it was not an appropriate means by which to resolve this type of situation. As there were a number of grounds of challenge made to both the procedure and its application, the Committee recognises that the Scottish Government could conclude that there was also no guarantee that arbitration would have been the end point to the dispute and that aspects of the matter might have proceeded to a judicial review in any event.

# The Judicial Review

## Terminology

There are a number of technical terms in this section of the report. Below is an explanation of some of the terminology used.

### *Judicial review*

A judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body.

In other words, a judicial review is a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached<sup>clxxxviii</sup>.

### *Petition*

A judicial review begins with the lodging of a document setting out the decision complained of and the reasons why. This is the 'petition'.

### *Petitioner*

The person or body bringing the court action is called a 'petitioner'. In this case, that was the former First Minister Alex Salmond. He was represented by his solicitors (Levy & McRae) and counsel.

### *Respondents*

These are the parties against whom these proceedings are taken. In this case, there were two respondents – the Permanent Secretary and the Scottish Ministers. The members of the Scottish Government are referred to collectively as the Scottish Ministers which is why this term is used in such legal proceedings. Both respondents were represented together and therefore we use the term 'the Scottish Government' throughout this section.

### *Duty of Candour to the Courts*

The Scottish Government has a duty to assist the court with full and accurate explanations of all the facts relevant to an issue which a court must decide.

A respondent's duty of candour in judicial review proceedings is summarised at page 125 of Fordham's Judicial Review Handbook, 6th ed (2012)<sup>clxxxix</sup>:

*"A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material. That should include (1) due diligence in investigating what material is available; (2) disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground; and (3) disclosure at the permission stage if permission is resisted... A main reason why disclosure is not ordered in judicial review is because courts trust public authorities to discharge this self-policing duty,*

*which is why such anxious concern is expressed where it transpires that they have not done so.”*

Advocates are subject to regulation by the Faculty of Advocates, under powers delegated to it by the Court of Session. Paragraph 6.2 (b) of the Guide to the Professional Conduct of Advocates details that an Advocate must not “seek to persuade a Court to proceed on a factual basis which he with reasonable certainty knows to be untrue”. An Advocate must have a proper basis for stating a fact in any pleadings (paragraph 6.3.8).

### *Stateable case*

The Guide to the Professional Conduct of Advocates details that:

*“An Advocate may not accept instructions to act in circumstances where, in his professional opinion, the case is unstateable in law or where the case is only stateable if facts known to him are misrepresented to, or concealed from, the Court. If such circumstances arise after he has accepted instructions, he must draw the matter to the client’s attention as soon as possible and indicate he is unable to act further. If necessary he may require to explain to the Court that he is unable to act further. There may, however, be exceptional circumstances in which it is proper for an Advocate, in order to assist the Court, to present a case which he believes to be unstateable in law. In such circumstances, the Advocate must explain to the client that he cannot do more than explain the client’s position to the Court, and that he will be bound to draw the Court’s attention to such statutory provisions or binding precedents as have led him to the conclusion that the case is unstateable.”*

### **Introduction**

447. On 4 January 2019 the Scottish Government conceded the judicial review brought by the former First Minister on the basis that the Permanent Secretary’s decisions in relation to the complaints against the former First Minister, as set out in her Decision Report and a letter to the former First Minister’s solicitors, were taken in circumstances which were procedurally unfair and in circumstances that were tainted by apparent bias by reason of the extent and effects of the Investigating Officer’s involvement with aspects of the matters raised in the formal complaints against the former First Minister prior to her appointment as Investigating Officer in respect of each of those complaints.<sup>cxc</sup> This was clearly a devastating result for the Scottish Government, as well as being wholly unsatisfactory for the two women who had made complaints. There was also a significant cost to the taxpayer.

448. One of the key objectives of the Committee has been to establish the facts of what exactly occurred which led to the concession of the judicial review.

449. Secondly, the Committee has wanted to understand the explanation for this outcome and whether anything could have been done differently. In our view there are clearly lessons to learn for the future.

450. The Committee has tried as far as possible to shine a light on what occurred. However, as we have previously mentioned in this report, our work has been hindered

by the Scottish Government's failure to produce key documents which were of interest to us until a very late stage in the inquiry. The Scottish Government asserted legal professional privilege over all the advice and communications in relation to the judicial review (with the exception of allowing the Committee sight of a report in December 2020) until the final week of the Committee's evidence taking, when it waived privilege on [certain documents](#) – namely written advice from external counsel – published on 2, 4 and 5 March 2021. The Committee still has not seen the joint minute agreed between the two parties when the Scottish Government conceded the review, the terms of which are reflected in the interlocuter of 8 January 2019.

451. We have commented further on the issue of legal professional privilege in the section of the report on 'challenges'. As noted in this section, the efforts of the Committee led to the provision of the Open Record of the judicial review. This is a compilation of the pleadings in the judicial review as at 13 December 2018 and has been a useful reference for the Committee in its evidence taking – in the absence of the legal advice. It is referred to throughout this section.

### **Judicial review: key dates**

452. As set out in the 'complaints handling' section, the Permanent Secretary made a decision in relation to the complaints on 21 August 2018, and this was communicated to the former First Minister on 22 August 2018. On 23 August 2018, the Government aborted plans to issue a statement on the complaints, following threatened interim interdict proceedings by the former First Minister. That same day the former First Minister's representatives also informed the Scottish Government of his intention to raise a petition for judicial review of the Permanent Secretary's decision. Late that evening the Daily Record published details in relation to the complaints and the former First Minister made a statement in response. His lawyers also contacted the Scottish Government with concerns as to how the Daily Record obtained details of the complaints.

453. The petition for judicial review of the Permanent Secretary's decision was served on the Scottish Government on 31 August 2018.

454. The judicial review process is, by its nature, a fairly complex legal process.

455. In order to assist with navigation through the events, we thought it would be helpful to set out the dates of key events. We have collated these dates from information provided by the Scottish Government and the former First Minister, as well as from media accounts at the time. We have referred to the former First Minister and, for ease, his representatives as "the Petitioner" given this is the formal term in judicial review proceedings.

Date	Step in proceedings
31 Aug 2018	Petition served on the Scottish Government Scottish Government has 21 days to consider the petition, to lodge Answers and to decide whether to oppose "permission" being granted.
20 Sep 2018	Scottish Government formally notified the court of its intention to contest the case (Scottish Government did not contest the granting of "permission").

Date	Step in proceedings
	The Court granted the Petitioner permission to proceed with the case.
27 Sept 2018	<p>Motions for reporting restrictions and urgent disposal of the case on behalf of the Petitioner are intimated to the Scottish Government.</p> <p>Court issued a timetable order allowing:</p> <ul style="list-style-type: none"> <li>- Scottish Government's Answers to be lodged by 16 October 2018</li> <li>- Adjustment period until 23 October 2018 with final version of pleadings by 30 October 2018</li> <li>- Procedural hearing on 6 November 2018</li> </ul>
4 October 2018	Hearing on Petitioner's motion for reporting restrictions. The Scottish Government does not oppose the motion and an interim order protecting the identities of the two complainers is granted.
8 October 2018	Court made an order in terms of section 11 of the Contempt of Court Act 1981, replacing the interim order of 4 October 2018, preventing the publication of information would could reveal the identities of Ms A and Ms B.
15 October 2018	Scottish Government lodges Answers and inventory of productions.
23 October 2018	<p>The Petitioner intimates adjustments to the petition, including to confirm when, by what means and in what terms the complainers first initiated their complaints.</p> <p>Scottish Government enrolls a motion, with Petitioner's consent to seek permission to adjust Answers until 30 October 2018.</p>
30 October 2018	Scottish Government intimates adjusted Answers to Petitioner.
31 October 2018	Scottish Government lodges second inventory of productions
2 November 2018	<p>Petitioner intimates motion seeking a commission to recover evidence and specification of documents.</p> <p>Petitioner lodges second inventory of productions and adjusted petition.</p>
6 Nov 2018	<p>Scottish Government lodges adjusted Answers.</p> <p>Case calls in court for the first time: substantive hearing fixed for four days beginning on 15 January 2019.</p> <p>The Court allows parties a further 14 days to adjust their pleadings. The judge advises parties that considers no need for commission to recover evidence.</p>
11 November 2018	The Petitioner makes request to Scottish Government for recovery of documents including about three meetings between complainers and particular civil servants and information about the prior involvement of the Investigating Officer.
16, 19 and 20 November 2018	Documents sent from Scottish Government to Petitioner.
18 November 2018	Petitioner lodges third inventory of productions.
21 November 2018	Scottish Government lodged third inventory of productions.
29 November 2018	Scottish Government intimate adjustments to Answers.
6 December 2018	Petitioner enrolls motion for a Commission with a specification of documents – Scottish Government intimates opposition.
7 December 2018	<p>Scottish Government sends documents to Petitioner.</p> <p>Court fixes hearing for 14 December on Petitioner's motion.</p>
13 December 2018	Scottish Government sends documents to the Petitioner

Date	Step in proceedings
14 December 2018	Copy of pleadings for both sides as adjusted to 13 December 2018 prepared (the Open Record).
14 December 2018	Following hearing on Petitioner's motion, the Court grants a Commission and allows parties to further adjust pleadings until 8 January 2018.
17 December 2018	Scottish Government sends documents to Petitioner.
19-21 Dec 2018	Commission and Diligence hearing takes place for the purpose of recovering evidence from Scottish Government.
27 December 2018	Further documents sent by Scottish Government to Petitioner and Commissioner.
28 December 2018	Commission hearing, then adjourned until 7 January 2019.
2 January 2019	Permanent Secretary concludes that Scottish Government should concede the case.
4 January 2019	A Joint Minute was lodged in Court in advance of a hearing due to take place on 8 January 2019. The Joint Minute sets out the agreement of the parties as to the basis on which the Petition was to be conceded.
8 January 2019	<p>Case is formally settled; the Court dismisses the petition on the basis agreed between the parties. The court makes an interlocutor (included in Annexe G) including:</p> <ul style="list-style-type: none"> <li>• finding the Permanent Secretary's decision report and letter unlawful in respect that they were taken in circumstances which were procedurally unfair and in respect that they were tainted by apparent bias by reason of the extent and effects of the Investigating Officer's involvement with aspects of the matters raised in the formal complaints against the petitioner prior to her appointment as Investigating Officer in respect of each of those complaints,</li> <li>• reducing the decision report dated 21 August 2018 and letter dated 22 August 2018,</li> <li>• reducing the three reports by the Investigating Officer, dated 22 February, 18 July and 23 July 2018,</li> <li>• allowing the undertaking offered on behalf of the Scottish Government to be recorded in the minute of proceedings, and</li> <li>• finding the Scottish Government liable to the Petitioner for the expenses of the petition and proceedings on an agent and client paying scale.</li> </ul> <p>This ends the court action.</p>

## Key stages in the judicial review

456. The Committee has looked at each stage of the judicial review process in detail.

457. Our goal is to understand exactly how the Scottish Government handled each stage of the judicial review. In particular, were opportunities missed for settling the judicial review earlier than was the case? This is important because an earlier settlement may have reduced some of the distress for the complainers, as well as potentially saving the taxpayer significant sums of money.

458. In the course of the inquiry, the Committee has managed to establish a clearer sense of the timeline relating to the Scottish Government's handling of the judicial

review. This has required us to be persistent in seeking information repeatedly from the Scottish Government. The documents provided to the Committee fail to give full detail of the judicial review or insights into decision making.

459. However, we have enough information, in particular as a result of late disclosure of legal advice, to get a clear sense of the turning points in the Scottish Government's handling of the judicial review. These are when crucial decisions had to be made as to whether to continue defending the case.

460. We set out, below, in the interests of transparency, our understanding of the events at each stage of the judicial review, based on the information we have obtained. This is a detailed account, but we think it is important that it is set out in a clear and factual way.

### *Permission to proceed*

461. The first stage in a judicial review is that the petitioner requires to obtain from the Court "permission to proceed".

462. No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed. This is the first procedural hurdle for the petitioner. A respondent (in this case the Scottish Government) is entitled to oppose permission being granted. If this happens, the Court may order a hearing to decide whether to grant permission.

463. The Court may grant permission to proceed only if it is satisfied that the petitioner can demonstrate a sufficient interest in the subject matter of the application and the application has a real prospect of success. The test is relatively low for a petitioner, there should exist an arguable case: something that has more than a remote prospect of success.

464. During evidence to the Committee, the Lord Advocate stated—

"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.<sup>CXCi</sup>"

465. In the timeline provided to the Committee on 26 October 2020, the Scottish Government states at the entry for 20 September 2018—

"Having given full consideration to the matter, the Scottish Government concluded that permission for the judicial review to proceed to a substantive hearing would be likely to be granted by the Court and no practical purpose would be served by opposing the grant of permission."



466. Legal advice released by the Scottish Government shows that whilst a [note from counsel dated 4 September 2018](#) indicates it may be possible to attempt at the permission stage to exclude certain of the petitioner's grounds of review on the basis of time bar, counsel's view was that "...it is inevitable that the Court will grant permission to proceed."

467. Instead, the Scottish Government raised the time bar point in the Answers to the Petition (contained within the Open Record) noting that the case was "time barred" (out of time) and should not have been raised. A judicial review must be raised within the period of 3 months beginning with the date on which the grounds giving rise to the application first arise.

468. As such, the Scottish Government argued that the grounds for the Petition first arose on 7 March 2018, when the Permanent Secretary sent a letter by email to the former First Minister notifying him that complaints had been received, providing a copy of the procedure and narrating the incident complained of.

#### *Petition as intimated and prospects of success*

469. The [Petition](#) as intimated on the Scottish Government sets out the former First Minister's arguments in full. The following is a summary of some of the key arguments made:

- **Ultra Vires:** The procedure had no statutory or legal basis and was beyond the powers of the Permanent Secretary. The former First Minister was not a Minister when the procedure was brought into being and he did not agree to it being brought in or to be bound by it.
- **Error of Law:** The Permanent Secretary erred by saying that the Scottish Government was not asserting jurisdiction or sanction over the former First Minister.
- **Incompetency:** The proceedings (investigation and finding) was incompetent in that the complaints were of alleged misconduct which occurred long before the procedure was written or came into effect. At the time of the alleged misconduct, complaints of this kind were dealt with using the Fairness at Work policy.
- **Procedural Unfairness:** The application of the procedure was procedurally unfair:
  - The Investigating Officer (IO) was required to "undertake an impartial collection of the facts" and prepare reports for consideration by the Permanent Secretary. The Permanent Secretary's decision-making involves evaluation of contentious evidence and the making of findings in fact. The Permanent Secretary had assumed a role of fact finder and acted beyond her powers under the procedure.
  - Neither the IO nor the Permanent Secretary gave the former First Minister any of the material presented to the Permanent Secretary by the IO. As a result, the former First Minister was prevented from

giving a full and fair response to the allegations against him. He was deprived of the right to prepare and present his case because he was denied access to potential witnesses and documents.

- The IO had two conflicts of interest. First, as the person who gathered and presented the evidence on which the complaints were based and as the person who was supposed to have prepared and presented evidence for and on behalf of the former First Minister. Second, as the person who was responsible for investigating the complaints and as the person who was responsible for making purported findings in fact.
  - Under the procedure the only information disclosed to the petitioner was the bare allegations. The former First Minister could not formulate a proper response without seeing the detail of the allegations as set out in statements from the complainers and any other witnesses.
  - The former First Minister was denied access to copies of the IO's initial and revised reports for possible use in formulating a response to the allegations.
- **General Irrationality:** In making the decision, the Permanent Secretary was irrational in taking account of the limited response by the former First Minister: the limited response was due to the Permanent Secretary's failure to act in accordance with natural justice and the former First Minister's rights to a fair hearing.

470. The Petition also included arguments that the Permanent Secretary's decision was incompatible with the former First Minister's rights under Article 6 (right to a fair hearing) of the European Convention on Human Rights ("ECHR"); that as one of the allegations in the decision was the subject matter of a previous complaint and dealt with under the Fairness at Work policy the former First Minister had a legitimate expectation it had concluded and the application of the new procedure was irrational and oppressive; and that communication or publication of the decision by the Scottish Government was an infringement of the former First Minister's right to privacy and confidentiality and a contravention of his rights under Article 8 of the ECHR (right to privacy).

471. Legal advice released by the Scottish Government includes [a note from counsel on prospects of success](#) dated 26 September 2018. The note sets out the view of counsel that "the majority of the grounds of challenge are weak and should be capable of being resisted successfully." The note continues "there is a real risk that the court may be persuaded by the petitioner's case in respect of the ground of challenge on 'procedural unfairness'...it would be wrong to pretend that we do not see a vulnerability in this regard. Equally, we should stress that the vulnerability arises from the Procedure itself, and not from its implementation in this particular case." The case for procedural unfairness was seen to arise as the witness statements and initial report prepared by the investigating officer were not shared with the petitioner as the

procedure does not provide for the sharing of such information with the Minister or former Minister who is the subject of the complaint.

472. Counsel's note goes onto cover the potential consequences of the court being persuaded by one or more of the Petitioner's grounds of challenge—

“Should the Court be persuaded by one or more of the petitioner's grounds of challenge, it may make an order quashing the decision made by the Permanent Secretary and requiring the Permanent Secretary to consider whether or not to order a fresh investigation. It is also possible that if the Court considers that the Procedure itself is flawed that it quashes the Procedure and requires Scottish Government to consider where to put in place a new Procedure containing additional procedural requirements. If the Procedure is quashed then it is highly likely that the decision would also be quashed as flowing from a flawed Procedure.”

473. No argument was made in the original Petition as to the decision having been tainted by “apparent bias” by reason of the Investigating Officer's involvement with aspects of the matters raised in the formal complaints prior to her appointment as Investigating Officer. This argument appears to have been inserted at a later stage, after the former First Minister was made aware of the Investigating Officer's previous involvement with the complainers.

474. In oral evidence on 8 September 2020 the Lord Advocate was asked specifically about the strength of the Scottish Government's position when the Petition was initially received. The Lord Advocate replied—

“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.”<sup>cxcii</sup>

### *Sisting of the judicial review*

475. In Scots law, sisting of a court case refers to a case being put on hold prior to the court making its final decision. The Committee heard evidence on whether the Scottish Government considered seeking to sist the judicial review proceedings in light of the police investigation.

476. The former Interim Director of Legal Services told the Committee in his evidence that sisting was discussed—

“I would not dispute the fact that sisting would have been a perfectly appropriate thing to have done, had the circumstances required it. If I look back, the most obvious reason for that would have been had charges been preferred in, say, the autumn, when we were still working through the case.”<sup>cxci</sup>

477. The legal advice published by the Scottish Government demonstrates that counsel gave information on sisting at the outset of the judicial review<sup>cxci</sup>. This advice

followed a note written by the Lord Advocate for the First Minister and the Permanent Secretary<sup>cxcv</sup>.

478. The Lord Advocate's note cites sisting in relation to the interplay between the judicial review and protecting the public interest in any potential future criminal prosecution. Both sisting and reporting restrictions are discussed in the Lord Advocate's note. The note indicates that counsel had been asked for advice on the matter of reporting restrictions, given the Lord Advocate's conclusion that reporting restrictions were preferable to sisting, stating reporting restrictions—

“would clearly be the preferable and appropriate route, since it would enable the issues raised by the petition to be addressed whilst protecting any future criminal process.”<sup>cxcvi</sup>

479. In oral evidence, the Lord Advocate stated—

“I can confirm that the Government considered at the outset of the judicial review process whether steps should be taken in relation to that process to avoid the risk that publicity attendant on the judicial review might prejudice the criminal investigation, and that consideration included the question of whether the judicial review should be sisted—that is, put on hold, essentially—or whether the matter could be dealt with adequately by restrictions on the reporting of the judicial review”<sup>cxcvii</sup>

480. The Committee heard from the former First Minister on the issue of sisting. The former First Minister told the Committee—

“Many people seemed to invest a great deal of hope that the criminal case would ride to the rescue, like the cavalry over the hill, and that somehow the civil case would never be heard.”<sup>cxcviii</sup>

481. The First Minister told the Committee that sisting had been considered by the Scottish Government early in the case—

“Sisting was considered at an early stage. Again, in my non-expert opinion, given the circumstances at an early stage of this, when a criminal investigation was also under way or at its early stages, it would have been absolutely extraordinary if the question of sisting had not even arisen in our considerations. My memory of those early discussions—by early, I am talking about early to mid-September or a bit longer than that—is that the preference seemed to be, if I recall correctly, in favour of reporting restrictions as opposed to sisting.”<sup>cxcix</sup>

482. The Committee believes that the decision on whether or not to sist the case was an appropriate decision to be taken at this earlier stage to avoid prejudicing the criminal investigation. The Committee is satisfied with the Lord Advocate's explanation and notes that Lord Woolman's order negated the need for the case to be sisted to avoid details coming out into the public domain.

### *Adjustments to petition*

483. On 27 September 2018 the court set out a timetable for the judicial review.

484. The timetable set for Answers (that is the formal defence to the judicial review) by the Scottish Government to be lodged by 16 October 2018.

485. The period in which pleadings (the judicial review petition and the answers) could be adjusted was set as until 23 October 2018 (later extended to 30 October on request of Scottish Government). The purpose of the adjustment period is to allow each party to make changes (adjustments) to their pleadings in light of arguments made by the other side.

486. A final set of pleadings was required to be lodged in court by 6 November 2018, in time for a procedural hearing of the same date.

487. The Scottish Government put forward its first set of answers on 15 October 2018. The [Scottish Government timeline](#) on the judicial review notes the specific arguments made to the petition as well as an overarching argument that—

“In summary the Answers asserted that a number of allegations made by the Petitioner were ‘out of time’ in that the Petition was brought more than three months after the grounds for complaint arose and there was no good reason for the Court to extend that time.”

488. Several adjustments were made to the petition and Answers. Annexe E sets out these adjustments and is taken from the [Scottish Government timeline](#) of the judicial review.

489. During this period of adjustments, the issue of prior contact between the Head of People Advice (also the Investigating Officer) and complainers comes to light. Documents released by the Scottish Government on the legal advice it received from counsel show that, on 30 October 2018, final Answers to the adjustments on the petition had been prepared and that there was an outstanding issue about the conversations complainers had with the Scottish Government prior to making their formal complaints. An email between Scottish Government officials (including the Director of People, Director of Communications, Ministerial Support and Facilities, the Head of Cabinet, Parliament and Governance, the Head of People Advice and the First Minister’s Chief of Staff) notes that “Counsel are of the view that it is disingenuous not to refer to the first time the members of staffed [sic] raised their concerns to a members of staff.<sup>cc</sup>”

490. A response to the email notes the Scottish Government’s position in relation to the Answers, making express reference to the Investigating Officer it states that “the procedure says that the person investigating should have had no prior involvement. Our view is that her role here didn’t signal ‘prior involvement’ - the matter is the substance of the complaint and she wasn’t in the organisation then.<sup>cci</sup>”

491. On 31 October 2018, senior counsel emailed Scottish Government officials with an urgent email, noting a potential problem had been flagged by junior counsel. Senior counsel stated—

“I have just discussed this with the Lord Advocate, as i am very concerned indeed. He has suggested a short note setting out my concerns, and this is now attached. I am sorry to be sending this to you at all, let alone late at night on Halloween, but I'm afraid i see no other option.<sup>ccij</sup>”

492. The [urgent note from senior counsel](#) sets out that the issue was “not hitherto known to either Ms O'Neill or myself” and summarises the concern as being “the answer to the question ‘when, by what means and in what terms the complainers first initiated their complaints’ is that Complainer B, as I now understand the position, first made her complaint to [the Head of People Advice]”. The note continues to explain that that is an issue because of the Head of People Advice’s role as Investigating Officer and paragraph 10 of the procedure, which, in senior counsel’s view, is that the Investigating Officer should have “no prior involvement with any aspect of the matter being raised.”

493. A consultation is set between the Scottish Government and counsel for Friday 2 November 2018. The Committee is aware that the First Minister’s Chief of Staff attended this consultation<sup>cciii</sup>. The First Minister confirmed that the Solicitor General was present at this meeting<sup>cciv</sup>. However, no notes of this consultation, other than an associated [email chain](#), have been provided to the Committee. The urgent note from senior counsel of 31 October 2018 concludes—

“Depending on the information available on Friday, a swift decision is going to have to be taken thereafter as to whether (a) the issue is disclosed and any argument based thereon then resisted, or (b) the issue is disclosed and the Petition then conceded as a result thereof. I can well understand the angst that even suggesting (b) will provoke, but if the proceedings are vitiated then it makes little sense to continue to defend the indefensible. There is a (small) upside to such an eventuality the Procedure would simply be reset, and safeguards could be put in place to minimize the risk of a further challenge to a renewed investigation.<sup>ccv</sup>”

494. A response to senior counsel from a Scottish Government official that same evening makes it clear that the issue that was being discussed is paragraph 10 of the procedure and the prior contact which the Investigating Officer had with complainers. The email states—

“I understand that there is a note of a discussion between the IO and complainer B, understood that as being the first time the complaint was raised, but that can be checked<sup>ccvi</sup>.”

495. The Scottish Government made the decision to continue to defend the judicial review. Speaking about the opinion of senior counsel on 31 October 2018, the First Minister told the Committee—

“After that opinion was submitted by Roddy Dunlop, there was a consultation with counsel, which I think was two days later. I was not at that. At that point, the discussion was around the interpretation of section 10 of the procedure and the differing interpretations that we thought that that was open to. The conclusion was not that we should be unconcerned about that point, nor that it was not a point of vulnerability, and certainly not that it was not a point that weakened our prospects of success. The conclusion was that the point was arguable and defensible, and that the Government thought that the argument could be made. Therefore, the decision was taken to continue.”

496. When asked by the Committee about this point at the end of October, the former Interim Director of Legal Services at the Scottish Government told the Committee—

“It took time to work out what the circumstances really meant. It was not a slam-dunk moment. Work required to be done as we tried to establish what the full factual circumstances were and then work out, as is set out in the grounds for the ultimate concession, whether the combination of the wording of paragraph 10 of the procedure with the facts that were emerging, and continued to emerge as we found out more, had that effect.”<sup>ccvii</sup>

497. On the same day as the consultation, 2 November 2018, the Scottish Government’s [timeline](#) shows that its Note of Argument (a concise summary of the submissions a party intends to develop at the substantive hearing) and Statement of Issues were lodged with the court. The Committee, despite its repeated requests for information from the Scottish Government does not have the detail or copies of either of these documents. The timeline simply states—

“The written Note of Argument set out the legal grounds on which the judicial review was being resisted. Reference was made to case law and other legal authority that supported the Scottish Government’s position as set out in the Answers.”

498. The Scottish Government identified (in its adjusted Answers as shown in the Open Record and as noted in legal advice released by the Scottish Government) as at 5 November 2018 the prior involvement of the Head of People Advice in the procedure. A further amendment was made on 20 November 2018 namely to adjust answer 19 to state, “prior to her appointment as IO Ms Mackinnon had involvement and contact with the complainers”.

499. Prior to the adjusted Answers being lodged by the Scottish Government on 5 November 2018, the pleadings narrate that the former First Minister was unaware of the IO’s previous involvement.

500. Prior to the Scottish Government releasing legal advice, a Member highlighted the adjustments made by the Scottish Government to its pleadings on 5 November 2018 (as reflected in the Open Record) and asked whether that was when the Scottish Government realised that crucial evidence that had not previously been made available to it made its legal position much weaker than it had been. The former Interim Director of Legal Services responded—



“Those adjustments were made in response to adjustments that the petitioner made slightly earlier, which raised a question and placed a call on the Scottish Government—that is on page 9 of the timeline. The petitioner first asked the question on 23 October. Towards the end of October and into the beginning of November—a procedural hearing took place on 6 November—we started to respond first through the formal legal process of making adjustments, to ensure that the Scottish Government’s position was accurately and correctly narrated to the court. Separate from that, a question arose about ascertaining what this meant—what had happened and what was going on. From that process onwards, and in the period that led to the specification in the middle of November, questions started to be asked in two respects. One question was what the issue was. Separately, a specification by Levy & McRae that was provided in draft on 2 November and taken forward later led me to undertake an exercise to find documents.” <sup>ccviii</sup>

501. The former Interim Director of Legal Services continued—

“I first became aware of it towards the end of October 2018. I first saw something in writing on 31 October, but that was not the first that I knew of the situation—I knew of it a few days before that, in the last few days of October... I realised that, if the circumstances were as they were set out by the petitioner, it was a potentially serious issue that had to be looked at. We had to find out and properly ascertain what the factual circumstances were. Once we had done that, we would take a view as to what that meant for our ability to defend.”<sup>ccix</sup>

502. When asked whether the new documents and resultant significant concerns were flagged to the Permanent Secretary, the former Interim Director of Legal Services told the Committee—

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

503. In a follow-up question on whether the Lord Advocate would have been aware, the former Interim Director of Legal Services responded, “Yes”.

504. The adjustment made to the petition by the Petitioner on 4 December 2018, as set out in Open Record, appears central to the judicial review being conceded as it introduced the argument of apparent bias.

#### *Disclosure of information and the commission*

505. A Commission and Diligence is a formal court process. The purpose of the Commission is to decide whether the petitioner should have access to documents sought in a specification of documents.



506. Persons who have the specified documents (“Havers”) are then cited to appear before the Commissioner and give evidence under oath regarding matters related to the specified documents.

507. Disclosure of documents is a normal part of litigation. However, it is much rarer for a Commission to be required in judicial review proceedings, particularly given the Scottish Government’s duty of candour. The former Interim Director of Legal Services explained in evidence: “In my experience, specifications of documents are relatively common, but I have never come across commission and diligence before.”<sup>ccxi</sup>

508. On 6 November 2018, a procedural hearing took place. The [timeline](#) of the judicial review provided by the Scottish Government states that on 6 November 2018—

“The judge indicated that he did not consider that there was a need at this stage for a Commission and the motion was not insisted on although the judge stressed his expectations of full compliance with the duty of candour on the Scottish Government.”

509. Following the 6 November procedural hearing, Levy & McRae, on behalf of the former First Minister, made requests to the Scottish Government for the recovery of documents. Documents were provided by the Scottish Government on 16, 19 and 21 November 2018. On 26 November 2018, Levy & McRae made a further request for the recovery of documents.

510. During this period, there was one consultation with counsel on 13 November 2018. The First Minister, the Permanent Secretary, the First Minister’s Chief of Staff and the Scottish Government Legal Directorate (“SGLD”) were in attendance. The Scottish Government have not provided any notes from this consultation. When asked about this meeting, the First Minister responded—

“I requested the meeting; it was part of what I thought was the proper thing to do. I was testing myself whether, as a result of what had come to light and the 31 October position, we actually still had a stateable case. That is why I requested the meeting... The 31 October note does not read as has been presented by some people, but it raises concerns, so the meeting was basically about me getting assurance that we were not prolonging a judicial review that was dead in the water. The meeting satisfied me that that was not the case and that we had a stateable case and were confident that we could continue to put the arguments.”

“I came out of the meeting satisfied that we had a stateable case and that, not just in a theoretical, abstract way but based on actual consideration of what the Government had intended around section 10 of the procedure, we could argue the interpretation that we thought should be attached to it.”<sup>ccxii</sup>

511. On 6 December 2018, the former First Minister’s agents enrolled a motion for a Commission with a four-page specification of documents. The motion was opposed by the Scottish Government. A hearing was set for 14 December 2018. The Scottish Government [timeline](#) states at the entry for 6 December 2020—

“The court has initially taken the view that there was no need for a Commission because the SG would be candid in its disclosure of all relevant documents. However, identifying all documents proved to be a lengthy process and so Levy & McRae applied to the court for a commission.”

512. Legal advice released by the Scottish Government shows that, on 6 December 2018, senior and junior counsel set out a revised view on prospects of success in a joint note<sup>ccxiii</sup>. The note indicates, “there has been substantial further development of the pleadings, accompanied by disclosure of a volume of information about, among other things, the discussions that took place with Complainers A and B prior to them making formal complaints.”

513. The note continues to address new grounds of challenge that had been introduced by the former First Minister based on the Investigating Officer’s prior contact with the complainers. The assessment of counsel on the new grounds of challenge was—

“these are now the petitioner’s strongest grounds of challenge. Moreover, and with regret, we are now jointly of the view that those grounds are more likely than not to succeed. At the outset, we recognise the dismay that this advice will cause. However, we feel it necessary to tender this advice, and the reasons for it, given the views which we have, independently at first and now of consensus, taken in this regard.”

514. Counsel then sets out the extent of the Investigating Officer’s contact with the complainers prior to them making formal complaints. It was clearly the joint view of senior and junior counsel that there were only two options in relation to next steps: to concede or to press on regardless, their view was—

“the ‘least worst’ option would be to concede the Petition. We understand how unpalatable that advice will be, and we do not tender it lightly. But we cannot let the respondents sail forth into January’s hearing without the now very real risks of doing so being crystal clear to all concerned.”<sup>ccxiv</sup>

515. On 7 December 2018, the Interim Director of Legal Services at the Scottish Government responded to counsel. The email notes that the Lord Advocate, First Minister and Permanent Secretary had all seen the 6 December 2018 joint note from counsel on prospects of success. The email raises two main actions which the author has been ‘asked to pursue’ from discussion with the Permanent Secretary—

“1) To ascertain the basis on which counsel felt the need to issue their note, at this point. I have consistently stressed to her and others the importance of our understanding the views and concerns of counsel and that it is right that counsel are clear to and with us about the weaknesses of our case as well as the strengths.”

“But the Perm Sec, having been aware of these concerns from the previous notes, the meeting with the FM, other advice from SGLD and on her own consideration of the matters and being fully sighted on the options that arise

from these concerns and that advice, is unclear – in effect - about what has changed since the last notes and FM meeting that leads you to write as you do. I understand that the FM has the same question.”

516. The note also raises a second question around what counter-arguments could be employed should the decision be taken to proceed. In an email response from senior counsel, it is noted that the position has changed because—

“Substantial further documentation has, since then, been made available. It leads me to the conclusions discussed in the Note. The concerns i expressed at the con with the FM have deepened in light of the documents now disclosed.”

517. On the second question that was posed, around counter-arguments, senior counsel notes, “The problem in this regard is the lack of arguments - hence my concerns.” They continue, “The only options are to argue (i) no breach, or (ii) breach but its effect does not vitiate. For the reasons given in the Note, i doubt either will work. (i) is probably unstateable. (ii) faces the problems identified in the Note.”

518. The [Scottish Government's detailed chronology of its participation in the judicial review](#) indicates that further documents were disclosed by the Scottish Government to the former First Minister's agents on 7 December 2018.

519. Following the issuing of counsel's note on 7 December, a consultation was held on 10 December 2018. Emails between Scottish Government officials dated 11 December 2018 show that the Lord Advocate felt it was right to continue to defend the judicial review—

“LA/ Sol Gen very clear that no question or need to drop the case. LA clear that even if prospects are not certain it is important that our case is heard. Senior counsel made clear that his note was not intended to convey that he didn't think we have a stateable case ...”

“The LA was indeed clear about no question of conceding, with a stress on the benefit that would accrue from a judicial finding (a) that it was right to have a procedure in such circumstances and (b) it was right to have this procedure, even if there is a risk - which we all know and understand - that he may be forced to hold that there were faults in the way it was applied in the particular case.<sup>CCXV</sup>”

520. Further documents were sent by the Scottish Government to the petitioner's agents on 13 December.

521. On 14 December 2018, there was a hearing before the Court. The Court granted the former First Minister's motion and ordered a Commission to take evidence, which was fixed for 19 December 2018.

522. A further joint note from senior and junior counsel was provided on 16 December 2018, which gave details on “practical matters” around the disclosure of documents and any further adjustments to the Petition and Answers<sup>CCXVI</sup>. In relation to searches undertaken, counsel noted, “We have an email from [Redacted] of 18.22 of Thursday

13 December describing the process that was undertaken of searching for documents. The email describes in general terms what was done and refers to work done by Scottish Government officials". Counsel goes on to pose a series of questions in relation to the searches, noting that this work needed to be done immediately with a view to providing a comprehensive explanation to the petitioner's agents in the hope of avoiding the need for a Commission.

523. Counsel also noted that there was discussion about the possibility of the Director General Organisational Development and Operations signing a certificate to confirm that, to the best of her knowledge, all relevant material had been disclosed. It appears from the former First Minister's evidence that in the end this step was not taken. In response to a question on the certificate the former First Minister responded, "I am not even sure whether we got to the point of decision. The undertaking was prepared to be signed, but when we then said, 'No, we're going ahead anyway,' I think that they withdrew objection on about 13 December"<sup>ccxvii</sup>

524. The note also sets out counsel's view that the "respondents' pleadings are not as full as they could or should be on the knowledge and involvement of the Permanent Secretary in the development of the Procedure and in the handling of the complainers [sic] concerns prior to formal complaints having been made." The note continues that the information provided to counsel on 13 December 2018 setting out the Permanent Secretary's position was "not sufficient". Counsel concludes by stating that "We would wish to have a full precognition as soon as possible dealing comprehensively with the Permanent Secretary's involvement and knowledge."

525. On 17 December 2018, further documents were sent by the Scottish Government to the former First Minister's agents. The [timeline](#) indicates that, on 18 and 19 December 2018, further documents were "identified" by the Head of Cabinet, Parliament and Governance and the Head of People Advice.

526. A further note from senior and junior counsel was also provided to the Lord Advocate and the Interim Director of Legal Services on 17 December 2018. The note was—

"prepared in response to a series of events in the week of 10 December 2018 which led us to consider very seriously whether we were bound to withdraw from acting for the respondents in this matter. Having given the question anxious consideration we concluded that we would be entitled to so withdraw but at this stage are not bound to do so."

527. The note details how a redacted email (a redaction not made on the instruction of junior counsel) had been provided to the petitioner and how, after "an immediate and clear direction was given that the unredacted email should be disclosed" prior to the hearing on 14 December 2018 the direction was ignored. The result was that—

"On Friday morning, we reached the view that we could not properly advise the Court that the Scottish Government had discharged its duty of candour. We sought and received instructions that the motion for commission and diligence should be conceded."

“...in relation to the motion more generally, senior counsel for the respondents felt bound to make the early concession that the petitioner was justifiably able to say that he was not satisfied that searches are exhausted. Lord Pentland asked senior counsel for the petitioner whether the petitioner’s concern that essentially for whatever reason the Scottish Government may not have carried out an entirely comprehensive search of any possible place where documents may be held. Senior counsel for the petitioner, of course, concurred”

528. The note continues to set out the professional difficulty which this situation put counsel in and that the judge was unimpressed at being faced with a situation in which it appears that the Scottish Government has not acted with full candour, as well as their frustration that “that parties will now be put to” the “expense and inconvenience of a commission” which was “entirely avoidable”.<sup>ccxviii</sup>

529. It is also noted that counsel had understood that a full statement was to be taken from the Permanent Secretary to answer the adjustments introducing a case of apparent bias against the Permanent Secretary based on her knowledge of the complaints and the involvement of the Head of People Advice. However, counsel indicated that the note that was received was not a precognition; rather, it “comprises 4 short paragraphs and it is not clear to us that it is in the Permanent Secretary’s own words.” Counsel notes that, as with disclosure of documents, this approach makes it unnecessarily difficult for counsel to put the Government’s “best foot forward”.

530. Counsel also raised the matter of resources available for management of the case at solicitor level. They noted there was one principal solicitor with responsibility for management of the case and that further preparations – particularly in the organisation of documents – requires additional resource dedicated to this case.

531. The note from counsel concludes—

“The decision to proceed has been taken by very experienced legal and political minds, who are entitled to proceed as they wish. However, we are – independently but also mutually – unable to see that the benefits in proceeding come close to meeting the potential detriments in so doing. Given the potential for harm we simply wish all concerned – and we include the First Minister in this – to be absolutely certain that they wish us to plough on regardless notwithstanding the concerns which we have outlined.”<sup>ccxix</sup>

532. The Commission hearing took place on 19 December 2018 but was adjourned to enable the former First Minister to consider documents that had been disclosed. The Commission hearing continued on 21 December 2018. At the Commission, the “havers”. including the Head of People Advice and the Head of Cabinet, Parliament and Governance, undertook to the Commissioner to carry out further searches. The [timeline](#) indicates that these revealed no further documents and the former First Minister’s agents were advised.

533. A further joint note was issued by senior and junior counsel on 19 December 2018. The note begins—

“We write further to recent events. With regret, our dismay at this case deepens yet further.”<sup>CCXX</sup>”

534. The note details the “extreme professional embarrassment” caused to counsel because of the way that the disclosure of documents had been handled. The note indicates that two further documents were disclosed as the Commission began. Both documents related to prior contact between the Investigating Officer and complainers. Counsel notes that “the late nature of the revelation” is “unexplained, and frankly inexplicable.” The additional documents had an impact on the averments (the statements of fact) provided by the Scottish Government in response to the former First Minister in his Petition.

535. The note indicates that counsel is considering whether “maintaining a defence of the appointment of the IO may be unstatable.” It also set out counsel’s belief that “we are each in a position which is, so far as dealings with the other side and the court are concerned, close to untenable.” Given the timescales, counsel noted their reluctance to take a final view on these two points and indicated that they were meeting with the Lord Advocate at 4pm.

536. The Scottish Government’s [timeline](#) indicates that on 20 December 2018 (the day after the first day of the Commission at which the Director of Communications, Ministerial Support and Facilities and one other official gave evidence) the Director General Organisational Development and Operations sent an email to senior officials and others “setting out steps that were required in relation to searches”. In evidence to the Committee, the former Director General Organisational Development and Operations stated, “At the point of issuing that email, the purpose, as I recall, was to be clear about where people should be searching. For example, I do not know whether this was made clear before, but for the avoidance of doubt, it was made clear that things such as WhatsApp messages and so on should be brought out.”<sup>CCXXI</sup>

537. On 21 December 2018, junior counsel emailed the Lord Advocate and the Interim Director of Legal Services noting the discussions that had taken place overnight between senior counsel and the Lord Advocate. The email provided “a list of work that would require to be undertaken if the case was to be progressed.” The email stated, “It goes without saying that our overall position vis-à-vis the case remains the same. The note also states under the heading ‘prospects’, “It need not be said but the new information over the last 24 hours about further contact between [the Head of People Advice] and the complainers simply reinforces our views about the case in relation to her prior involvement/apparent bias.”<sup>CCXXII</sup>”

538. On Saturday 22 December, senior counsel responded to the email, and added another issue in relation to the Investigating Officer being called as a witness—

“The problem with this is that [the Head of People Advice] stated in the commission yesterday, on oath, that she could not remember that meeting. That leaves us unable to aver, let alone prove, what happened at that meeting, and thus unable to rebut the rather obvious inferences that will otherwise be drawn from the fact that it occurred. If one needed a watershed moment where the case moved from very difficult to unstatable, that was it. Given the amount of work ongoing I must urge that a view be taken thereon as soon as is possible.

Continuing to rest on pleadings that we know to be untrue is liable to result in severe judicial criticism.<sup>ccxxiii</sup>

539. On 24 December 2018, IT specialists carried out searches of officials' email accounts to identify relevant documents. When asked about this, the Director General Organisational Development and Operations stated, "I was part of a discussion on or around 24 December, which recognised that we would have to bring in specialists from the IT team. At that point, there was an agreement about some specific terms that they should be asked to search for and specific mailboxes and H drive files that they should be asked to search in."<sup>ccxxiv</sup>

540. On 27 December 2018, further documents were provided by the Scottish Government to the former First Minister's agents and the Commissioner. On 28 December 2018, a further Commission hearing took place, but no evidence was led and a resumed hearing was set for 7 January 2019. Junior and senior counsel indicated on 28 December 2018 that "in light of their professional duties and their view of the case, they will require to withdraw from acting on 3 January if matters are not resolved by then."<sup>ccxxv</sup>

541. On 2 January 2019, the Permanent Secretary concluded that the Scottish Government should concede the judicial review proceedings.

#### *Decision to concede*

542. At the Committee meeting of 8 September 2020, the Permanent Secretary stated—

"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."

543. In the same evidence session, the Lord Advocate said—

"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."

544. Following that evidence session, further information was made available which gives more detail on what happened from 21 December 2018 onwards. Specifically, the Committee received information about a report that was requested by the Permanent Secretary and compiled by the former Director General Organisational Development and Operations. In her written submission, the former Director General Organisational Development and Operations states—



“On or around 21st December, the Permanent Secretary asked me in my role as Director General to urgently collate, on her behalf, various strands of advice received from senior professional advisers and present these to her in a report. The purpose of the report was to allow the Permanent Secretary to review the case and decide on next steps...to the best of my recollection it set out the relevant financial, legal, and handling considerations, input that was provided to me by the respective senior professional advisers. I did not provide any concluding recommendations in respect of the material collated.

“I submitted this to the Permanent Secretary on or around 28th December. My understanding is that following receipt of this advice, and I believe after having obtained further legal advice, the Permanent Secretary concluded that the petition should be conceded. As far as I can recall, I had no further involvement in that decision-making process. In my role, I directly briefed some of my staff and others who had been closely involved on the outcome.”

545. Seemingly referring to the report compiled by the former Director General Organisational Development and Operations between 21 and 28 December 2018, the former Interim Director of Legal Services said—

“the crucial paper was the report that was prepared at the end”.

546. The former Director General Organisational Development and Operations explained the nature of the report to the Committee, saying—

“my recollection is that there were three main parts to the advice that my report covered: financial advice, which I was given by the principal finance officer; legal advice, which came from a variety of sources but was collated and passed to me by the director of legal services; and handling advice, which, as I recollect, reflected advice about, in some part, legal handling, which again would have come from SGLD, and in some part communications handling, which would have come from the communications directorate.”

547. The former Director General Organisational Development and Operations suggested in evidence that the report, which is available [in full as part of the Scottish Government's late publication of legal advice](#), did not directly advise the Permanent Secretary on how to proceed. One of the [timelines](#) submitted by the Scottish Government on the judicial review suggests the contents of this document was very instrumental in the Permanent Secretary's decision to concede the judicial review.

548. The Scottish Government timeline of 26 October 2020 stated that between 21 and 29 December 2018—

“Further communications took place between Counsel and the Scottish Government, including DG Organisational Development & Operations.”

549. The former Director General Organisational Development and Operations questioned this in her written submission (note that the timeline is actually dated 26 October 2020), stating that—



“The Judicial Review timeline submitted to the Committee by the Scottish Government on 27th October could be interpreted as suggesting that there were direct communications between Counsel and myself between 21 and 29 December 2018. This is not my recollection and the Scottish Government has since clarified that there were no such communications.”

550. On 31 December 2018, the Lord Advocate emailed the Interim Director of Legal Services and other officials regarding the concession. The email included the Lord Advocate’s view that (a) the concession should be narrowly framed to reflect accurately and carefully the legal basis upon which Ministers are conceding the petition; and (b) the basis for the concession be explained as fully as it can be. That same afternoon advice from the Scottish Government Legal Directorate in relation to the nature and basis of concessions was provided to the Permanent Secretary. This advice has not been disclosed by the Scottish Government and neither has the Joint Minute that was lodged with the Court. Therefore, beyond the terms of the court’s interlocuter of 8 January 2019 (in Annexe G), the grounds for the final disposal of the case are not clear. Paragraph 27 of [the Scottish Government’s statement to the Committee on the judicial review](#) states—

“The Petitioner and Respondents agreed to settle the case on the basis of that acceptance. On 8 January 2019 they lodged a joint minute with the Court setting out 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”. The judge in the Court of Session accepted the joint minute and issued a final order bringing the case formally to an end.”

551. [The Scottish Government’s timeline on the judicial review](#), however, narrates that on 8 January 2019 the First Minister made a statement in the Scottish Parliament about the decision of the Scottish Government to concede the judicial review on the apparent bias point only.

552. On the decision to settle the judicial review, the Lord Advocate states in his [written submission](#)—

“The decision to settle reflected a conclusion, based on a review of all the material which had by then become available, that the judicial review should be conceded for the reason set out in the Scottish Government response on the handling of the judicial review. The timing of the decision was attributable to the identification of additional documents during the commission process (which is described in the Scottish Government response) and a review of the case undertaken in light of those documents.”

553. On 8 January 2019, the Permanent Secretary [issued a statement](#) setting out details of the decision to concede. In that statement, she said that “all other grounds of Mr Salmond’s challenge have been dismissed”. This is not accurate. The judicial review was conceded on the basis set out in the interlocuter at Annexe G that the Permanent Secretary’s decisions in relation to the complaints were unlawful in respect that they were taken in circumstances which were “procedurally unfair and in respect that they were tainted by apparent bias by reason of the extent and effects of the

Investigating Officer's involvement with aspects of the matters raised in the formal complaints against the petitioner prior to her appointment as Investigating Officer in respect of each of those complaints". The other grounds that were put forward in the petition were not able to be tested in those proceedings.

## **Analysis**

554. The Committee has examined why the Scottish Government was forced to concede the judicial review in such an embarrassing and costly manner. We would like to comment on several crucial aspects of the Scottish Government's handling of the judicial review response. We discuss each in turn below.

### *Failure to identify and disclose documents and information*

555. It is clear that at the start of the judicial review process those within the Scottish Government managing the judicial review and their counsel did not possess a complete picture of events relating to the handling of the complaints against the former First Minister. Instead, information and evidence was gradually discovered over the course of the judicial review process which was then required to be revealed to the Petitioner. This drip feeding of new information was extremely damaging to the Scottish Government's case.

556. The particular area of concern appears to have been around the revelations of the nature of the prior contact between the Investigating Officer and the complainers, prior to her appointment as Investigating Officer. It appears that the Scottish Government's counsel's understanding of the nature of this contact also developed over time. New details about this contact were brought to their attention over the course of the judicial review process. This culminated in the information which emerged in December 2018 which appeared to directly – or at least cumulatively – lead to the concession of judicial review.

557. There were two periods of time in which new and potentially significant information was brought to the attention of the Scottish Government's counsel.

### *October 2018*

558. As we have discussed earlier in this report, the concerns in relation to the Scottish Government's case related to the Investigating Officer's contact with the complainers prior to being appointed as the Investigating Officer came to the fore in late October 2018. This prior contact included discussions on the complaints process and the potential to take forward formal complaints before she was appointed as Investigating Officer under the complaints procedure. A detailed timeline of this contact is provided in Annexe F. This was clearly a significant issue of concern, given that paragraph 10 of the complaints procedure states (our emphasis)—

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

559. In late October 2018, counsel sought instructions on responding to adjustments by the Petitioner intimated on 23 October 2018 calling on the Scottish Government to set out when, by what means and in what terms the complainers first initiated their complaints. Information about the prior contact was brought to the attention of Scottish Government counsel and this led to the urgent note from senior counsel of 31 October 2018. In oral evidence on 1 December 2020, the Investigating Officer, the Head of People Advice, told the Committee—

“To my understanding, it became apparent during October 2018 as part of the judicial review process. It is my understanding that the Scottish Government’s Counsel had not been aware of the prior contact and had raised the matter.”

560. In response to a question about the significance of the documents identified at the end of October 2018, the former Interim Director of Legal Services stated that—

“I think that everybody who was involved realised that it was a potentially significant issue—no one needed to be told.”

561. Senior counsel’s note sets out that the prior contact—

“presents a very real problem indeed. The Petition is resisted on the basis that a fair Procedure was instituted and then followed. If I am correct in the view [in relation to the interpretation of paragraph 10], then the Procedure was not followed: rather, an express embargo was ignored in a way that may vitiate the entire proceedings”. He goes on “it would be wrong for me to suggest that this revelation is anything other than an extremely concerning one.”

562. The Committee has limited evidence of the efforts undertaken by the Scottish Government to satisfy themselves that they had searched for and identified all the relevant documents relating to prior contact prior to and following this stark warning from counsel. The Committee’s insight is further impeded by the failure of the Scottish Government to provide any notes – other than [two associated email chains](#) – from the preceding consultations with counsel on 2 and 13 November 2018.

563. When asked about who was tasked with supplying the information for the judicial review, the former Interim Director of Legal Services explained—

“the co-ordination was done by the permanent secretary’s office. Because of the high-profile nature of the matter and the sensitivity of the information, the number of holders of documents and people who were looking for information was relatively small. In other circumstances and perhaps for more typical litigation, more people might be involved, but there was very much a narrow group in the permanent’s secretary’s office and the likes of [the Head of Cabinet, Parliament and Governance], from whom you have taken evidence, as well as the people who we thought were involved in the development of the policy and its application, such as [the Head of People Advice and the Director of People], from whom you have also taken evidence. It was a pretty small and compact group of people... A number of things were happening in tandem with each other, and the group of people that had the knowledge and understanding

of what happened at the time and were trying to make sense of it was also the same tight group of people who were the holders of the documents concerned.”

### *December 2018*

564. Despite further tranches of documents being disclosed in November and early December, the second occasion when new information emerged appears to have been during the Commission and Diligence process in late December.

565. The problems with the location and production of relevant documentation appear to have been particularly stark in relation to the Commission and Diligence which began on 19 December 2018.

566. Documents identified at this late stage in December 2018 appeared to cast new light on the nature of the prior contact.

567. When asked about the issues with identifying information heading towards the Commission and Diligence, the former Interim Director of Legal Services told the Committee there were practical difficulties with accessing the email accounts and H-drives of officials who were on leave and asking information technology people to search inboxes because of the sensitivity of the information. He went on to explain the challenges—

“One of them was an issue about people who were not there; others were issues about the extent to which we had properly identified things such as search criteria about what to look for. It was a relatively small number of people, which was an advantage and a disadvantage; the advantage of that was that we were able to ask for the information without asking the entire Government to search, because that would be completely inappropriate, so we could not treat it like an FOI request... It was a smaller number of people who were asked to do those things, but at the same time they also, by virtue of being a small number of people, had an enormous task, as it transpired, going by the amount of information that is there. Again, the question was how we were able to access and check email accounts and, no doubt password-protected H-drive documents and various things when people were out of the country.”<sup>ccxxvi</sup>

568. The Lord Advocate told us in oral evidence that two documents were of particular significance: documents [JR011](#) (Scottish Government phase 3 documents footnote 15) and [JR017](#) (phase 3 footnote 15). The Lord Advocate explained—

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

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

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

569. The Scottish Government evidence indicates that the final documents provided to the Commission and Diligence included notes found on the Investigating Officer’s iPad which she did not realise she still held on that device (she had searched another device for the notes and they had been backed up on her iPad).

570. The Lord Advocate [told the Committee](#) about the impact of the revelation of these documents—

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

571. Analysis of the key points in the time between August 2018 and January 2019 would appear to indicate that documents central to the Scottish Government conceding the judicial review were identified on 18 December 2018. This was when the Scottish Government widened its search to include documents from 1 October 2017 to 31 January 2018 instead of documents from 1 October 2017 to 16 January 2018 as initially requested by Mr Salmond’s legal advisers.

572. Although the documents were not identified by the Scottish Government until 18 December 2018, the former First Minister’s legal team had requested this search on 6 December 2018 in a four-page specification that called for recovery of documents ‘arising from or related to the communications received from either Ms A or Ms B in the period 1 October 2017 and 31 January 2018’.

573. The further documents identified by the Investigating Officer (the Head of People Advice) on 21 December 2018 also appear significant. The identification of these documents followed instruction from a senior Government official which indicated that forms of communications, such as WhatsApp, should be included in any search.

574. The Scottish Government instructed IT specialists to search relevant mailboxes on 24 December 2018. Documents were provided to Levy & McRae on 27 December 2018. It is unclear if the documents provided on 27 December 2018 were identified as a result of the search carried out on 24 December.

575. Mr Salmond states in his [initial written submission](#) that—

“I was forced to pursue a lengthy and very expensive Commission process over Christmas 2018 to enable recovery of documents which the judge had said in November ought to have been provided without formal orders and which the Scottish Government had previously claimed did not exist”

576. The legal advice published by the Scottish Government sets out in clear terms their counsel’s view on how the Commission and Diligence and the disclosure of documents in December unfolded.

577. Counsel’s note of 19 December 2018, after the first day of the Commission, begins: “We write further to recent events. With regret, our dismay at this case deepens yet further. We will not rehearse the regrettable way in which document disclosure has unfolded. Suffice to say we have each experienced extreme professional embarrassment as a result of assurances which we have given... on instructions, turning out to be false as a result of the revelation of documents, highly relevant yet undisclosed.” Counsel described further revelation of documents as “unexplained, and frankly inexplicable”, going on to indicate that “we regret that we simply cannot understand why these documents have been made available only now”. Emails from counsel on 21 and 22 December following the second day of the Commission refer to the revelation of new information to counsel concluding that “If one needed a watershed moment where the case moved from difficult to unstatable, that was it.”

### **Concession of judicial review**

578. It appears to the Committee that the main issues leading to the concession of the judicial review at such a late stage were: the failure to recognise in the first place that the prior involvement of the Investigating Officer was an issue, the delays and mistakes in identifying and submitting documents and the decision to continue with the defence when it was recognised as an issue.

579. Both the Permanent Secretary and the Director of People had been aware that the Head of People Advice had been in contact with Ms A and Ms B prior her appointment as Investigating Officer. It is clear that the Scottish Government did not consider, prior to October 2018, this prior involvement to be an issue in relation to the validity of the process. This was confirmed by the Lord Advocate who said—

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

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

The critical phrase in that sentence is “the matter being raised”. The Government’s interpretation of that phrase was and is that it refers to the subject matter of the complaints; that is, the events that are being complained of. That interpretation is eminently supportable;’

580. The Permanent Secretary stated in evidence that she had been aware of prior contact by the Investigating Officer at the time but this was not a focus of preparation for the judicial review because the petition as lodged did not cover this matter and so the Government preparations for the review did not cover it.

581. The Investigating Officer and her colleagues confirmed that legal advice was taken throughout the development of the policy and the complaints handling process. On that basis Scottish Government lawyers supporting these processes were aware of the prior contact by the Investigating Officer at the time. However it appears that this key information was not communicated to or considered by Scottish Government lawyers or counsel preparing for the judicial review.

582. The issue of prior contact was determined to be an issue and made known to counsel in October 2018. The significance of this matter was set out in the urgent note from counsel on 31 October 2018. It was intimated to the former First Minister in adjusted pleadings on 5 November 2018. However, there is no suggestion that the Scottish Government considered this serious enough to concede the case at that point. Nor, despite warnings from counsel, did they conduct sufficient searches to identify all the relevant material.

583. The Scottish Government only decided to concede the case following the discovery of further communications in December 2018 between the Investigating Officer and the complainers which suggested the level of contact was greater than previously thought.

584. The first of these additional emails was recovered because the search dates were revised (the end date being 31 January 2018 rather than 16 January 2018). We fail to understand why these emails were not identified at the outset, once this issue was raised by counsel and particularly during the previous searches. Regardless of the date, they were clearly relevant.

585. The Committee is not in a position to comment on the Scottish Government’s chances of success at the outset of the judicial review, although the initial Note on Prospects has now been published by the Scottish Government. The Committee has not seen the legal advice provided to Mr Salmond.

586. However, there were various key points at which there were opportunities, from the end of October and even more so into December, to re-consider prospects and, crucially, ensure that all the relevant information was available to inform decision-making.

587. The emergence of further new information in December 2018 was documented in the report by the Director General of Organisational Development and Operations. The information provided in the report reflects the extent of the evidence found in the



Commission and Diligence including a 'watershed moment' in December. It reflects the need to give due consideration to the cost of the review weighed against the potential for success. It suggests – and as now evidenced in the legal advice published by the Scottish Government – that counsel considered the case to no longer be stateable. The Director General's report included detailed work on how to concede, including draft media lines and detail on handling the announcement.

588. The Committee considers that the major flaw in the conduct of this judicial review was the significant failure to identify all the relevant documents at the outset of the judicial review in August 2018. It is inexplicable that these were not identified by October 2018 when the issue of prior contact was identified as a concern by counsel. The process for recovering of documents was fundamentally flawed and contributed to the awarding of the maximum expenses to the Petitioner. This also doubtless prolonged the length of the judicial review process.

589. The Committee accepts that the Scottish Government is entitled to decide whether to proceed to continue to defend a petition for judicial review so long as it believes in the merits of doing so. It is for Ministers to make any such decision informed by advice from the Law Officers. The Committee does not call into question the opinions of counsel or the Law Officers

590. The Committee also acknowledges that decisions as to whether to continue defending a petition for judicial review is, at the end of the day, a matter of judgement, informed by legal advice but also by the wider public interest, particularly in the case of any public body. The Committee cannot stand in the shoes of the Scottish Government and pretend to make such a decision.

591. The Committee does, however, note that from 31 October 2018, substantial concerns were being expressed by counsel as to the prospects of success in relation to the challenge under paragraph 10 of the Scottish Government's procedure on handling harassment complaints. These concerns related to both the interpretation of paragraph 10 as well as the possible violation of paragraph 10 if prior contact were to be found to have the meaning suggested by counsel. The Committee acknowledges that the opinion of Law Officers until at least 11 December 2018 continued to be that the Scottish Government should defend the case.

592. The Committee acknowledges that had the petition been conceded earlier, it is an open question as to whether the complainers would have been willing to make renewed complaints following any adjustments that the Scottish Government might have made to paragraph 10. The complainers were not consulted on this at any stage leading up to the concession, although the Committee notes the complainers concerns about resubmitting their complaints following the Scottish Government's concession. It is also an open question as to whether the Petitioner may have lodged a fresh petition. These and other considerations may have been in the minds of the Scottish Government at the time.

593. However, the Committee notes that had the Scottish Government identified all relevant documents and complied fully and promptly with its duty of candour at an

early stage, the prior contact that had already been identified by 31 October 2018 and which was subsequently to prove fatal due to the failure to disclose key evidence, would have been brought fully to the fore.

594. By 31st October 2018, senior external counsel had concluded that the Government would likely lose the judicial review. That assessment only worsened as the case progressed and prior contact between the Investigating Officer and complainers emerged. The Committee is also concerned that the First Minister decided to proceed with the judicial review despite clear advice that it would likely fail.<sup>1</sup>

595. The key people involved in the investigation were known. It was obvious by this time that the prior involvement of the Investigating Officer was a fundamental issue. Therefore, the Committee cannot understand why the Scottish Government did not recognise there needed to be a full interrogation of all electronic devices belonging to that individual, regardless of what they believed the search criteria to be.

596. The Permanent Secretary outlined in evidence<sup>ccxxvii</sup> improvements that had been made to its processes for interrogating corporate information and in a letter of 20 November 2020, stated that a review of corporate information management processes for storage, retrieval and deployment of corporate information was underway and was due to report in December 2020.

597. The outcome of this review should be published and, if not carried out as part of this work, the Scottish Government should review its compliance with its duty of candour, understand how a Commission and Diligence came to be required, how the Government responded to it and its governance arrangements.

598. The Committee concludes that the Scottish Government was responsible from an early stage for a serious, substantial and entirely avoidable situation that resulted in a prolonged, expensive and unsuccessful defence of the Petition. The Committee finds that this state of affairs is unacceptable by an organisation such as the Scottish Government and that those responsible should be held accountable.

599. The Committee is conscious that the Permanent Secretary's office was identified as coordinating the supply of information for the judicial review and that the Permanent Secretary was one of a few people who had been aware of the prior contact of the Investigating Officer. It must be questioned why the Permanent Secretary in her role and with her knowledge did not ensure that the relevant information was extracted and processed at a much earlier stage. This individual failing is as significant as the general corporate failing already described.

### **Awarding of full costs to the former First Minister**

600. The default position is that expenses will be awarded on the “party and party” scale, but there are two other scales on which a successful party may ask the court to award expenses, namely, “solicitor and client, third party paying”, and “solicitor and

---

<sup>1</sup> This paragraph was agreed to by division: For 5 (Jackie Baillie, Alex Cole-Hamilton, Murdo Fraser, Margaret Mitchell, Andy Wightman, Against 4 (Alasdair Allan, Linda Fabiani, Stuart McMillan, Maureen Watt)

client, client paying”. The Court has discretion to decide which of the three should apply.

601. The principles applied by the Court when approaching this issue have been set out by Lord Hodge as<sup>ccxxviii</sup>—

- The Court has discretion as to the scale of expenses which should be awarded.
- In the normal case expenses are awarded on a party and party scale; that scale applies in the absence of any specification to the contrary
- Where one of the parties has conducted the litigation incompetently or unreasonably, and thereby caused the other party unnecessary expense, the Court can impose, as a sanction against such conduct, an award of expenses on the solicitor and client scale
- In its consideration of the reasonableness of a party’s conduct of an action, the Court can take into account all relevant circumstances.
- Those circumstances include the party’s behaviour before the action commenced, the adequacy of a party’s preparation for the action, the strengths or otherwise of a party’s position on the substantive merits of the action, the use of a Court action for an improper purpose, and the way in which a party has used Court procedure, for example to progress or delay the resolution of the dispute.

602. The Committee is aware that the award of expenses made in favour of Mr Salmond as Petitioner was made on the, “agent and client, client paying” scale – a more generous level of award than the standard.

603. In his evidence to the Committee the former Interim Director of Legal Services indicated that he did not take issue with the Court’s decision on the award of fees, saying—

“In my experience, specifications of documents are relatively common, but I have never come across commission and diligence before. I have never come across a situation where, in effect, a petitioner was forced to go into a situation where a commission on diligence was not only served but proceeded in the way that it did. Whatever adjective you use to describe the situation, it certainly seemed difficult to me to say, given the way that events panned out, that it would be wrong to have allowed the higher level of expenditure on behalf of the petitioners.”<sup>ccxxix</sup>

604. The Lord Advocate in his written submission states that—

“The costs of settlement reflected the expenses incurred by the petitioner in pursuing the judicial review process assessed by reference to the rules governing the recovery of expenses in litigation in the Scottish Courts. As the Scottish Government’s response on the handling of the judicial review explains, the judicial review was conceded on the basis that the Scottish Ministers would meet the petitioner’s expenses on an agent and client, client paying basis. 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.”

605. In [oral evidence to the Committee on 17 November 2020](#), the Lord Advocate stated in response to a question on the award of expenses—

“It was highly unsatisfactory—let us put it that way—that the Government should be in a position where, after it had set out its stall in pleadings, disclosed documents and given assurances to the court that full disclosure had been made, it transpired during the course of the commission that there were additional documents, which had not previously been disclosed, that bore substantively on the issues in the case. Indeed, as the committee has heard, further documents were identified even after that point. That was not the way that I, as the Government’s senior law officer, would like to see a Government litigation conducted. It is clear that, corporately, there was a failure to get to the bottom of all the documentation at the time when that should have happened—in the course of November.”

606. The Committee’s view is that the Scottish Government’s procedure for and handling of document disclosure during the judicial review proceedings was seriously flawed and it was this significant failure to disclose documents – in the run up to and following counsel’s urgent note of 31 October 2018 – and to allow statements to be made to the Court that all documents had been disclosed when they had not been that led to the awarding of costs at the level set out above.

## **Governance arrangements**

607. The final point the Committee wishes to make about the Scottish Government’s handling of the judicial review is about the governance arrangements for the response.

### *Overall governance*

608. The Deputy First Minister’s letter of 14 October 2020 set out the officials who were involved to varying degrees in the oversight and handling of the judicial review process. They were—

- The Permanent Secretary
- The Director General, Organisational Development and Operations (“DGODO”)
- Interim Director, Scottish Government Legal Directorate
- Deputy Director, Scottish Government Legal Directorate

609. In structural terms, the DGODO reports directly to the Permanent Secretary. The former Interim Director of Legal Services said in evidence that he reported in terms of line management to the Director General for Constitution and External Affairs, but he indicated that in practical terms he reported to the Permanent Secretary and her team as the team coordinating the response to the judicial review—

“In that sense, the co-ordination was done by the permanent secretary’s office.”<sup>CCXXX</sup>

610. This is similar to the position regarding the development of the procedure where the Director of People indicated that she, in practice, reported to the Permanent Secretary (her line manager was the DGODO).

611. As mentioned earlier in the report, counsel raised the matter of resources available for the management of the case at solicitor level. They noted there was one principal solicitor with responsibility for management of the case and that further preparations – particularly in the organisation of documents – required additional resource dedicated to the case.

612. The Permanent Secretary is identified as First Respondent in the pleadings. The pleadings of the former First Minister, as set out in the initial petition and the Open Record, criticise the Permanent Secretary’s actions on various counts.

613. It is unclear whether any kind of governance review was put in place around the judicial review and, in particular, an assessment of the Permanent Secretary’s suitability to lead the corporate response to this work given her status as First Respondent.

614. The Permanent Secretary was questioned about whether it was appropriate for the same person to oversee the creation and implementation of a complaints procedure and the response to a legal challenge against it. She [explained](#) that—

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

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

615. In terms of Ministerial oversight, the Lord Advocate was obviously involved in the oversight of and response to the judicial review. The First Minister was ultimately involved in the decision making, included attending a meeting with counsel, the Permanent Secretary and the Chief of Staff on 13 November 2018.

616. The Permanent Secretary confirmed that written information and advice on the judicial review was provided to other Ministers. She [explained](#) that—

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

617. As the most senior civil servant, we recognise that the Permanent Secretary has the responsibility and accountability for the Scottish Government procedure on the handling of harassment complaints and the implementation of that procedure. However, given her role and interest in the procedure and in the investigation of the complaints, the Committee suggests it might have been a wiser course of action to involve, on a more formal basis, other senior staff (for example Directors General) in the decision-making process for the judicial review.

### *Commission and Diligence*

618. As previously highlighted, the failure to identify relevant documents was a key issue and therefore the Committee sought clarification on who had oversight of this particular part of the process. The Permanent Secretary suggested oversight of the process was with the Scottish Government Legal Directorate (SGLD) whereas both the former Interim Director of Legal Services and the former Director General Organisational Development and Operations suggested that oversight was, in practice, the responsibility of the Permanent Secretary’s private office. The fact there are different perspectives on this suggests a confusion of governance.

### **The status of the procedure**

619. The Committee would like to comment on the current status of the procedure.

620. The Committee notes that on [3 August 2020](#) Laura Dunlop QC was invited by the Scottish Government to begin an independent review of the complaints handling procedure. The Scottish Government published the [report by Laura Dunlop QC](#) on 16 March 2021. The report made ten recommendations. It is reasonable to assume that any changes resulting from her review will not lead to amendments in the procedure until Summer 2021 at the earliest. Whilst the Committee welcomes the review and notes its recommendations, it is concerned that these will not be likely be adopted until three plus years have passed since concerns with the operation of the procedure were first raised.

621. In his evidence, the former First Minister said “the policy that was developed in 2017 was the subject of my judicial review and has been declared unlawful, so it is now in limbo”.<sup>ccxxxi</sup>

622. However, in her evidence the First Minister said “the procedure is still in place. If a complaint about a current or former minister came in again, that procedure is still extant and could be used. The initial judicial review petition had a number of grounds of challenges – I think that there were eight – some of which were about its application

but some of which were about the fundamental lawfulness of the procedure itself, such as that it was ultra vires and that it should not have been retrospective. None of those was tested in court, because of what happened with the judicial review, so none of these concerns has been established one way or the other.”<sup>ccxxxii</sup>

623. The Committee notes that the procedure still appears to be live and in operation. It can be found on the [Scottish Government website](#) with no indication that it has been suspended. However, we understand that it has not been used following the experiences of Ms A and Ms B. This may be because individuals are understandably reluctant to use the procedure, given what occurred. The Committee believes that there should be no barrier to staff raising concerns and progressing them to formal complaints if they so wish. It is for the Scottish Government to consider how it would deal with such concerns in light of the challenge to its current procedure following the experiences of Ms A and Ms B.

624. Furthermore, whilst the Committee appreciates that Laura Dunlop QC’s review has been underway and has only recently reported, it fails to understand why the Scottish Government has not made any changes to the procedure in relation to the role of the Investigating Officer to date<sup>ccxxxiii</sup>. At the very least, the Committee believes that further guidance should have been drawn up on the interpretation of paragraph 10 of the procedure to avoid the same mistakes happening again should someone else have come forward.

625. To avoid this happening in the future, the Committee’s view is that the Investigating Officer should be someone who has not been previously involved in any way with the complaints. The Committee is dismayed that senior officials did not see that having someone investigate the complaints who had provided support to those women when they first raised concerns was problematic and could lead to challenge.

626. While this could present challenges for a small organisation, the Scottish Government is a large organisation in which it should be possible for someone with the relevant experience to conduct the investigation who has not been previously involved in providing support to the complainers.



# Scottish Ministerial Code

## Introduction

627. One of the elements of the Committee's remit is to consider "actions in relation to the Scottish Ministerial Code".

628. In this section of the report we provide some background information about the Scottish Ministerial Code and make recommendations on how it might be strengthened in the future. We will then discuss the work being undertaken by James Hamilton, who is one of the independent advisers on the Code. Finally, we will cover the evidence we heard about alleged breaches of the Scottish Ministerial Code by the First Minister.

## The Scottish Ministerial Code

629. The [Scottish Ministerial Code](#) (sometimes referred to as the "Ministerial Code") is a code of conduct for members of the Scottish Government (the First Minister, Cabinet Secretaries and Law Officers) and junior Scottish Ministers.

630. The enforcement of the Ministerial Code is set out in paragraphs 1.6 and 1.7 of the Code—

"1.6. Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Ministerial Code and for justifying their actions to Parliament and the public. The First Minister is, however, the ultimate judge of the standards of behaviour expected of a Minister and of the appropriate consequences of a breach of those standards. Although the First Minister will not expect to comment on every matter which could conceivably be brought to his or her attention, Ministers can only remain in office for so long as they retain the First Minister's confidence.

1.7. Where he or she deems it appropriate, the First Minister may refer matters to the independent advisers on the Ministerial Code to provide him or her with advice on which to base his or her judgement about any action required in respect of Ministerial conduct. The findings of the independent advisers will be published.

631. The Ministerial Code also states—

"1.3.C: .... Ministers who knowingly mislead the Parliament will be expected to offer their resignation to the First Minister."

632. As can be seen, the Ministerial Code provides that it is the First Minister who is the ultimate judge of Ministers' behaviour. The Code does not any contain any special provisions for when an allegation is made that it is the First Minister who is alleged to have breached the Code. However, there is precedent for a First Minister to refer allegations that they have breached the Code to the independent advisers on the Code for further investigation<sup>ccxxxiv</sup> The system of independent advisers on the Ministerial Code was established in June 2008 by the then First Minister, Alex Salmond.

## **Referral by the First Minister to the independent advisers**

633. On [8 January 2019](#), the First Minister made a statement to the Parliament about the concession of the judicial review into the Scottish Government complaints procedure. During this statement she referred to three meetings and two telephone conversations that she had with the former First Minister during the course of 2018.

634. At [First Minister's Questions on 10 January 2019](#), the First Minister was asked about whether her meetings with the former First Minister breached paragraph 4.23 of the Ministerial Code about record keeping at meetings with external organisations and individuals. The First Minister responded that she was satisfied that she conducted herself appropriately and in line with all the rules.

635. On 13 January 2019, the First Minister announced that she had referred herself to the independent advisers on the Ministerial Code in relation to the questions that had arisen about her contact with Mr Salmond during the Government's investigations into the complaints that had been made against him.

636. In a statement issued on 19 January 2019, the First Minister commented—

“Questions have been raised about my meetings and telephone calls with Alex Salmond during the Government's investigation into the complaints which were made.

“I have acted appropriately and in good faith throughout, and in compliance with the Ministerial Code at all times. However, I have reflected carefully and understand that it is also important for Parliament and the wider public to be assured of that.

“I have therefore decided to refer the matter for consideration by one or both of the Independent Advisers on the Ministerial Code.”<sup>CCXXXV</sup>

637. The referral is being led by James Hamilton, who is a standing member of the panel of independent advisers. Mr Hamilton is a former Director of Public Prosecutions in Ireland and has been an independent adviser since January 2013.

638. The referral was paused after the former First Minister was charged with a series of criminal offences. The former First Minister was acquitted of all charges on 23 March 2020. After a further pause by the Scottish Government due to COVID-19, the referral was recommenced on 3 August 2020.

## **Remit of the referral to James Hamilton**

639. The Deputy First Minister announced the remit of the referral in response to a parliamentary question on 3 August 2020. The [remit](#) for the referral is—

“1. Review any relevant documentation relating to the meetings and discussions listed above [note: the meetings and discussions listed in the referral were:

- 29 March 2018 - Meeting between Ms Sturgeon and Geoff Aberdein, former Chief of Staff to Mr Salmond, Scottish Parliament
- 2 April 2018 - Meeting between Ms Sturgeon and Mr Salmond at Ms Sturgeon's home.
- 23 April 2018 - Telephone conversation between Ms Sturgeon and Mr Salmond.
- 7 June 2018 - Meeting between Ms Sturgeon and Mr Salmond at SNP Conference, Aberdeen.
- 14 July 2018 - Meeting between Ms Sturgeon and Mr Salmond at Ms Sturgeon's home
- 18 July 2018 - Telephone conversation between Ms Sturgeon and Mr Salmond.]

2. Interview any Minister or official of the Scottish Government, including Special Advisers, who may have any knowledge of the facts and content of the meetings and discussions, to assess whether the Ministerial Code is engaged and, if so, whether the terms of the Code have been complied with.

3. Interview any relevant person outwith the Scottish Government, including the former First Minister, Alex Salmond, who may have information relating to the facts and content of the meetings and discussions.

4. Determine if there is any evidence that the First Minister attempted to use information discussed during those meetings and discussions to influence the conduct of the investigation being undertaken by the Permanent Secretary into allegations made against Mr Salmond under the Procedure.

5. Provide the Deputy First Minister with a report setting out the findings and conclusions with regard to:

- i. whether the Ministerial Code is engaged regarding the meetings and discussions;
- ii. whether there has been any breach of the Code and the nature of any such breach; and
- iii. if a breach has occurred, advice on the appropriate remedy or sanction.

6. The Independent Adviser is further invited to consider and offer views on whether the Ministerial Code might need revision to reflect the terms of the Procedure and the strict limitations it places on the involvement of the First Minister in cases which fall to be considered under the Procedure."

640. The Deputy First Minister was asked in written parliamentary questions whether Mr Hamilton would be limited by this remit and whether as part of the remit he could ascertain whether the First Minister had misled the Parliament in relation to the complaints against the former First Minister. The Deputy Minister responded on 6 November 2020—

"As indicated by the First Minister at First Minister's Questions on 29 October, in delivering the remit the Independent Adviser is not constrained in taking

evidence and reporting on other aspects of the Ministerial Code that he deems to be relevant.”<sup>ccxxxvi</sup>

641. On 13 January 2021 the Deputy First Minister wrote to the Committee to enclose an [exchange of correspondence](#) he had had with Mr Hamilton.

642. Mr Hamilton told the Deputy First Minister that—

“Having considered the evidence submitted to me by various participants, and the issues raised on this topic, I consider that the issue of reporting of meetings by the First Minister to the Parliament on a broad view appears to be within the scope of the remit but even on a narrower view is so closely connected to the remit that I am minded to include this within the scope of my report.

I also wanted to note that I consider the allegations made by Mr. Salmond concerning whether or not the First Minister should have intervened to arrange a process of mediation to be within the scope of the remit set out above.”

643. The Committee welcomes the decision of James Hamilton to clarify the remit of his work. However, the fact there was a need for clarification may point to the need to revisit paragraph 1.7 of the Ministerial Code, which sets the role of the independent advisers. This paragraph is currently very short. It may benefit from being more detailed. We have identified the following points for consideration.

644. First, the role of the advisers is to “provide advice” rather than take a view on whether a breach has occurred. This could be clearer. Second, the First Minister is not obliged to take the advice of the independent advisers when they have reported. Third, the First Minister sets the terms of the referral to the independent advisers. It is not clear whether the remit of the referral is binding or not or if the advisers are free to investigate potential breaches of the Code which have not been specifically highlighted in the referral.

645. The Ministerial Code is the responsibility of the Scottish Government. It is not a document which requires to be approved by the Parliament. We note however that there is precedent for the Scottish Government to amend the Ministerial Code in response to a request from a committee of the Parliament. In 2016 the First Minister agreed to amend references to parliamentary liaison officers in the Ministerial Code following correspondence from the Standards, Procedures and Public Appointments Committee.<sup>ccxxxvii</sup>

646. As such, we ask that the First Minister responds favourably to our request to revise and strengthen paragraph 1.7 of the Ministerial Code. In particular we recommend that in the future the independent advisers should be invited to review the referred actions against the Ministerial Code as a whole rather than being invited to consider specific sections.

647. We also note that there may be a general requirement to amend the Ministerial Code as a result of the outcome of this inquiry and the work carried out by James Hamilton and Laura Dunlop QC. We recommend that the First Minister gives

consideration to a full review of the Ministerial Code with a view to considering what changes are required.

## **Report of the independent adviser**

648. The remit of the referral to James Hamilton confirms that—

“The final report will be published. If required, the report will be redacted to remove the risk of any complainer being identified and otherwise to ensure compliance with the terms of the order made by the court in the criminal proceedings.”

649. As is normal with reports from the independent adviser, the report will be made to the Scottish Government, not the Scottish Parliament.

650. At the time of writing, we understand that James Hamilton has not passed his report to the Scottish Government. We understand that this will happen some time in March 2021, in advance of the recess which is due to begin on 25 March 2021.

651. The Committee seeks the Scottish Government’s commitment that, once it receives Mr Hamilton’s report, it will be published as soon as possible, and certainly in advance of 24 March 2021 (assuming it has been received by then). The Committee appreciates that the Scottish Government must make certain legal checks before publication, but we stress that these should be undertaken as a matter of urgency. The Committee notes that the First Minister responded “Yes” [when asked at First Minister’s Question Time](#) on 4 March 2021 if the Scottish Government would release Mr Hamilton’s report on the day it was handed over.

## **Our role**

652. We want to be clear that the work being undertaken by James Hamilton is completely separate from the work of our inquiry.

653. Mr Hamilton will gather his own evidence and reach his own conclusions in his own report. He will do so independently of this Committee and he is not obliged to take into account any conclusions we reach. Nor do we think it would be appropriate for us to seek to direct Mr Hamilton’s work or influence his own conclusions.

654. However, it remains the case that the Ministerial Code is also in our remit. We have conducted our own evidence taking on this subject. We consider it important that we report to the Parliament on the Ministerial Code in order to fulfil our remit.

655. In doing so we must acknowledge that there has been a great deal of discussion of and interest in the question of whether the First Minister has met the requirements of the Ministerial Code. We understand that this is a subject on which there are strong views and, on occasion, competing versions and interpretations of events.

656. The approach we will take in this report is to identify which particular provisions in the Ministerial Code are alleged to have been breached – and how.

657. We will set out the facts of the matter, as far as they are known. Where we have heard different accounts or interpretations of events we will also set them out. As far as possible we will refer to the actual text of the written submissions we received or the actual words which witnesses used. This is to allow the reader to read the actual evidence we received, rather than a paraphrasing of that evidence.

658. Finally, the Committee will set out some conclusions about the Ministerial Code phase of our inquiry.

## **Evidence received by the Committee**

### **Accurate and truthful information to the Parliament**

The Ministerial Code states—

“1.3.C: It is of paramount importance that Ministers give accurate and truthful information to the Parliament, correcting any inadvertent error at the earliest opportunity.”

The Ministerial Code goes on to state that “Ministers who knowingly mislead the Parliament will be expected to offer their resignation to the First Minister”.

659. There have been allegations that the First Minister breached this provision in relation to her statements to the Parliament about her meetings with the former First Minister.

660. The former First Minister has alleged, for example, that “...Parliament has been repeatedly misled on a number of occasions about the nature of the meeting of 2nd April 2018”.<sup>ccxxxviii</sup>

661. There appear to be three separate elements to the allegations made by the former First Minister about Parliament being misled. These are outlined below.

#### *Dates of meetings*

662. The first allegation relates to the dates given to the Parliament by the First Minister on which she was informed about the complaint against the former First Minister.

663. On 8 January 2019, during a statement to the Parliament on the conclusion of the judicial review, the [First Minister stated](#) “on 2 April, he [Alex Salmond] informed me about the complaints against him, which—of course—in line with the procedure, the permanent secretary had not done”.

664. On 10 January 2019, the First Minister also [told the Parliament](#) that “...Alex Salmond informed me of the investigation at a meeting on 2 April 2018”.

665. However, it subsequently emerged that the First Minister had participated in an additional meeting. This was a meeting on 29 March 2018 with Geoff Aberdein, the former Chief of Staff to the former First Minister. The First Minister had not mentioned this meeting in her remarks in the Parliament on 8 and 10 January 2020.

666. In her [written submission to the Committee](#), the First Minister detailed her account of how this meeting came about and what was discussed—

“Alex Salmond told me on 2 April 2018 at a meeting at my home that complaints against him were being investigated under the Procedure. At that meeting, he showed me a copy of the letter he had received outlining the detail of the complaints.

As has been reported already, four days earlier - 29 March 2018 - I had spoken with Geoff Aberdein (former Chief of Staff to Alex Salmond) in my office at the Scottish Parliament.

Mr Aberdein was in Parliament to see a former colleague and while there came to see me.

I had forgotten that this encounter had taken place until I was reminded of it in, I think, late January/early February 2019.

For context, I think the meeting took place not long after the weekly session of FMQs and in the midst of a busy day in which I would have been dealing with a multitude of other matters.

However, from what I recall, the discussion covered the fact that Alex Salmond wanted to see me urgently about a serious matter, and I think it did cover the suggestion that the matter might relate to allegations of a sexual nature.”

667. The First Minister was asked in evidence about what was discussed at the meeting on 29 March 2018. She told the Committee—

“What I am saying to you is that, ahead of 2 April, I had an awareness that there was a complaint. No doubt, I had suspicions about what the nature of that might be, but that is what it was: a general awareness—a suspicion that, no doubt, I had all sorts of theories about in my head. It was reading the permanent secretary’s letter, which Alex Salmond showed me on 2 April, that gave me the knowledge, and the detail behind that knowledge, of all the things that I have spoken about.”<sup>ccxxxix</sup>

668. The First Minister also explained to the Committee how she came to forget about the meeting on 29 March 2018—

“Not unreasonably at all, some people have asked how I could have forgotten the conversation on 29 March, and I certainly wish that my memory of it was more vivid, but as I have stated, it was the detail of the complaints under the procedure that I was given on 2 April that was significant and, indeed, shocking.



That was the moment at which any suspicions that I had, or general awareness that there was a problem, became actual and detailed knowledge.”<sup>ccxi</sup>

669. The former First Minister commented in oral evidence about the allegation that the First Minister has breached the Ministerial Code. He told the Committee—

“In terms of a breach of the ministerial code, I would have thought that either explanation breaches the ministerial code. Either the meeting on 29 March was not forgotten about and Parliament was deliberately misled, or, alternatively, it was forgotten about and Parliament was not informed when Nicola was reminded of it. My submission says that those are, to me, clear breaches of the ministerial code.”<sup>ccxli</sup>

### *Capacity in which the First Minister held meetings*

670. The second allegation about the accuracy of the First Minister’s remarks to the Parliament relates to her account of the status of the meeting on 2 April 2018.

671. The former First Minister has challenged the accuracy of the First Minister’s statements to the Parliament that she had attended the meeting on 2 April 2018 in her capacity as party leader and that it had not been a Government meeting.

672. On 8 January 2019, the First Minister told the Parliament—

“The contacts that I had with Alex Salmond, the dates of which I have set out today, were not Government meetings. I have known Alex Salmond as a friend and colleague for 30 years, and he was then a member of my party, although he is not at the present time.”<sup>ccxlii</sup>

673. On 10 January 2019, she told the Parliament “...like other party leaders here, I have responsibilities as leader of my party and I took part in meetings in that capacity”<sup>ccxliii</sup>.

674. The First Minister [told the Committee](#) that she decided to meet the former First Minister after her meeting with Geoff Aberdein—

“What I recall most strongly about the conversation is how worried Geoff seemed to be about Alex’s welfare and state of mind, which, as a friend, concerned me. He also said that he thought that Alex might be considering resigning his party membership. It was those factors that led me to agree to meet him, and it was those factors that placed the meeting on 2 April firmly in the personal and party space.”

675. The Committee [took evidence from Peter Murrell](#), Chief Executive of the SNP, who indicated that he only found out about the nature of the meeting with the former First Minister when it became public knowledge the following year.

676. The position of the former First Minister is that in advance of the 2 April 2018 meeting there was “a shared understanding” between the participants about the issues for discussion. This was because of the earlier meeting on 29 March 2018. These

issues were “the complaints made and the Scottish Government procedure which had been launched”.<sup>ccxliv</sup>

677. The former First Minister told the Committee in [his written submission](#)—

“The pre-arranged meeting in the Scottish Parliament of 29th March 2018 was “forgotten” about because acknowledging it would have rendered ridiculous the claim made by the First Minister in Parliament that it had been believed that the meeting on 2nd April was on SNP Party business (Official Report 8th & 10th January 2019) and thus held at her private residence. In reality all participants in that meeting were fully aware of what the meeting was about and why it had been arranged.”

678. He went on to state in his written submission—

“...the repeated representation to the Parliament of the meeting on the 2nd April 2018 as being a ‘party’ meeting because it proceeded in ignorance of the complaints is false and manifestly untrue.”<sup>ccxlv</sup>

679. In evidence, the First Minister was asked whether she was at the meeting as party leader or First Minister. She responded—

“I agreed to that meeting on 2 April—people can now read this, and, no doubt, lots of people will have listened to my opening statement—on the basis, first, that Geoff seemed very concerned about Alex’s state of mind and wellbeing. I was, at that time, his friend and I wanted to see him on that basis. There was also a sense that there was a serious issue that might affect his status in the party. So, I agreed to meet on that party and personal basis.

Clearly, what he showed me was a letter relating to a Government investigation. If I had been intervening, I would therefore have been doing so as First Minister. I would have had no locus to intervene at that stage in that procedure as party leader; I would have been doing that as First Minister. So, clearly, the decision on whether to intervene in the way that he was asking me to would have been taken by me as First Minister.”<sup>ccxlv</sup>

### *Interventions*

680. The third allegation about the accuracy of the First Minister’s remarks to the Parliament relates to her account of whether she intervened in the complaints process following the meeting on 2 April 2018.

681. On 8 January 2019, the First Minister explained to the Parliament how she responded to the request from the former First Minister that she should intervene in relation to the complaints—

“I was very firm when, as I have set out, in the first meeting he informed me of the complaints and when, after that, he made me aware of the concerns that he had about the process and that he was proposing mediation and arbitration,

that—and this is the key principle for me—I had no role in the process. I did not intervene or seek to intervene.<sup>ccxlvii</sup>”

682. On 10 January 2019, she also explained to the Parliament—

“I did not know how the Scottish Government was dealing with the complaint, I did not know how the Scottish Government intended to deal with the complaint and I did not make any effort to find out how the Scottish Government was dealing with the complaint or to intervene in how the Scottish Government was dealing with the complaint.<sup>ccxlviii</sup>”

683. The First Minister stated in [her written submission](#) to this inquiry that “I made clear to him that I had no role in the process and would not seek to intervene in it”.

684. However, the written submission from the former First Minister claims—

“The First Minister’s position on this is simply untrue. She did initially offer to intervene, in the presence of all those at the First Ministers house on the 2nd April 2018. Moreover, she did engage in following the process of the complaint and indeed reported the status of that process to me personally.<sup>ccxlix</sup>”

685. The former First Minister commented further about the First Minister’s offer to intervene—

“She said she would when it was the appropriate time. As I say, the conversation was not about if she would intervene, but when. Nicola’s anxiety was that she wanted to find a situation where the permanent secretary came to her, or a suitable moment to do it. However, there was no doubt—and I believed—that she was going to assist in that direction for what I believe was the perfectly proper purpose of securing mediation.<sup>cc</sup>”

686. In a [WhatsApp message to the First Minister](#) sent on 6 June 2018, the former First Minister stated—

“My recollection of our Monday 2 April meeting was rather different. You wanted to assist but then decided against an intervention to help resolve the position amicably.”

687. Duncan Hamilton, who acted as an Advocate to the former First Minister and was present at the meeting on 2 April 2018, stated in written evidence—

“I can confirm that the First Minister did offer to assist. We discussed mediation. My clear recollection is that her words were ‘If it comes to it, I will intervene.’<sup>ccli</sup>”

688. The First Minister was asked about Duncan Hamilton’s statement. She commented—

“I do not know what “If it comes to it” would mean in the context of what we are dealing with. If it comes to what?

An investigation was under way. All that I am trying to explain here—it is imperfect, and I get that—is that I am in this discussion, in which I have been told something shocking and upsetting; I am trying to process it all in my mind as I go, and maybe I express myself in ways that I should not have done. I am not saying that I did not, but I believe that I was clear that I could not, and would not, intervene in this process.<sup>cclii</sup>”

689. The First Minister also told the Committee—

“I also know that I was perhaps trying to—how will I best put this?—let a long-standing friend and colleague down gently. Perhaps I did that too gently and he left with an impression that I did not intend to give him. I think that I was clear, and I certainly intended to be clear.<sup>ccliii</sup>”

690. She also commented—

“A crucial part in this is that I did not intervene. It has been put to me today that I should have intervened, but I did not. Whatever way I expressed myself and whatever discussions I took part in, I did not intervene in the process.<sup>ccliv</sup>”

## Recording of meetings

The Ministerial Code states—

“4.22 Ministers meet many people and organisations and consider a wide range of views as part of the formulation of Government procedure. Meetings on official business should normally be arranged through Private Offices. A private secretary or official should be present for all discussions relating to Government business. Private Offices should arrange for the basic facts of formal meetings between Ministers and outside interest groups to be recorded, setting out the reasons for the meeting, the names of those attending and the interests represented. A monthly list of engagements carried out by all Ministers is published three months in arrears.

4.23 If Ministers meet external organisations or individuals and find themselves discussing official business without an official present – for example at a party conference, social occasion or on holiday – any significant content (such as substantive issues relating to Government decisions or contracts) should be passed back to their Private Offices as soon as possible after the event, who should arrange for the basic facts of such meetings to be recorded in accordance with paragraph 4.22 above.”

691. There have been allegations made that the First Minister breached the Ministerial Code in relation to how certain meetings with the former First Minister were, or were not, recorded.

692. The [written submission from the former First Minister](#) stated, for example—

“In terms of the meetings with me, the only breaches of the Ministerial Code are the failure to inform civil servants timeously of the nature of the meetings.”

### *Details of meetings*

693. The First Minister's written submission sets out details of when she met the former First Minister – and when she first informed the Permanent Secretary of these meetings.

694. As we have previously discussed, the First Minister met with the former First Minister at her home on 2 April 2018. The First Minister stated in her written submission that she took no action as a result of this meeting.

695. According to the First Minister's submission, there followed further contact between the First Minister and the former First Minister—

“Mr Salmond sent me a message on 22 April 2018 asking to speak to me by phone.

As previously advised to Parliament, I spoke to him by phone on 23 April (the substantive call took place early evening after a call in the morning had to be aborted due to poor signal).

He asked me if I would make the Permanent Secretary aware that I knew about the investigation and encourage her to accept his request for mediation.

I said that I was not willing to do so. A special adviser was in the room with me during this call, though not on the line.

Mr Salmond sent me a message on 31 May 2018 asking to meet.  
I did not agree to a meeting at that time.

Mr Salmond sent me a further message on 3 June 2018.

Both the tone and content of this message led me to conclude that legal action by Mr Salmond against the Scottish Government was a serious prospect.

I decided that I should make the Permanent Secretary aware of this, and I wrote to her on 6 June 2018.<sup>cclv</sup>”

696. A [copy of this letter](#) was provided to the Committee by the Scottish Government.

697. The First Minister went on in her submission to explain that having decided to write to the Permanent Secretary, she agreed to meet Mr Salmond. She sent him a message to this effect on 5 June 2018. The meeting took place in Aberdeen on 7 June 2018.

698. The third and final meeting took place between the First Minister and the former First Minister on 14 July 2018 at her home.

699. On 16 July 2018, the First Minister states in [her written submission](#) that she made the Permanent Secretary aware of the meeting on 14 July 2018 and some subsequent

messages from the former First Minister. The Committee has not received a copy of any note or letter relating to this exchange.

#### *Evidence from the former First Minister*

700. The former First Minister's view is that under the Ministerial Code, the First Minister should have reported the meeting of 2 April 2018 to the Permanent Secretary. He commented in evidence—

“She certainly should have reported the matter to the civil service. In this case, I would say that it should have been reported to the permanent secretary, because of its nature.”<sup>cclvi</sup>

#### *Evidence from the First Minister*

701. The First Minister explained her reasons for not immediately reporting the contact with the former First Minister in oral evidence to the Committee—

“Let me turn to my decision not to immediately report the contact. Sections 4.22 and 4.23 of the “Scottish Ministerial Code” seek to guard against undisclosed outside influence on decisions that ministers are involved in, and are likely to have an influence on, such as changes in policy or the awarding of contracts.

The situation was, as I saw it, the opposite of that. The terms of the procedure excluded me from any investigation into a former minister. I had no role in the process and should not even have known that an investigation was under way. In my judgement, the undue influence that section 4 is designed to avoid would have been more likely to arise had those who were conducting the investigation been informed that I knew about it. I did not want to take the risk that they might be influenced—even subconsciously—by any assumption of how I might want the matter to be handled: their ability to do the job independently would be best protected by my saying nothing.

It is also my reading of the code that, had I reported it, the fact of my meeting with Alex Salmond would have had to be made public, potentially breaching the confidentiality of the process.

It is for those reasons that I did not immediately record the meeting on 2 April, or the subsequent phone call on 23rd April, in which Mr Salmond wanted me to tell the permanent secretary that I knew about the investigation and to persuade her to agree to mediation.

It is worth noting that the ministerial code places a number of obligations on ministers. Respect for the impartiality of civil servants and the confidentiality of Government business are also obligations that are imposed on me by the code. My judgment changed when Alex Salmond made it clear to me that he was seriously considering legal action. I felt then that I had no choice but to inform the permanent secretary, which I did on 6 June 2018.<sup>cclvii</sup>

702. The First Minister also commented on the capacity in which she was attending the meeting on 2 April 2018—

“My decisions about notification were not based on the classification of the meeting. I did not think, “If I say it’s a party meeting, I don’t have to report it,” but I can maybe take responsibility for giving the impression that that was the case. The reason that I did not report it was that, if I had reported it, I would have compromised the independence, the privacy and the confidentiality of the process. That was the basis on which I took that decision.”<sup>cclviii</sup>”

## Legal advice

The Ministerial Code states—

“2.30 Paragraph 1.2 of this Code acknowledges the overarching duty on Ministers to comply with the law. It is part of the role of the Law Officers (the Lord Advocate and the Solicitor General for Scotland) to ensure that the Government acts lawfully at all times. Ministers and officials should therefore 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. All briefing to Ministers with legal implications should be informed by appropriate advice on the legal considerations.”

703. The former First Minister has alleged that the First Minister breached the Ministerial Code in how she responded to legal advice she had received in relation to the judicial review.

704. The position of the former First Minister was summarised in his written submission—

“Further once the Judicial Review had commenced, and at the very latest by October 31st 2018 the Government and the First Minister knew of legal advice from external counsel (the First Minister consulted with counsel on 13th November) that on the balance of probability they would lose the Judicial Review and be found to have acted unlawfully. Despite this the legal action was continued until early January 2019 and was only conceded after both Government external counsel threatened to resign from the case which they considered to be unstateable. This, on any reading, is contrary to section 2.30 of the Ministerial Code.”<sup>cclix</sup>

705. In evidence to the Committee, the former First Minister stated—

“Everything about that legal advice—even how it has been described in terms—suggests that, on the balance of probabilities, it indicated that the Government was about to lose. If that is the case—if the legal advice says that—and the case was continued in the knowledge of the First Minister against that legal advice, that would be a breach of the ministerial code. If we could just see the document, we would all be better informed.”<sup>cclx</sup>”



706. The Committee has discussed the question of the Scottish Government's response to the legal advice received on the judicial review in some detail earlier in this report.

707. The First Minister told the Committee—

“In any legal challenge that a Government faces, there is a balance of risk. That risk cannot be eliminated, but the task of ministers is to consider carefully all the advice that we receive and the broader public interest. The test in the ministerial code is not the view of external lawyers, but of law officers.<sup>cclxi</sup>”

### **The views of this Committee**

708. The Committee has considered carefully its role in respect of the Ministerial Code element of its remit. We have been mindful of the separate report being prepared by James Hamilton into whether any breaches of the Ministerial Code have occurred. His report was commissioned under paragraph 1.7 of the Ministerial Code and will reach its own conclusions.

709. The Committee does not consider there would be merit in attempting to replicate this work, unless there was a pressing reason for doing so.

710. Having examined the scope of Mr Hamilton's work, we are satisfied that its remit is now sufficiently wide that it will examine all relevant provision in the Ministerial Code.

711. We note that the First Minister and the former First Minister both appear to be supportive of James Hamilton's work. The First Minister told the Committee that—

“I also accept without any reservation that my actions deserve to be scrutinised. Two years ago, I volunteered for such scrutiny by referring matters relating to my contact with Alex Salmond to the independent adviser on the ministerial code, James Hamilton.<sup>cclxii</sup>”

712. The former First Minister expressed confidence in Mr Hamilton when he [told the Committee](#)—

“I have every reason to believe that he is a man of great integrity and experience. I appointed him to the panel.”

713. We note that James Hamilton is a former Director of Public Prosecutions at the Irish Office of the Director of Public Prosecutions. As such, he is well placed to closely analyse the competing accounts and interpretations of events with reference to the rules set out in the Ministerial Code.

714. The Committee has gathered extensive written and oral evidence as part of the Ministerial Code phase of our inquiry. We note that Mr Hamilton will be able to draw upon this evidence when he prepares his report if he considers it to be relevant.

715. We would also observe that Mr Hamilton has more scope than this Committee to receive evidence in private. Our evidence sessions in relation to this section have been

held in public and the evidence we received has as far as possible been published online. This brings with it particular legal obligations. Mr Hamilton has taken evidence entirely in private and in his published report he can reach conclusions without requiring to place the evidence considered in the public domain. We think this may make it easier for him to obtain the information he needs to reach conclusions on his inquiry.

716. For all these reasons, the Committee believes that James Hamilton's report is the most appropriate place to address the question of whether or not the First Minister has breached the Scottish Ministerial Code.

717. For its part, the Committee has some observations about the evidence we have collected on the Ministerial Code phase of its inquiry.

718. The Committee finds it hard to believe that the First Minister had no knowledge of any concerns about inappropriate behaviour on the part of Mr Salmond prior to November 2017. If she did have such knowledge, then she should have acted upon it. If she did have such knowledge, then she has misled the Committee.<sup>2</sup>

719. The Committee notes that there are contradictions as to the purpose of the meeting on 29 March 2018 and what took place at that meeting. However, the First Minister's failure to recollect this meeting in the weeks following her statement to Parliament on 8 January 2019 and her account of this meeting is at odds with that of Mr Salmond who asserts that Mr Aberdeen told him that the First Minister was so informed on 29 March 2018. The Committee accepts that there may be differing recollections of this meeting and is not in a position to take a view on whether the former First Minister's or the First Minister's version of events is the more persuasive, although it notes that the former First Minister's version has the benefit of being confirmed by others.<sup>3</sup>

720. The Committee notes that there is a fundamental contradiction in the evidence in relation to whether, at the meeting on 2 April 2018, the First Minister did or did not agree to intervene. Taking account of the competing versions of events, the Committee believes that she did in fact leave Mr Salmond with the impression that she would, if necessary, intervene. This was confirmed by Duncan Hamilton who was also at the meeting. Her written evidence is therefore an inaccurate account of what

---

<sup>2</sup> This paragraph was agreed to by division: For 5 (Jackie Baillie, Alex Cole-Hamilton, Murdo Fraser, Margaret Mitchell, Andy Wightman), Against (Alasdair Allan, Linda Fabiani, Stuart McMillan, Maureen Watt). Alasdair Allan, Linda Fabiani, Stuart McMillan and Maureen Watt disagreed with this paragraph on the grounds that it does not distinguish between bullying behaviour and sexual harassment. Some evidence to the inquiry indicated that the former First Minister could display bullying behaviour, the First Minister explained that he could be very challenging to work for but there has been no suggestion the First Minister was aware of sexual harassment.

<sup>3</sup> This paragraph was agreed to by division: For 5 (Jackie Baillie, Alex Cole-Hamilton, Murdo Fraser, Margaret Mitchell, Andy Wightman), Against 4 (Alasdair Allan, Linda Fabiani, Stuart McMillan, Maureen Watt)

happened, and she has misled the Committee on this matter. This is a potential breach of the Ministerial Code under the terms of section 1.3 (c).<sup>4</sup>

721. The Committee notes the First Ministers explanation that it would have been inappropriate for her to have reported the meeting on 2 April 2018 to the Permanent Secretary given that a) it concerned the revelation of an investigation into complaints under the Scottish Government's procedure, b) the First Minister had no role in that procedure and c) the First Minister took the view that to have intervened would potentially have prejudiced the investigation. However, the Committee is concerned that it took until 6 June 2018 (and several meetings and messages exchanged) for the First Minister to inform the Permanent Secretary of the fact of her meetings with Mr Salmond at the point that legal action was being contemplated. Given the sensitivities of the matter and the fact that it related to internal government complaints handling, the Committee believes that it was inappropriate for the First Minister to continue to meet and have discussions with the former First Minister on this topic. She should have made the Permanent Secretary aware of her state of knowledge of the complaints and the facts of the meetings at the earliest opportunity after 2 April at which point, she should have confirmed that she would cease to have any further contact with Mr Salmond on that subject.<sup>5</sup>

---

<sup>4</sup> This paragraph was agreed to by division: For 5 (Jackie Baillie, Alex Cole-Hamilton, Murdo Fraser, Margaret Mitchell, Andy Wightman), Against 4 (Alasdair Allan, Linda Fabiani, Stuart McMillan, Maureen Watt)

<sup>5</sup> This paragraph was agreed to by division: For 5 (Jackie Baillie, Alex Cole-Hamilton, Murdo Fraser, Margaret Mitchell, Andy Wightman), Against 4 (Alasdair Allan, Linda Fabiani, Stuart McMillan, Maureen Watt)

## Overall Conclusions

722. The Scottish Government must have policies and procedures in place to tackle and eradicate sexual harassment in the workplace.

723. Scottish Government employees must have the confidence to be able to report inappropriate behaviour and to know that they will be taken seriously. Complaints must be dealt with fairly, sensitively and robustly regardless of who is being complained about.

724. It was right that the Scottish Government reviewed its procedures; indeed, it would have been extremely remiss if they had not. It is clear there was a determination to change the culture of the organisation and to ensure everyone is treated with dignity and respect.

725. However, two women brought forward complaints and they were badly let down. This was a policy and procedure in which they should have had confidence. Instead, their complaints were thrust into the public domain in a way they could never have imagined, through the leaking of the allegations, a subsequent judicial review and ultimately this inquiry.

726. These were the first complaints to be taken forward under this new procedure and they were significant in terms of the person being complained about. It was imperative that everything was done to make sure that the procedure was robust and fair and, just as importantly, seen to be robust and fair.

727. However, fundamental errors were made which called the procedure into question. These errors were compounded by the way in which the judicial review was dealt with by the Scottish Government. This resulted in over £500,000 of public money being spent on defending a judicial review that ultimately had to be conceded.

728. However, this is not just about procedures or public money. It is about ensuring that, in the future, anyone complaining about sexual harassment is not let down in the way these women have been.

729. We know that Laura Dunlop QC has concluded her review of the procedure and made recommendations. We also know that neither Ms A nor Ms B was asked about their experiences as part of this. Therefore, we think the Scottish Government should give them the opportunity to comment on the recommendations of that review.

730. Having robust policies and procedures in place is only one side of the equation. Equally important is that the culture and leadership of any organisation are such that people feel able to come forward. The Scottish Government must be clear about what behaviour is acceptable and not acceptable in the workplace and make sure people feel able to call out inappropriate behaviour and know their complaints will be dealt with seriously and sensitively.

## Wider reflections<sup>6</sup>

731. The process of this inquiry has been unsatisfactory for all the reasons set out at the beginning of this report. The Committee believes that it is the duty of Government, in the wake of serious failings, to be open and candid with Parliament and to publish all relevant material and an account of what went wrong in a case such as this. Parliament, if it so wishes, can then scrutinise the matter. To leave it to a Committee to have to drag information out of Government and other bodies is a wholly unacceptable response to the accountability that is meant to exist by the executive to Parliament.<sup>7</sup>

732. The Committee's inquiry has been constrained by the circumstances set out at the beginning of this report. Had there been full disclosure of all relevant information at the outset of this Inquiry, our job would have been easier, our task accomplished quicker and our conclusions more comprehensive. If such inquiries in future are not to be afforded such full disclosure, then the Committee believes that only a judge-led inquiry would have the powers to investigate matters to the full extent.

733. The events involved also highlighted the dual role of the Lord Advocate as legal adviser to the Scottish Government and head of the Crown Office and Procurator Fiscal Service. This was placed firmly in focus by the handing over of the decision report by the Scottish Government to the Crown Agent. As described by the Lord Advocate<sup>cclxiii</sup> this involved the Lord Advocate acting as an adviser to Ministers, and as the conduit to the Crown Agent in order to ensure appropriate handling arrangements were put in place. The Committee has no question that this process was managed with integrity and professionalism, but it provides a good example of a long-standing tension in the Lord Advocate's dual roles. The Committee notes that public perceptions are important in this regard and seeks reassurance that the existing arrangements continue to command confidence in the independent exercise of these two important roles.

734. The experience of our committee, particularly in respect of its efforts to obtain Government legal advice, suggests that the Parliament may have insufficient powers to hold the executive to account. The Committee recommends the establishment of a commission to review the relationship between the executive and the legislature and make recommendations for change.

---

<sup>6</sup> The inclusion of this section was agreed to by division: For 5 (Jackie Baillie, Alex Cole-Hamilton, Murdo Fraser, Margaret Mitchell, Andy Wightman), Against 4 (Alasdair Allan, Linda Fabiani, Stuart McMillan, Maureen Watt). Alasdair Allan, Linda Fabiani, Stuart McMillan and Maureen Watt disagreed with the inclusion of this section on the grounds that it is not in the Committee's remit, there was no evidence to draw on and it detracted from the overall conclusions

<sup>7</sup> Paragraphs 731 to 734 were agreed to by division: For 5 (Jackie Baillie, Alex Cole-Hamilton, Murdo Fraser, Margaret Mitchell, Andy Wightman), Against 4 (Alasdair Allan, Linda Fabiani, Stuart McMillan, Maureen Watt)

The two women who made complaints about the former First Minister gave evidence in private, under oath, to the Committee. This is a note of that private session.

## **Note of private oral evidence session held by the committee on the Scottish Government handling of harassment complaints on Monday 15 March 2021**

1. On Monday 15 March 2021, the Committee on the Scottish Government Handling of Harassment Complaints (“the Committee”) undertook a private virtual oral evidence session with the two women who made complaints about the former First Minister which were dealt with under the Scottish Government procedure on the handling of harassment complaints involving current and former Ministers (“the procedure”).
2. This evidence session was held in private to protect the identity of the individuals in question. In line with its legal obligations, including the court order by Lord Woolman of 8 October 2018 in terms of section 11 of the Contempt of Court Act 1981, the Committee must not put into the public domain any information which would identify the individuals to whom the Committee spoke.
3. During the complaints handling process and the subsequent judicial review, the two women were given the designations Ms A and Ms B by the Scottish Government. The Committee has used the same designations throughout its inquiry and this note likewise uses the designations of Ms A and Ms B.
4. The Committee wishes to put on record its sincere thanks to Ms A and Ms B for sharing their thoughts and reflections on deeply personal and challenging events. It was the Committee’s privilege to be trusted by Ms A and Ms B in this way.
5. The experiences shared by Ms A and Ms B are deeply personal, but they are also part of a broader problem and impact of permissive attitudes to unacceptable behaviour, and the personal cost which challenging such behaviour can bring. The Committee felt very deeply Ms A’s and Ms B’s determination to see learning from the events, which have had such a deep personal impact on them. Their experiences must stand against inertia and drive change on a bigger scale.
6. The following is an anonymised note of the key evidence heard by the Committee. Quotes used to reflect the words of the witnesses are not attributed to either Ms A or Ms B.
7. Ms A and Ms B spoke of the “double-edged sword” of anonymity. They explained that whilst it had afforded them protection in terms of their identities not being public knowledge, it had also meant that they lost their voice, something which they had both found particularly challenging. They explained:

*“The idea of anonymity is a double-edged sword, because it means that we are faceless and voiceless. After we have been through the original experiences, the Scottish Government investigation, the judicial review, the trial and now a committee process that has sparked a lot of public comment, it just feels like*

*the ultimate insult piled on to injury when people ascribe motives to us that fit a particular theory that they have.”*

8. The session began with the witnesses making the solemn affirmation.

### **Organisational culture and barriers to reporting concerns**

9. Ms A and Ms B expressed views on an organisational culture which they felt did not challenge inappropriate behaviour by the former First Minister. One of the witnesses told the Committee that *“there was complicity across a number of fronts in terms of people not challenging that behaviour”* with the witnesses also adding that:

*“The culture that existed leading up for a number of years to the point at which we would have had to make complaints was about not challenging behaviours in the first instance, and perhaps there were not clear boundaries for what was appropriate behaviour, or leadership in the organisation to challenge behaviours.”*

10. The witnesses also discussed how, in their experience, there were no wider conversations about organisational culture which allowed patterns of behaviour to be identified and addressed. One witness explained:

*“There was not a central repository or a place where, cumulatively, you could see that lots and lots of low-level concerns had been expressed and that those were escalating, or were beginning to allow a picture of behaviour to be formed... Whatever procedure you have in place is only as good as the culture that it sits within.”*

11. Witnesses shared with the Committee their thoughts on informal resolution, explaining that the difficulty with an organisation addressing behaviours consistently in that way is that there is no visibility for others going through similar experiences. One of the witnesses explained:

*“There is no sense in the organisation of what the scale of the problem is and you are unaware whether people are coming forward. They might be having their complaints dealt with in a completely satisfactory way, but you do not know that and you end up thinking, ‘Maybe I am the only one. Maybe everyone else just puts up with this.’ You can end up thinking that there is no point in raising anything, because there is no sense that these things are addressed every week and can work out well for everybody involved.”*

12. Sharing their thoughts about the possibility of making a complaint, one witness commented that “making complaints was simply not the done thing”. The witnesses said that there was no promotion or encouragement to use the Fairness at Work policy. One of the witnesses said that, as they read it, the policy would have involved the director of Human Resources (HR) sitting down with the former First Minister and having a chat, continuing:



*“It was just laughable. It was something that was clearly never going to happen; it was a process that you could not imagine trying to apply.”*

13. The Scottish Government began to talk about harassment in the wake of the #MeToo movement in late 2017. Speaking of their decision to speak out at that time, the witnesses told the Committee:

*“I wanted to make sure that the Government was aware of things that had been able to happen previously and to make sure that the reason that they did not happen going forward was not just that we had a different cast of people in Government, but that we had a robust enough culture and set of structures to avoid them happening or to nip them in the bud before it became a systemic issue.”*

*“the motivation for coming forward was never around any procedure... All I knew was that these things had happened...I wanted to make sure that something had been done so that they never happened again, regardless of what the procedure was.”*

14. One of the witnesses also explained that it was not a different procedure which gave rise to them speaking out, but rather a shift in context around the wider #MeToo movement, saying:

*“It was not the content of the policy that made a difference in whether I felt able to make a complaint. It was the context and the many surrounding factors, rather than what the procedure said.”*

15. One of the witnesses alluded to the importance of being able to raise matters after the fact, saying that in a working environment where inappropriate behaviour was commonplace and normalised you might not recognise at the time how inappropriate any individual incident was.

16. Both witnesses spoke of their desire to see real change when the Scottish Government review of its policies to deal with harassment began, with one witness telling the Committee:

*“I was very concerned that it would be the kind of corporate exercise that ends up concluding that everything is broadly fine, with the need only for a couple of tweaks here and there...when, actually, under the surface, some really quite serious things had happened in the past that had never been recognised or acknowledged, and which the procedures that existed had never been competent to deal with, which meant that people had never felt able to use them.”*

17. One of the witnesses also shared reflections on what she saw as the permissive attitude towards unacceptable behaviour at the time of the incidents, saying:

*“Leslie Evans, as permanent secretary, talked about the concept that what you permit, you promote. I have always thought that that is quite a nice*

*encapsulation of this, and I think that it is a sad indictment of what happened at that time that such behaviour was permitted and a blind eye was turned to it.”*

18. The Committee was also told how the witnesses wanted to feed in from *“experiences to help to create a more robust set of policies on the issue”,* and how *“The idea of coming forward was about trying to make it a better process in the future.”*

19. Witnesses told the Committee they did not feel that there was a safe space in or channel through which to raise concerns. One of the witnesses told the Committee that an individual was *“not suddenly going to feel able to use the existing channels”* of HR as a space in which to raise historic concerns that they had not felt comfortable taking to HR at the time. The same hesitancy existed around contacting a union representative who you may not know but who would be within the workplace.

20. The Scottish Government’s approach of appointing a senior civil servant as a confidential sounding board was briefly explored. Witnesses noted that the approach was in contrast to an independent reporting route as put in place at, for example, the UK Parliament and the Scottish Parliament. One of the witnesses made it clear that an independent route would be something they would want to see put in place, saying:

*“it could be really valuable to have a truly independent contact point, or at least the option of that, because the more sensitive a matter is, the more likely it is that somebody will not necessarily feel comfortable bringing it up with somebody internally.”*

21. The witnesses also spoke of the risks that the Scottish Government’s approach posed, concluding that:

*“If you appoint somebody internal, there is a chance that, for some people, that person will be in their direct management chain.”*

22. Both Ms A and Ms B made it clear to the Committee that they had never felt pressured into making a formal complaint.

### **Provision of information and sources of support**

23. The Committee discussed with Ms A and Ms B what information they had been provided with throughout the course of the investigation of their complaints and through the judicial review process. Both witnesses said that they had been reassured throughout and that they did not have *“any comprehension that things were going wrong.”*

24. On the concession of the judicial review, one of the witnesses told the Committee that:

*“The terms in which I was told about that were in line with the terms of the Scottish Government’s news release. It was presented to me as having been a question of a narrow technicality.”*

25. Ms A and Ms B also said that there is quite a lot of information that they had only become aware of through evidence to the inquiry, as it had not been shared with them at the time.

26. One of the witnesses also highlighted that there was frustration around the manner in which the Scottish Government had managed the release of information on the complaints to the Committee's inquiry, saying:

*"We share frustrations about the piecemeal nature of the way in which documents have been given to the committee. Certainly from my perspective, I am happy for anything that I have put into the system on the issue to be shared."*

27. Both Ms A and Ms B noted that more expert and external support would have been helpful to them, rather than everything being filtered through HR. In particular, support around the referral made to Police Scotland was raised. One of the witnesses told the Committee:

*"More expert support would have been helpful, in particular around the police referral. I found that to be very frustrating. I had particular concerns that it would have been invaluable to be able to discuss the matter with somebody from Police Scotland or somebody who had retired from Police Scotland—somebody with direct experience, to allow me to have a frank discussion. Instead, I went through HR as an intermediary, and everything was discussed in general terms rather than engaging on the specifics of the case, which just meant that I was operating quite blind."*

28. The matter of legal advice was also raised by the witnesses, who again highlighted that they did not have access to any legal advice through the Scottish Government. They explained to the Committee that:

*"When we had questions about the judicial review, there were issues about which it would have been really helpful to speak about to lawyers—even just internal Government lawyers. However, everything was filtered through HR, so it was a bit Chinese whispery—you did not feel as solidly in command of the information as you would have liked to have felt."*

29. The Committee was also told by Ms A and Ms B that they had received no support from the Scottish Government in the time since the conclusion of its process. One of the witnesses explained:

*"I was quite taken aback by the lack of contact and support from the Scottish Government after the conclusion of its process. We were given regular updates over the period of the judicial review, but after that we were basically just dropped. We went through the entirety of the police investigation and the criminal trial with next to no contact from the Scottish Government, let alone any kind of support. There might be good reasons for that, but I certainly expected something, given that the Government initiated the police referral and given the duty of care for us as staff members or former staff members, which the Government had placed a lot of emphasis on during the process. I was quite taken aback because it felt as though we were just left to swim."*

## **Length of time to investigate complaints made under the procedure**

30. The Committee heard that the length of the investigation under the procedure had been significant and that the lack of a timetable for the running of the procedure did cause Ms A and Ms B significant stress. One witness said:

*“From the point of view of somebody using the process, broadly, I would say that the process seemed reasonable, although it took significantly longer than I had expected, and I found that to be quite anxiety inducing.”*

31. Ms A and Ms B also sought to explain to the Committee the continued impact of the investigation on them more than 3 years on from their putting concerns on the record. One of the witnesses said:

*“I first started having conversations with people about this in November 2017, and I am still having conversations with people about it. It has been so much more protracted than I had expected.”*

## **Mediation**

32. The witnesses also told the Committee about the offers of mediation made by the former First Minister. Ms A and Ms B recollected that they were informed of the first offer of mediation after it had been rejected. The second offer of mediation was put to Ms A and Ms B before it was declined. One of the witnesses told the Committee:

*“I was clear that mediation was not something that I wanted; it would not have served any purpose, as far as I was concerned.”*

*“I felt absolutely unable to take part in any mediation at that point—because I did not want to enter into that conversation, because I was quite anxious about that potential encounter, but also because it was very clear that he was, at that point, not accepting any responsibility for any of his behaviours or actions. Therefore, I did not see what could possibly be achieved through mediation at that point.”*

## **Confidentiality**

33. The witnesses shared with the Committee some of the concerns they had at the time of making their complaints, and still have, about confidentiality.

34. In particular Ms A and Ms B highlighted the number of people who knew about their complaints and the fact that as complainers they were not made aware of who had access to their information or the capacity in which they had access to information, or were involved in the process of the investigation and subsequently. The witnesses explained that:

*“Because confidentiality was obviously very important to us, it was always quite alarming to realise how many people apparently had access to our identities. I believe that the Information Commissioner’s Office was told that 23 people had a copy of the decision report. That seems to be a surprisingly high number”.*

35. The witnesses shared with the Committee that they continue to be unclear about who has access to their personal information that they are often contacted by people from Scottish Government who they do not know in order to be given updates, on for example the release of documents to the Committee. One of the witnesses told the Committee:

*“I was surprised to get an e-mail from someone who, at the time, I had no idea was involved in the process. That continues to happen in terms of the correspondence that we get from the Scottish Government to notify us of the release of documents. I see a number of people’s names attached to things, and I have no idea what their involvement in the process is. I find that quite concerning.”*

### **Referral to the police**

36. Ms A and Ms B spoke of the referral of their concerns to the police by the Scottish Government. Both women felt that it was the right thing for the Scottish Government to have done, even if it was not their preference. One of the witnesses explained:

*“Sometimes it can be very difficult to be able to acknowledge to yourself that behaviour that is often trivialised in society ... should trigger a referral to the police.”*

37. The two witnesses told the Committee that they had both been made aware from the outset that a police referral may follow, because of the Scottish Government’s duty of care to staff. Nevertheless, the impact of the referral on Ms A and Ms B was profound. One of the women told the Committee:

*“I remember vividly the fear that I had about [the police referral] ...I knew that that was always a possibility, but I do not think that I was entirely mentally prepared for what that would mean.”*

38. Ms A and Ms B also addressed specifically comments which had been made in other evidence that the Lord Advocate had directed them to make police statements. Addressing this point, one of the witnesses told the Committee:

*“For the avoidance of doubt, the Lord Advocate did not direct us to make statements to the police—in fact, we had no communication from him. No message was passed on on behalf of the Lord Advocate, and nobody in the Scottish Government instructed me to make a statement to the police.”*

### **Concession of judicial review**

39. The Committee noted that the Scottish Government’s legal advice had indicated that an earlier concession of the judicial review would have enabled the complainants to resubmit their complaints under an improved procedure. In response to a question about whether they contemplated resubmitting their complaints after the Scottish Government’s concession of the judicial review in January 2019, one of the witnesses said:

*“Not in any serious way. It is something that I would have struggled to see the purpose of, and I would have struggled to feel confident that the Government was going to handle it appropriately.”*

### **Learning lessons for the future: the Scottish Government procedure and processes**

40. Considering what may have been helpful to Ms A and Ms B at the time, one of the witnesses spoke about the importance of behavioural standards being set very clearly for Ministers, saying:

*“If there were very explicitly stated standards of behaviour—behaviours that are expected towards staff and behaviours that will not be tolerated—at least there would be a reference point and people would be clear in their own mind that something may have become normalised but is actually not okay, and a piece of paper would specifically say so. That would give you a hook so that, if you needed to make a complaint or had a concern, you would be very clear that a line had been crossed.”*

41. The witnesses were also asked for a view on the way that their complaints had been managed, and what impact their experiences may have on whether people will raise concerns in the future. Both witnesses expressed concerns about the impact that the handling of their complaints and the judicial review may have on the likelihood of other people to raise concerns. The witnesses told the Committee:

*“The handling of these complaints has been quite damaging—unsurprisingly, perhaps—to the prospect of other people coming forward. I was really hoping that if you raised a complaint ... you would be helping to set a healthy precedent that, actually, no Minister is exempt from the standards and policies that should regulate appropriate behaviour. I would hope that you can bring forward complaints against even the most powerful people and they will be taken seriously, and that, through that precedent, a culture can be built that makes people feel that things are possible. Unfortunately, I suspect that that has been hindered rather than helped by the way that things developed.”*

*“A procedure gets you only so far. Even if you have the most perfect procedure that provides all those assurances and support to people who make complaints, you also need a culture that enables people to feel that they can use that procedure. Maybe things have changed significantly, but from what I have seen, I do not feel reassured that there has been a meaningful change in culture. I think that the Government has given itself a bigger hill to climb because of the failure of the process. I presume that, if anything, that will deter people from coming forward.”*

### **Learning lessons for the future: parliamentary inquiries**

42. In relation to the work of the Committee, Ms A and Ms B shared their thoughts on how the issue being made political had been very difficult to deal with. One of the witnesses said:

*“It is not too edifying to be brought into a political argument about something that happened to us in the course of our work. On some level, I have always thought of it as a fairly mundane issue that happens day in and day out, unfortunately, to people in all organisations. The politicisation of that has been very difficult.”*

43. The witnesses also shared with the Committee the impact of seeing party political comments on the issue of their complaints on them, saying:

*“It has been difficult throughout the process to have, from the various parties’ press releases and social media tiles, the impact on us in relation to our motivations for coming forward and our involvement with the party of government...In the future, I want a bit of a moratorium on party politics when it comes to dealing with matters of this sort.”*

44. The Committee heard of the impact of the media speculation as a result of the Committee’s work. One witness explained the tension between highlighting an issue and the resultant media speculation:

*“It has highlighted the inadequacies of the complaints process, but it has also shown the kind of circus that can bubble up around it. One of the most distressing aspects has been to see media commentary on how this has set back the #MeToo movement, which is obviously the complete opposite of what any of us hoped to achieve by starting to put those things on the table.”*

45. Speaking on the impact of social media throughout the inquiry, one of the witnesses shared her distress at the negative impact that platforms such as Twitter can have in driving a different narrative, saying:

*“When material is put on to social media by Committee members that is then used as a way to accelerate or extend that narrative past the point of the remit of the Committee or past the point of evidence, that is extremely difficult for us to see.”*

46. On the wider narrative around sexual harassment, the Committee heard from Ms A and Ms B about their feelings on manner in which the Committee’s inquiry has unfolded, and what impact this may have had on victims of sexual harassment. One of the witnesses told the Committee:

*“I am aware that watching this process unfold has been quite distressing, whether for women who were involved in some way in the case, but not in the Government investigation, or for women who have been involved in incidents of harassment in completely different walks of life. I wonder whether it might have been helpful to think more at the beginning about framing and to set a context at the start of the process, perhaps with the help of some women’s organisations, that was more focused on the sensitive handling of issues around sexual harassment and what one could constructively work towards.”*

47. The impact of the scrutiny which complainers in this case, and in other sexual harassment cases, have received was also highlighted to the Committee by one of the witnesses:

*“It has been extremely upsetting to see that something that we entered into in good faith with the intention of making things better for people in future has actually been detrimental not just to the chances of their wanting to raise complaints in the future but to people’s mental health, because of the coverage of this.”*

48. Ms A and Ms B also highlighted how valuable training on issues of harassment may be for any future Committees undertaking work on the matter. One of the witnesses told the Committee:

*“I hope that no Committee in the future has to deal with such matters again, but I also hope that if it does, it is given some sort of background and training on responses to harassment in work, so that it is aware of the impact of what comes out in the media on women broadly—not just women; all people—and on the potential for them to come forward in the future.”*

49. Speaking very candidly about their experiences and the feelings which they continue to grapple with, one of the witnesses told the Committee that she felt guilt for not having done something to address the issue sooner, continuing:

*“We are now having our motives impugned and questioned in a way that ascribes all sorts of, frankly, nonsensical political motivation. I cannot possibly imagine what, if I was part of some sort of ulterior plan, I could possibly have achieved from going through this. The impact on my life has been massive, and there is nothing that I could have gained from this at all.”*

50. The witnesses also shared their feelings of guilt around starting a process which had involved and had an impact on many other women. One witness saying:

*“It went from feeling that we had made people feel able to speak up—when they thought that they would never be able to—to feeling that we had just created a position that left them open to so much often personally directed abuse and misrepresentation on social media, so it has been completely crushing”.*

### **The Laura Dunlop QC Review**

51. Ms A and Ms B told the Committee that they have not had any contact with Laura Dunlop QC as part of her review of the procedure. Both witnesses told the Committee that they had not had “any ... involvement in” the review:

### **Final observations**

52. The witnesses both gave closing remarks. Both Ms A and Ms B reaffirmed their hope that their experiences can drive positive change.



53. Ms A and Ms B both chose to highlight the central importance of organisational culture as opposed to specific procedures, saying:

*“Having a culture that facilitates and enables people to feel that they can come forward and use whatever the process is, is more important than the nuts and bolts of the process itself.”*

And

*“I hope that something positive can come out of this and that there is a much easier process for anyone who wants to come forward in future. A lot of things have come out in the media and from an organisational perspective through this process that have been damaging to potential complainers.*

*I hope that there will be an opportunity through the work of the Committee and its report to potentially right some of those negative impacts and to set a positive example of how such complaints can be dealt with in future in a way that creates a culture in which people feel that they can come forward and have their complaints handled appropriately.”*

## Annexe A – Overview of Evidence

The evidence received during the course of the inquiry is somewhat different from that received during the course of other Committee inquiries both in scale and form. The Committee received in excess of 500 documents running to thousands of pages.

In particular, the Committee received substantial bundles of evidence from the Scottish Government and the former First Minister, Alex Salmond. These bundles of evidence included copies of emails; text messages; letters; meeting notes; draft documents and staff communications. This evidence is available on the [Committee's webpage](#).

The Scottish Government also provided a written statement or written statements including timelines, for each phase of the inquiry. Similarly, Mr Salmond provided written evidence in addition to documentation.

Organisations and individuals with evidence relevant to the remit of the Committee and its inquiry provided [written submissions](#) and, in some cases, also oral evidence. A note of the written submissions received by the Committee as well as the dates of oral evidence sessions and the witnesses involved is provided below.

All evidence was required to be in line with [the Committee's statement on the handling of information and evidence](#).

The Committee took public oral evidence running to over 40 hours. This included over 8 hours of evidence with the Permanent Secretary. An evidence session with the two complainers under the procedure took place in private to protect their anonymity.

The documents received by the Committee fall into four phases of evidence, mirroring the four phases of the inquiry, namely - the development of the procedure; the handling of complaints; the judicial review and the Ministerial Code.

Written submissions were received from the following organisations:

- [FDA](#)
- [PCS](#)
- [Police Scotland](#)
- [Prospect](#) (an [additional written submission](#) was also received)

The following individuals provided written evidence to the Committee:

- [The Lord Advocate](#) ([additional written evidence was also received](#))
- [Barbara Allison](#), Director of Communications, Ministerial Support and Facilities, Scottish Government
- [Sarah Davidson](#), former Director General, Scottish Government
- [Sir John Elvidge](#), former Permanent Secretary
- [Duncan Hamilton](#), counsel to Mr Salmond in the judicial review. Former MSP and former Special Adviser, Scottish Government
- [James Hamilton](#), Independent Adviser on the Scottish Ministerial Code
- [Sir Peter Housden](#), former Permanent Secretary

- [Lorraine Kay](#), former civil servant
- [Liz Lloyd](#), Chief of Staff to the First Minister ([additional written evidence](#) was also received)
- [Peter Murrell](#), Chief Executive SNP ([additional written evidence](#) was also received)
- [Kevin Pringle](#), former Special Adviser, Scottish Government
- [Angus Robertson](#)
- [Alex Salmond](#), former First Minister (additional [written evidence on the judicial review](#); [written evidence on the publication of legal advice](#) and [written evidence on the Ministerial Code](#) was also received)
- [Nicola Sturgeon MSP](#), First Minister of Scotland (an [additional written submission](#) was also received)
- [John Swinney MSP](#), Deputy First Minister of Scotland

### **Oral evidence sessions held by the Committee**

#### **3rd Meeting, 2020 (Session 5) Tuesday 18 August 2020**

- Leslie Evans, Permanent Secretary, Scottish Government

#### **4th Meeting, 2020 (Session 5) Tuesday 25 August 2020**

- James Hynd, Head of Cabinet, Parliament and Governance, Scottish Government
- Nicola Richards, Director of People, Scottish Government

#### **5th Meeting, 2020 (Session 5) Tuesday 1 September 2020**

- Dave Penman, General Secretary, FDA
- Malcolm Clark, Convenor of the Council of Scottish Government Unions and PCS Scottish Government Group President

#### **6th Meeting, 2020 (Session 5) Tuesday 8 September 2020**

- Leslie Evans, Permanent Secretary, Scottish Government
- Rt Hon James Wolffe QC, Lord Advocate, Scottish Government

#### **7th Meeting, 2020 (Session 5) Tuesday 15 September 2020**

- Sir Peter Housden, former Permanent Secretary, Scottish Government
- Barbara Allison, Director of Communications, Ministerial Support and Facilities, Scottish Government

#### **11th Meeting, 2020 (Session 5) Tuesday 27 October 2020**

- Judith Mackinnon, Head of People Advice, Scottish Government
- Barbara Allison, Director of Communications, Ministerial Support and Facilities, Scottish Government

#### **12th Meeting, 2020 (Session 5) Tuesday 3 November 2020**

- Paul Cackette, former Interim Director of Legal Services, Scottish Government
- Sarah Davidson, former Director General Organisational Development and Operations, Scottish Government

#### **14th Meeting, 2020 (Session 5) Tuesday 17 November 2020**

- Rt Hon James Wolffe QC, Lord Advocate, Scottish Government
- Leslie Evans, Permanent Secretary, Scottish Government

**16th Meeting, 2020 (Session 5) Tuesday 1 December 2020**

- Judith Mackinnon, Head of People Advice, Scottish Government
- Nicola Richards, Director of People, Scottish Government
- Gillian Russell, Director, Health Workforce, Scottish Government
- John Somers, Principal Private Secretary to the First Minister, Scottish Government

**17th Meeting, 2020 (Session 5) Tuesday 8 December 2020**

- Peter Murrell, Chief Executive, Scottish National Party

**1st Meeting, 2021 (Session 5) Tuesday 12 January 2021**

- Leslie Evans, Permanent Secretary, Scottish Government

**7th Meeting, 2021 (Session 5) Monday 8 February 2021**

- Peter Murrell, Chief Executive, Scottish National Party

**13th Meeting, 2021 (Session 5) Friday 26 February 2021**

- Rt Hon Alex Salmond, former First Minister

**14th Meeting, 2021 (Session 5) Tuesday 2 March 2021**

- David Harvie, Crown Agent
- Rt Hon James Wolffe QC, The Lord Advocate

**15th Meeting, 2021 (Session 5) Wednesday 3 March 2021**

- Rt Hon Nicola Sturgeon MSP, First Minister

**19th Meeting, 2021 (Session 5) Monday 15 March 2021**

- Two complainers under the Scottish Government's procedure (in private)

On occasion witnesses who provided oral evidence also wrote to the Committee after the session. This further evidence was used by some witnesses to clarify matters which had been discussed during the meeting. It was also used to provide additional information as requested by the Committee.

- Lord Advocate ([25 November 2020](#) and [17 March 2021](#))
- Barbara Allison ([21 September 2020](#) and [26 October 2020](#))
- FDA ([3 September 2020](#))
- Sir Peter Housden ([23 October 2020](#))
- James Hynd ([28 August 2020](#))
- Judith Mackinnon ([28 October 2020](#); [31 October 2020](#) and [7 December 2020](#))
- Peter Murrell ([9 December 2020](#) and [13 January 2021](#))
- The Permanent Secretary ([21 August 2020](#); [11 September 2020](#); [20 November 2020](#) and [21 January 2021](#))
- Nicola Richards ([28 August 2020](#) and [7 December 2020](#))
- John Somers ([7 December 2020](#))

The Committee also held a number of meetings in both public and private, where no witnesses appeared. Dates of these meetings are provided below.

1st Meeting, 2019 (Session 5) [Wednesday 20 February 2019](#)  
2nd Meeting, 2019 (Session 5) [Tuesday 14 March 2019](#)  
3rd Meeting, 2019 (Session 5) [Wednesday 28 March 2019](#)  
4th Meeting, 2019 (Session 5) [Thursday 9 May 2019](#)  
5th Meeting, 2019 (Session 5) [Thursday 5 September 2019](#)  
6th Meeting, 2019 (Session 5) [Wednesday 2 October 2019](#)  
7th Meeting, 2019 (Session 5) [Wednesday 20 November 2019](#)

1st Meeting, 2020 (Session 5) [Wednesday 26 February 2020](#)  
2nd Meeting, 2020 (Session 5) [Monday 22 June 2020](#)  
8th Meeting, 2020 (Session 5) [Tuesday 22 September 2020](#)  
9th Meeting, 2020 (Session 5) [Tuesday 29 September 2020](#)  
10th Meeting, 2020 (Session 5) [Tuesday 6 October 2020](#)  
13th Meeting, 2020 (Session 5) [Tuesday 10 November 2020](#)  
15th Meeting, 2020 (Session 5) [Tuesday 24 November 2020](#)  
18th Meeting, 2020 (Session 5) [Tuesday 15 December 2020](#)

2nd Meeting, 2021 (Session 5) [Tuesday 19 January 2021](#)  
3rd Meeting, 2021 (Session 5) [Friday 22 January 2021](#)  
4th Meeting, 2021 (Session 5) [Tuesday 26 January 2021](#)  
5th Meeting, 2021 (Session 5) [Wednesday 27 January 2021](#)  
6th Meeting, 2021 (Session 5) [Tuesday 2 February 2021](#)  
8th Meeting, 2021 (Session 5) [Tuesday 9 February 2021](#)  
9th Meeting, 2021 (Session 5) [Friday 12 February 2021](#)  
10th Meeting, 2021 (Session 5) [Tuesday 16 February 2021](#)  
11th Meeting, 2021 (Session 5) [Wednesday 17 February 2021](#)  
12th Meeting, 2021 (Session 5) [Wednesday 24 February 2021](#)  
16th Meeting, 2021 (Session 5) [Friday 5 March 2021](#)  
17th Meeting, 2021 (Session 5) [Tuesday 9 March 2021](#)  
18th Meeting, 2021 (Session 5) [Friday 12 March 2021](#)  
19th Meeting, 2021 (Session 5), [Monday 15 March 2021](#)  
20th Meeting, 2021 (Session 5) [Tuesday 16 March 2021](#)  
21st Meeting, 2021 (Session 5) [Wednesday 17 March 2021](#)  
22nd Meeting, 2021 (Session 5) [Thursday 18 March 2021](#)

## **Annexe B – Timeline of events 31 October 2017 to 31 August 2018**

This timeline has been collated using all sources of evidence presented to the Committee.

**31 October 2017:** The First Minister instructs the Permanent Secretary at Cabinet to review the policies in place around harassment in light of allegations of harassment at the UK Parliament and the Scottish Parliament.

**2 November 2017:** A review of policies in place within the Scottish Government to deal with harassment begins. The Permanent Secretary sends an all-staff email about sexual harassment.

**3 November 2017:** Sir Jeremy Heywood writes to Permanent Secretaries of all departments asking them to ensure that they are satisfied that there are robust policies in place to deal with harassment.

Ms A emails the Permanent Secretary's office to say she welcomes the planned review. No mention of a concern is made.

**6 November 2017:** A Scottish Government intranet article from the Permanent Secretary states that a review of policies to deal with harassment is being undertaken.

**7 November 2017:** The issue of possible complaints against former Ministers is being considered as part of a 'Sexual harassment: routemap'.

Ms B makes initial contact with the Director of Communications, Ministerial Support and Facilities.

**8 November 2017:** The first version of the procedure to deal with complaints made against former Ministers is shared by the Head of Cabinet, Parliament and Governance. The draft procedure covers only former Ministers.

Ms B and the Director of Communications, Ministerial Support and Facilities talk over the phone.

**9 November 2017:** The Permanent Secretary is made aware by the Director of Communications, Ministerial Support and Facilities of the nature of the call with Ms B.

**10 November 2017:** A heavily reworked version of the procedure has been developed, still covering only former Ministers. HR is aware that a concern has been raised about a former Minister with the Director of Communications, Ministerial Support and Facilities (this is Ms B's concern).

The Permanent Secretary asks the Director for Safer Communities to act as a confidential sounding board for staff. Similarly, the Director of Communications, Ministerial Support and Facilities is asked by the Permanent Secretary to provide support for staff in a pastoral role.

Ms B and the Director of Communications, Ministerial Support and Facilities exchange texts and arrange to speak the next day.

**11 November 2017:** Ms B and the Director of Communications, Ministerial Support and Facilities speak over the phone.

**13 November 2017:** A staff message is issued from the Permanent Secretary which includes contact information for the confidential sounding board (the Director for Safer Communities) if staff wish to speak about issues of harassment.

Ms B and the Director of Communications, Ministerial Support and Facilities exchange texts. The Director of Communications, Ministerial Support and Facilities tells Ms B that she has advised the Director for Safer Communities that she may be contacted by her.

**14 & 15 November 2017:** Ms B and the Director of Communications, Ministerial Support and Facilities exchange texts. Ms B indicates that she does not think she will contact the Director for Safer Communities.

**15 November 2017:** Following a discussion between the Head of Cabinet, Parliament and Governance and the Permanent Secretary, a new draft of the procedure is shared which covers complaints against current as well as former Ministers. A number of new drafts are created on this day.

**17 November 2017:** An email chain includes a draft letter from the First Minister to the Permanent Secretary. The draft letter states that the First Minister would like the review to consider ways in which the Scottish Government can address any staff concerns and, if necessary, those relating to former Ministers as well as current Ministers, regardless of party. The First Minister's Chief of Staff is involved in these emails.

**20 & 21 November 2017:** Ms A meets the First Minister's Principal Private Secretary raising her concern. She is referred to the Director of Communications, Ministerial Support and Facilities who also suggests that she may wish to contact the Director for Safer Communities in her role as confidential sounding board. Ms A does not contact the Director for Safer Communities.

**22 November 2017:** The draft letter of 17 November is sent from the First Minister to the Permanent Secretary.

The Director of Communications, Ministerial Support and Facilities and the Director for Safer Communities meet Ms A. An anonymised note of Ms A's concerns is taken and passed to the Director of People and the Head of People Advice.

The Director of Communications, Ministerial Support and Facilities and Ms B exchange texts. The Director of Communications, Ministerial Support and Facilities advises Ms B that she has met one other person to hear of their experience.

The Permanent Secretary has her mid-year review with Sir Jeremy Heywood. The issue of harassment is discussed, and it is noted that the Scottish Government is including former Ministers in its refresh.

**23 November 2017:** The Director of People updates the Permanent Secretary on the Scottish Government's response to sexual harassment.

**24 November 2017:** A draft version of the procedure is shared with the First Minister.

**27 November 2017:** A further version of the procedure is circulated by the Head of Cabinet, Parliament and Governance, noting that it has changed slightly from a version that went to the First Minister on 24 November.

**28 November 2017:** The Director of People asks the Director for Safer Communities and the Director of Communications, Ministerial Support and Facilities if Ms A and Ms B would speak to HR to discuss the "organisational response".

**29 November 2017:** The Director for Safer Communities emails Ms A about her raising a concern. The email acknowledges the permission to pass the narrative to the Director of People and Head of People Advice and it is noted that the procedure being developed will be shared with Ms A "to test whether this would have helped at the time and also to consider next steps".

The Director of Communications, Ministerial Support and Facilities contacts Ms B by text and they agreed to talk on the phone on the same day.

Ms B gets in touch with the Director of People.

**30 November 2017:** A version of the draft procedure, which accepts changes from 27 November is circulated.

Ms A contacts the Director of People and a meeting is arranged for 5 December 2017.

**5 December 2017:** A further draft of the procedure with suggested changes is circulated. The email chain notes that changes reflect the fact that more of a role has been given to the Permanent Secretary should the issue be with a current First Minister and that organisational duty of care has also been drawn out.

Ms A meets the Director of People and the Head of People Advice.

The Head of People Advice contacts Ms B to arrange a phone call.

**6 December 2017:** A clean version of the draft procedure including the changes suggested on 5 December is circulated.

An email chain refers to the sign-off process for the harassment timeline and references a FOI on the development of the original process in 2010.

**7 December 2017:** The Head of People Advice calls Ms B as arranged.



**8 December 2017:** The Head of People Advice emails Ms B following their call with options on next steps.

**12 December 2017:** A further draft of the procedure appears. A meeting is held with trade unions at which the draft procedure is discussed. The First Minister makes notes on the draft procedure.

**13 December 2017:** A clean version of the most recent draft of the procedure appears. Reference is made to the hard copy amended by the First Minister on 12 December. A discussion between the Permanent Secretary and First Minister leads to an agreement that the policy should cover all forms of harassment, not just sexual harassment.

An email suggests that the draft be shared with unions.

**14 December 2017:** An edited version of the draft reframing the procedure as being about all forms of harassment, including sexual harassment, is shared along with a request for only the procedure as it related to current ministers to be shared with unions. It is noted that “the former Ministers process is more for us to know what we would do rather than to have out there as a published policy. Although we would share it if asked.” A final draft of the procedure is circulated, and this final draft goes to unions.

A draft of the procedure is shared with Ms A along with an email around options for next steps.

The Head of People Advice contacts Ms B.

**15 December 2017:** The timeline for sign-off with the First Minister is agreed, along with a line about what can be agreed with unions. The email notes: “we are very close to reaching a final position with the unions on this.”

**19 December 2017:** A meeting takes place with union representatives, notes from the meeting are shared, and a discussion on which changes to incorporate takes place over email. A tracked changes version of the procedure with union comments is circulated.

Ms A indicates by email that she thinks she would like to make a formal complaint and asks for further clarification on some process issues. It is agreed that the matter will be picked up in January

**20 December 2017:** The final draft is sent to the First Minister for approval, along with a covering letter from the Permanent Secretary to the First Minister.

**16 January 2018:** Ms A and the Director of People meet. Ms A makes a formal complaint. The Director of People appoints the Head of People Advice as Investigating Officer under the procedure.

**17 January 2018:** The Head of People Advice, acting as Investigating Officer, meets Ms A meet for a formal interview on Ms A’s complaint.

**18 January 2018:** The Head of People Advice, acting as Investigating Officer, issues email invitations to potential witnesses in the investigation of Ms A's complaint.

**22 January 2018:** The Head of People Advice asks the Director of People if Ms B has been in touch.

**23 January 2018:** Ms B notifies the Director of People of her intention to make a formal complaint.

The Head of People Advice is appointed Investigating Officer under the procedure for the complaint of Ms B. A call is arranged between her and Ms B for the following day.

**24 January 2018:** The Head of People Advice, acting as Investigating Officer, and Ms B speak on the phone. Ms B's formal complaint is subsequently received by email.

**26 January 2018:** A meeting between Ms B and the Head of People Advice, acting as Investigating Officer, is held for the formal interview on Ms B's complaint.

**19-30 January 2018:** The Head of People Advice, acting as Investigating Officer, carries out interviews relating to the two formal complaints.

**12 February 2018:** The new procedure is shared on the Scottish Government's internal intranet alongside an article by the Permanent Secretary.

**22 February 2018:** The initial investigation report is finalised.

**26 February 2018:** The Head of People Advice, acting as Investigating Officer, and the Permanent Secretary, acting as Deciding Officer, meet to discuss the investigation report.

**5 March 2018:** The Permanent Secretary meets Ms A and Ms B to discuss the investigation of their complaints.

**7 March 2018:** The former First Minister is made aware of the complaints received, the initial investigation and is invited to respond.

**16 March 2018:** The former First Minister<sup>8</sup> responds to the Permanent Secretary, stating that he is taking advice from counsel before responding. The Permanent Secretary responds to say that she will extend the deadline for response to 4 April 2018.

**21 March 2018:** The Head of People Advice, acting as Investigating Officer, contacts Ms A and Ms B to let them know that the Permanent Secretary has extended the time allowed for the former First Minister to respond.

---

<sup>8</sup> From this point reference to the former First Minister should be taken to mean the former First Minister's legal advisers, Levy & McRae.

**30 March 2018:** The former First Minister contacts the Permanent Secretary requesting a further extension in which to respond.

**4 April 2018:** The Permanent Secretary writes to the former First Minister extending the deadline to 25 April 2018. The letter states that, if a substantive response is not received by that date, the Scottish Government will move to the next phase of the procedure.

**23 April 2018:** The former First Minister responds to the Permanent Secretary making an offer of mediation. The former First Minister also raises points of concern around the procedure and the investigation.

**24 April 2018:** The Permanent Secretary responds to the former First Minister rejecting the offer of mediation as the investigation “is still in the fact finding stage” and stating that, as such, mediation would “not be appropriate at this time.” The letter reiterates that, if the former First Minister is planning to make a substantive response, he should do so by the 25 April 2018.

**25 April 2018:** The former First Minister writes to the Permanent Secretary to state that a response will be provided the following day.

**26 April 2018:** The former First Minister writes to the Permanent Secretary about the rejection of the offer of mediation and asks for clarification as to what stage the procedure is at in light of her comment that it is in the fact-finding stage. The letter raises a number of issues with the procedure and information supplied to date and notes that the former First Minister disputes “most of the factual content of the allegations”. The offer of mediation is made for a second time.

**30 April 2018:** The Permanent Secretary writes to the former First Minister. It is noted that the offer of mediation has been put to the complainers and that they have declined the offer. The letter states that the former First Minister’s substantive response of 26 April 2018 will be passed to the Investigating Officer for her consideration. The Permanent Secretary defends the retrospective nature of the procedure.

**2 May 2018:** The Head of People Advice updates the Director of People as to the progress of the investigation.

**8 May 2018:** The former First Minister writes to the Permanent Secretary raising issues around procedural unfairness and incompetency of the procedure. The letter lists information which has not been available to the former First Minister including statements from the complainers and witnesses and Ministerial diary entries.

**10 May 2018:** The Head of People Advice, acting as Investigating Officer, contacts witnesses provided by the former First Minister.

**15 May 2018:** The Permanent Secretary’s office contacts the Head of People Advice as Investigating Officer for an update on the investigation. The response states that statements from witnesses proposed by the former First Minister should be complete by 25 May 2018.

**30 May 2018:** The Head of People Advice, acting as Investigating Officer, sends an email update to the Permanent Secretary's office and to the Director of People stating that two witness statements have been taken. The Head of People Advice as Investigating Officer has set a final deadline of 6 June 2018 for another witness to make a statement and says that if a statement cannot be taken by then she will proceed without his evidence.

**5 June 2018:** The former First Minister writes to the Permanent Secretary to "consolidate objections to the proceedings as a whole". This letter is passed to the Head of People Advice as Investigating Officer on 11 June 2018.

**13 June 2018:** The former First Minister writes to the Permanent Secretary seeking assurances of confidentiality, stating specifically that sharing details with the First Minister would be a breach of confidentiality. The letter also restates the former First Minister's position that the Permanent Secretary has "no jurisdiction to apply the 2017 procedure."

**18 June 2018:** The Scottish Government receives an FOI request specifically asking if there have been complaints about the former First Minister's conduct. The deadline for response to the FOI request is noted as 16 July 2018.

**19 June 2018:** The former First Minister offers lawyer-to-lawyer discussions by email to the Permanent Secretary's office. This is rejected; the offer is made again and is rejected again on 21 June 2018 with a note that "since a formal process is underway it is best if you continue to make representations direct to the Permanent Secretary".

**20 June 2018:** The Director of People drafts a summary of "Where we are now..." The document contains notes in relation to the FOI which has been received.

**21 June 2018:** The Permanent Secretary writes to the former First Minister (responding to his letters of 5 and 13 June 2018). The letter states that the Permanent Secretary remains satisfied that the procedure is "fair and legally competent". The letter also notes that the Scottish Government "continues to take all reasonable steps to maintain the confidentiality of the investigation" but notes that "an absolute guarantee of confidentiality" cannot be given because of the Government's statutory obligations "including those in relation to Parliament and Freedom of Information legislation."

**26 June 2018:** The former First Minister writes to the Permanent Secretary offering arbitration as a means to address the dispute on the issue of "competency and illegality" of the procedure. Clarification is also asked around what was meant by statutory duties in relation to not giving a guarantee of confidentiality. An exemption in FOI legislation is highlighted.

**4 July 2018:** The Permanent Secretary responds to the former First Minister stating that she remains satisfied that the procedure is "fair and competent" and rejects the offer of arbitration. The former First Minister is advised of the receipt of the FOI request.

**9 July 2018:** The former First Minister writes to the Permanent Secretary seeking confirmation that an exemption will be applied under the terms of the Freedom of Information (Scotland) Act 2002 and that material will not be released. The letter also renews the offer of arbitration.

**11 July 2018:** The former First Minister writes to the Permanent Secretary. The letter covers the offer of arbitration as well as raising a subject access request under the Data Protection Act 2018 for access to diaries relating to the former First Minister's period in office.

**12 July 2018:** The Permanent Secretary responds to the former First Minister's letters of 9 and 11 July 2018. The letter rejects the offer of arbitration and states that the Scottish Government is not in a position to confirm how it will deal with the FOI request. The letter also notes that the Investigating Officer "is concluding her investigation and is likely to submit her final report to me by close of business on Monday 16 July 2018."

A separate letter is sent from the Permanent Secretary to the former First Minister providing him with information requested under a subject access request on 11 July 2018.

**13 July 2018:** The former First Minister writes to the Permanent Secretary on the matter of arbitration stating that it is not intended to cover "the substance of the causes of concern" but the dispute on "competency and illegality."

**18 July 2018:** The Permanent Secretary writes to the former First Minister reiterating the Scottish Government's position that the procedure "is fair and legally sound". The letter states that the former First Minister has not provided a substantial response to concerns A-I but has for concerns J-K and notes his denial of harassment. The letter states the Scottish Government grounds for refusing arbitration and provides a final deadline of 20 July 2018 for any further response to be made by the former First Minister.

The Head of People Advice, acting as Investigating Officer, submits a revised report to the Permanent Secretary as Deciding Officer.

**19 July 2018:** The former First Minister responds to the Permanent Secretary's letter of 18 July 2018 stating that he will make further representations about the complains by 3pm on 20 July 2018.

**20 July 2018:** The former First Minister writes again to the Permanent Secretary making observations on the Scottish Government's position on arbitration and on the unfairness of the process to date. A statement on concerns A to I is also attached.

**23 July 2018:** Ms A and Ms B are contacted to seek their response to the former First Minister's statement attached to letter of 20 July 2018.

**31 July 2018:** The Head of People Advice, acting as Investigating Officer, contacts Ms A and Ms B to set up meetings.

**1 August 2018:** The Head of People Advice, acting as Investigating Officer, contacts Ms A and Ms B to ask if they would cooperate in a police investigation if the matter was referred to the police by the Scottish Government.

**13 August 2018:** The Director of People provides the Permanent Secretary's office with a read out of statements from Ms A and Ms B about a police referral. Both complainers voice concern over a referral and implications for their anonymity.

**17 August 2018:** The Permanent Secretary's office sends a note from the Permanent Secretary to the First Minister via the First Minister's Principal Private Secretary. The note includes reference to the First Minister's disclosure of 6 June 2018 to the Permanent Secretary which highlighted that the former First Minister had made the First Minister aware of the investigation. The note indicates that the Permanent Secretary will inform the First Minister of the outcome of the investigation once the complainers and the former First Minister have been informed.

**20 August 2018:** An email from the Permanent Secretary's office to the First Minister's Principal Private Secretary says that the former First Minister and complainers have been told that the Permanent Secretary will write to them the following day on the outcome of the investigation.

The Director of People speaks to both complainers to make them aware of the likely police referral.

The Director of People is in contact with the Crown Agent (having also been in touch on 17 and 19 August 2018) to send information in relation to the complaints.

**21 August 2018:** The Permanent Secretary's office contacts the former First Minister to say that the Permanent Secretary is not in a position to write on the outcome of the investigation. The Permanent Secretary's office is asked for an explanation of the delay by the former First Minister.

The Director of People contacts Ms A and Ms B to say that a police referral is likely to happen that day.

The Crown Agent receives hard copy material from Scottish Government. The Crown Agent meets Detective Chief Superintendent and Chief Constable to discuss the handling of the referral from the Scottish Government.

This is the date of the Permanent Secretary's decision on the complaints.

**22 August 2018:** Ms A and Ms B are provided with a copy of the Permanent Secretary's Decision Report and both speak to the Permanent Secretary.

The former First Minister is made aware of the outcome of the investigation. By return he writes letters to the Permanent Secretary and to the First Minister highlighting the duty of confidentiality on them and across the civil service.

The Director of People sends the Crown Agent the formal letter of referral dated 20 August 2018.

**23 August 2018:** At around 2pm, the Scottish Government informs the former First Minister of its intention to issue a response to the FOI received on 18 June 2018 which will confirm the existence of the complaints. The former First Minister is told that the Permanent Secretary also plans to make a public statement at 5pm.

During the course of the afternoon, the former First Minister indicates to the Scottish Government that he has instructed senior counsel to draft judicial review proceedings against the Permanent Secretary's decision and that he has lodged a petition seeking orders including interim interdict preventing publication of the complaints, the facts of the complaint, the process or the decision.

The Scottish Government pauses the FOI release and the public statement because of the interim interdict issue.

At around 7pm, the former First Minister notes that the interim interdict is not being sought that evening as he has not been approached by the press. The issue is still live to address future publication and the determination on the interim interdict is dependent on court availability.

The former First Minister is contacted by the Daily Record to indicate that it is carrying a story. The former First Minister is given a deadline of 10pm to respond to the Daily Record. The former First Minister provides a statement in response.

Just before 10pm, an article is published on the Daily Record website about the complaints.

Around 10:30pm, the former First Minister contacts the Permanent Secretary's office to state that he has been approached by the Daily Record and has issued a statement. The email raises concerns about the level of detail which the Daily Record has on the complaints and asks for a formal investigation into how the information has come to be in the public domain. The email also notes that the former First Minister's ability to seek an interim interdict has been undermined and that he will move to judicial review.

**24 August 2018:** The former First Minister holds a press conference and announces that he will move to judicial review of the procedure.

**27 August 2018:** The former First Minister writes to the Permanent Secretary setting out concerns about the level of detail in media reports around the complaints.

**31 August 2018:** The petition for judicial review is formally lodged by the former First Minister.

## **Annexe C – Scottish Parliament Committees: Functions and Powers**

### **Introduction**

This annexe sets out some information about the work of Committees in the Scottish Parliament. It also explains the powers of Committees – and highlights some constraints within which they operate.

The information in this annexe is partly reproduced from the [Guidance on Committees](#), which is a comprehensive guide as to how committees operate.

In addition, it should be stressed that all Committees must comply with the provisions of the [Scotland Act 1998](#) and the Parliament's [Standing Orders](#) (which set out the rules and procedures of the Parliament).

### **Establishment**

The usual procedure for forming a Committee is that the Parliament agrees a motion lodged by the Parliamentary Bureau proposing that a Committee is established.

The Parliamentary Bureau is the body within the Parliament responsible under Standing Orders for proposing the business of the Parliament, recommending the establishment of Committees, and other related functions.

Motions about the establishment of Committees specify the membership, remit and duration of the Committee. The Parliament must agree the motion before a Committee can be established.

This is how the Committee on the Scottish Government Handling of Harassment Complaints (SGHHCC) was established. The Parliament agreed unanimously that its remit should be—

“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.”

### **Membership**

The SGHHCC has nine members. In proposing membership of Committees, the Parliamentary Bureau must have regard to the balance of the parties within the Parliament.

In practice, the number of seats for each party on each Committee is decided on a roughly proportional basis. This gives the larger parties a share of seats on each Committee that matches their share of seats in the Chamber, while smaller parties may have a single seat on some Committees and none on others.



In the case of the SGHHCC, all parties in the Parliament are represented on the Committee.

## **Conveners**

Under Standing Orders, each Committee must have a convener to convene (i.e. call) its meetings and to chair them.

It is for the Parliament to decide, on a motion of the Parliamentary Bureau, the political party whose members are eligible to be the convener of each Committee (or that the eligible members are those not representing any political party). The Bureau must have regard to the balance of political parties in the Parliament when making such proposals. In practice, the distribution of convenerships among the parties is done using a version of the “d’Hondt” formula. This is an algorithm that can be applied objectively to achieve fair distribution according to numerical strength.

A similar procedure is followed in relation to the Deputy Conveners of committees.

In the case of the SGHHCC, the Parliament decided that the Convener should be a member of the Scottish National Party and the Deputy Convener a member of the Scottish Conservative and Unionist Party.

## **Remit**

Committees must operate within the remit given to them by the Parliament which establishes them and to which they are, ultimately, accountable. However, within those remits, Scottish Parliament Committees have a wide range of general powers which give them the ability to set their own priorities and act with a high degree of autonomy. The general function of a Committee is to consider matters within its remit – known as “competent matters” – and report on them to the Parliament.

## **Meetings in public**

Rule 12.3.4 of Standing Orders provides that Committee meetings shall be held in public except where a Committee decides, under Rule 12.3.5, to hold all or part of a meeting in private.

Committees may have taken items in private where they wish to discuss confidential material in connection with a third party (for example, individual claims for witness expenses or shortlists of committee advisers). Committees may also meet in private to take oral evidence or to consider written evidence of a particularly sensitive nature (for example, evidence involving commercial confidentiality or evidence from vulnerable or intimidated people). Committees may also meet in private to discuss draft reports when they have considered that this will facilitate the achievement of consensus and prevent media focus on preliminary conclusions which may not feature in the final report. Each decision to meet in private has, however, to be taken based on the facts and circumstances of the particular item of business.

## **Privilege**

Section 41 of the Scotland Act 1998 provides that for the purposes of the law of defamation, any statement made in “proceedings of the Parliament” (which includes proceedings in the Committees) and the publication under the authority of the Parliament of any statement is absolutely privileged.

This means that such statements cannot form the basis of an action of defamation. “Statement” in this context means “words, pictures, visual images, gestures or any other method of signifying meaning”. Accordingly, this protection applies to any statements made in public or private meetings of a Committee and any Committee reports, including written evidence published in or as an annex to a Committee report. It is important to note that the protection provided by section 41 relates only to the law of defamation. It does not shield members from the operation of the law in relation to other matters.

This means, for example, that the SGHHCC and all participants have to comply with the court orders made by (1) Lord Woolman on 8 October 2018 protecting the identities of the complainers under the Scottish Government procedure and (2) the Lord Justice Clerk, Lady Dorrian, on 10 March 2020 preventing publication of the names and identity and any information likely to disclose the identity of the complainers in the case of HMA v Alexander Elliot Anderson Salmond.

Furthermore, the SGHHC Committee, like all Committees, must comply with its other legal obligations, including (for example) its data protection and human rights obligations.

## **Sub judice**

Under Rule 7.5 of Standing Orders, a member may not make reference in a Committee meeting to any matter in which legal proceedings are active (as defined in section 2 of the Contempt of Court Act 1981), unless special permission has been received from the Presiding Officer. If a member raises an issue without the Presiding Officer’s permission which, in the view of the Convener is, or may be, sub judice the Convener will order the member to stop.

## **Powers to call witnesses and obtain documents**

Committees have the power to require witnesses to submit written evidence and attend to give oral evidence.

The power to require the attendance of witnesses and the production of documents is derived from section 23 of the Scotland Act and from Rule 12.4 of Standing Orders. It applies in relation to any subject for which the Scottish Government has general responsibility. Standing Orders permit Committees to exercise these powers in relation to “any competent matter”, i.e. any matter within its remit.

There are some statutory limitations on this power. Committees cannot require a judge or tribunal member to give evidence and a person is not obliged to answer questions or produce documents if he or she would be entitled to refuse to do so in proceedings

in a court in Scotland. A procurator fiscal is not obliged to answer questions or produce documents concerning a criminal prosecution if the Lord Advocate considers that to do so would prejudice criminal proceedings or would be contrary to the public interest. If a person were to be required to attend or produce documents, he or she would be notified in writing by the clerk. A person who, without reasonable excuse, did not comply with such a requirement could be prosecuted for a criminal offence.

## **Written evidence**

Written evidence is normally published on the Committee's webpage and circulated to Committee members. The call for evidence on the website will make clear the Committee's intentions in relation to publication. In addition, receipt of written evidence will be acknowledged and that acknowledgement will contain information about how the evidence will be handled. If the person or body submitting written evidence does not wish the material to be published, this must be specifically indicated. However, even where this is done, the Parliament cannot guarantee that the material will not be made available to a third party as the result of an application under the freedom of information legislation.

In addition, a Committee may decide to edit or not to publish written evidence that it considers to be potentially defamatory or which contains obscene or offensive material or which gives rise to issues under data protection legislation. It is also possible that material which is irrelevant, frivolous or repetitive will not be published or circulated to the committee. Where a Committee publishes written evidence on the website, other than as part of a Committee report, it does not form part of the proceedings of Parliament and, as such, is not covered by parliamentary privilege. Neither the Parliament nor the author of the evidence therefore has a defence of privilege to an action for defamation.

Further information about how written evidence is handled by committees can be found in the Parliament's Policy on the Treatment of Written Evidence by Subject and Mandatory Committees. The SGHHC Committee also published [its own statement](#) about how it proposed to handle and process information and evidence it received in the course of its inquiry.

## **Oral evidence**

Committee meetings are regulated by the Parliament's Standing Orders and constitute "proceedings of the Parliament". Accordingly, as discussed above, under section 41 of the Scotland Act 1998 any statements made at a Committee meeting are absolutely privileged for the purposes of the law of defamation. This provides witnesses, as well as members, with a defence of privilege in the event that an action for defamation is brought arising from statements made during the meeting. Committees may, however, be reluctant to provide a platform to allow potentially defamatory comments to be made and it is a matter for the convener to decide whether to allow a witness (or member) to continue to make such remarks.

It is possible for Committees to take evidence in private, although this is very rare and a Committee would require to be satisfied that there was a good reason for so doing. A Committee would, however, consider whether to take evidence in private if it wished

to hear sensitive personal information, to take evidence from a vulnerable witness or to maintain commercial confidentiality. The decision is, however, one for the committee and not for the witness. Normally, there is no *Official Report* of evidence taken in private.

## **Oaths**

There is provision in section 26(1) of the Scotland Act 1998 and Rule 12.4.3 for witnesses to be required to give evidence under oath.

It is an offence for individuals to fail to take such an oath where required to do so and where they do give evidence under oath or affirmation it is an offence to make a statement which they know to be false, or do not believe to be true, provided the statement is relevant to the evidence being given.

## **Confidentiality requirements**

All MSPs must comply with the Code of Conduct for MSPs, which sets out the standards of conduct for MSPs in relation to their parliamentary duties.

The Code of Conduct includes requirements in relation to confidentiality and the work of committees. The provisions can be found in [section 7 of the Code](#). As well as keeping draft reports confidential, Committee members must also keep certain other documents and pieces of information confidential, including (for example) documents produced during private meetings of the Committee and any other documents or information which the Committee has agreed must be treated as confidential.

## **Annexe D – Scottish Government structure and key figures in the inquiry**

The Committee is aware that, throughout its report, there is reference to a number of senior civil service and Scottish Government structures. What is provided below is an overview of these structures and of the roles and responsibilities of these key individuals as they relate to general Scottish Government functions.

Where the post holder had a formal role in the procedure developed by the Scottish Government to deal with harassment complaints involving current and former Ministers, this is indicated and highlighted with an \*.

### **Scottish Government structure**

The Scottish Government is structured into over 30 directorates, each of which is led by a Director. Directors report to a Director General who is responsible for several Directorates. Directors General report to the Permanent Secretary.

The Scottish Government's Executive Team is responsible for the day to day running of the Scottish Government. It is made up of the Permanent Secretary and the six Directors General.

Senior civil servants are accountable to Scottish Government Ministers. Ministers are accountable to the Scottish Parliament.

Civil servants are bound by the [Civil Service Code](#) and the [Civil Service Management Code](#).

Special advisers are temporary civil servants appointed in accordance with Part 1 of the Constitutional Reform and Governance Act 2010. The [Code of Conduct for Special Advisers](#) states that:

“Special advisers are bound by the standards of integrity and honesty required of all civil servants as set out in the Civil Service Code. However, they are exempt from the general requirement that civil servants should be appointed on merit and behave with impartiality and objectivity, or that they need to retain the confidence of future governments of a different political complexion. They are otherwise required to conduct themselves in accordance with the Civil Service Code.”

Scottish Ministers are bound by the [Scottish Ministerial Code](#).

The Lord Advocate is the senior Scottish Law Officer and, as such, a Scottish Government Minister. The Lord Advocate's main functions include being the principal legal adviser to the Scottish Government and representing the Scottish Government in civil proceedings.

## **Senior Civil Servants**

### ***Permanent Secretary – Leslie Evans***

The Permanent Secretary to the Scottish Government is the most senior civil servant and is the principal policy adviser to the First Minister as well as secretary to the Cabinet. The Permanent Secretary is the principal accountable officer for the Scottish Government, being personally responsible to the Scottish Parliament for the exercise of their responsibilities.

\*Under the procedure, the Permanent Secretary is also the Deciding Officer.

### ***Director General of Organisational Development and Operations – Sarah Davidson***

The Director General of Organisational Development and Operations reported directly to the Permanent Secretary.

She was responsible for a report collating all relevant information on the judicial review in late December 2018. This report informed the Permanent Secretary's decision to concede the judicial review.

### ***Director of People – Nicola Richards***

The Director of People is responsible for Human Resources, Organisational Development, Leadership and Learning within Government. The Director of People reports to the Director General of Organisational Development and Operations.

The Director of People was involved in commenting on the policy and liaising across teams about it. The Director of People was also engaged in other work around sexual harassment.

\*Under the procedure, the Director of People is responsible for appointing an Investigating Officer.

### ***Head of People Advice – Judith Mackinnon***

The Head of People Advice was engaged in the organisational response to the #MeToo movement as part of the Director of People's team.

As a senior civil servant in the HR team, the Head of People Advice also had a role in the drafting of the Procedure.

\*Under the procedure, the Head of People Advice was appointed as Investigating Officer by the Director of People.

### ***Head of Cabinet, Parliament and Governance – James Hynd***

The Head of Cabinet, Parliament and Governance supports the First Minister and Cabinet members to ensure the effective conduct of Cabinet business and collective decision-making.

The Head of Cabinet, Parliament and Governance took the lead with colleagues in the Scottish Government Legal Directorate on the drafting of the policy on handling complaints involving former Ministers (and then current and former Ministers) and also advised on the links between the procedure and the Ministerial Code.

The Head of Cabinet, Parliament and Governance reports to the Director General for Constitution and External Affairs.

### ***Interim Director of Legal Services – Paul Cackette***

From May 2018 to June 2019 Mr Cackette was Interim Director of Legal Services at the Scottish Government – the most senior lawyer in the Scottish Government.

The Director of Legal Services reports to the Director General for Constitution and External Affairs.

### ***Director of Communications, Ministerial Support and Facilities – Barbara Allison***

The Director of Communications, Ministerial Support and Facilities was asked by the Permanent Secretary to provide pastoral care for staff across a number of offices in November 2017. In her role providing pastoral care, Ms Allison had early contact with two individuals who later made formal complaints.

Ms Allison was appointed Director of Communications, Ministerial Support and Facilities on 1 June 2016. Prior to this, she was Director of People at the Scottish Government.

### ***Director for Safer Communities – Gillian Russell***

The Director for Safer Communities was asked by the Permanent Secretary on 10 November 2017 to act as a confidential sounding board (also sometimes referred to as 'confidante') for staff who wished to discuss any matters relating to harassment. The details for the confidential sounding board were shared with Scottish Government staff on 13 November 2017 through an all-staff email.

Ms Russell had early contact with an individual who was later made a formal complaint.

Ms Russell is now Director, Health Workforce at the Scottish Government.

## Annexe E – Adjustments to the Petition and Answers

This description of adjustments to the pleadings (Petition and Answers) in the judicial review are taken from the [Scottish Government timeline](#) of the judicial review. These pleadings as adjusted to 13 December 2018 are available in the [Open Record](#).

Date	Party	Adjustment
23 October 2018	Petitioner	Factual averments <sup>9</sup> as regards the development of the Procedure and its application to the Petitioner. Also “when, by what means and in what terms the complainers first initiated their complaints and whether those complaints were first made under and in terms of the Procedure and when those complaints were first deemed to be formal complaints in terms of paragraph 10 of the Procedure.”
30 October 2018	Scottish Government	Set out more fully argument in relation to time bar and provided further information on the reasons for the development and introduction of the Procedure.
5 November 2018	Scottish Government	Provided further detailed factual information on the development of the Procedure and contact between Ms A and Ms B and senior employees of the Scottish Government.
6 NOVEMBER 2018	PROCEDURAL HEARING	FURTHER TIME GRANTED FOR ADJUSTMENTS
14 November 2018	Scottish Government	Provided further grounds for resisting the Petitioner’s argument that that there had been a breach of his legitimate expectations in relation to the way one of the complaints made against him had been handled.
14 - 19 November 2018	Petitioner	Focused on timing and circumstances of contact between Ms A, Ms B and Scottish Government officials and the contact and involvement with the Investigating Officer prior to Investigating Officer being appointed under the procedure. It was averred that the

<sup>9</sup> ‘Averments’ are formal statements about fact or circumstance which the party is essentially offering to prove or substantiate.



		appointment of the Investigating Officer was in contravention of the Procedure and that the decision was unlawful in respect that "it was tainted by bias".
20 November 2018	Scottish Government	Answer 19 was adjusted to state that, prior to her appointment as Investigating Officer, the Head of People Advice had involvement and contact with the complainers.
23 November 2018	Petitioner	Detailed averments as to the contact between senior employees of the Scottish Government and Ms A and Ms B prior to the point at which formal complaints were made and further averments as to the Investigating Officer's knowledge of the complaints prior to the stage at which they were formally raised under the Procedure and prior to her appointment as Investigating Officer
29 November 2018	Scottish Government	Further statements on extent of the contact between senior employees of the Scottish Government and Ms A and Ms B prior to formal complaints being made. Maintained the Scottish Government's position that, taking all the relevant facts and circumstances into consideration, such contact did not make the way in which the complaints were dealt with unlawful.
4 December 2018	Petitioner	Specific averments concerning, amongst other things, contact between Ms A and Ms B and senior employees of the Scottish Government prior to the time at which the complaints were made formal. Specifically averred that, having regard to the Permanent Secretary's involvement in the development and introduction of the Procedure, her knowledge of the Investigating Officer's prior involvement in the complaints before her appointment as Investigating Officer, and her knowledge of and involvement in the management of the complaints from an early stage, a fair-

		minded and informed observer would conclude that there was a possibility of conscious or unconscious bias in the decisions made
8 December 2018	Scottish Government	Provided more information about the role the Permanent Secretary played in the development and introduction of the Procedure, that the Permanent Secretary was aware by 22 November 2017 that complaints had been made against the Petitioner, and that the Permanent Secretary was aware by 14 December 2017 that the Investigating Officer was involved in the management of the complaints.

## **Annexe F – Procedure development and Head of People Advice contact with Ms A and Ms B prior to appointment as Investigating Officer**

Below is an overview of the involvement of the Head of People Advice in the development of the procedure and her contact with Ms A and Ms B prior to their formal complaints being made.

**7 November 2017:** The Head of People Advice is involved in emails around the development of the procedure<sup>cclxiv</sup>.

**10 November 2017:** The Head of Cabinet, Parliament and Governance sends a draft of the procedure to recipients including the Head of People Advice<sup>cclxv</sup>.

The Director of People sends a note to colleagues, including the Head of People Advice, setting out who is leading on what. The note indicates that the Head of People Advice has a role in the communications plan, the policy review, engagement on culture and “Live issues”. “Live issues” includes reports to HR and reports to others, noting one which is a reference to the concern raised by Ms B with the Director of Communications, Ministerial Support and Facilities<sup>cclxvi</sup>.

Emails are sent on behalf of the Permanent Secretary indicating that the Head of People Advice will play a leading role in the management of complaints of sexual harassment<sup>cclxvii</sup>.

**14 November 2017:** The Head of People Advice prepares a ‘checklist’ of questions for use when interviewing people making complaints related to sexual harassment for the Director for Safer Communities in her confidante/ sounding board role<sup>cclxviii</sup>.

**22 November 2017:** The Director of People and Head of People Advice receive a note of a first meeting with Ms A and the Director for Safer Communities and the Director of Communications, Ministerial Support and Facilities<sup>cclxix</sup>.

**By 23 November 2017:** The Head of People Advice has taken legal advice on how to manage the two complaints<sup>cclxx</sup>.

**27 & 28 November 2017:** The Head of People Advice is included in the circulation list for the latest draft of the procedure. She is also included in an email setting out paperwork which the Permanent Secretary would like, including draft letters to former First Ministers and current party leaders<sup>cclxxi</sup>.

The Director of People and the Head of People Advice consider what the organisational response and next steps should be with the individuals who have come forward to raise concerns<sup>cclxxii</sup>.

**29 November 2017:** Ms A and Ms B agree to speak to the Director of People and the Head of People Advice to allow them to respond from an organisation perspective and to discuss and agree next steps<sup>cclxxiii</sup>.

**5 December 2017:** The Director of People and the Head of People Advice meet Ms A to discuss her complaint and the draft procedure<sup>cclxxiv</sup>.

**5 & 6 December 2017:** The Head of People Advice is in text contact with Ms B in order to make arrangements to speak<sup>cclxxv</sup>.

**7 December 2017:** The Head of People Advice speaks to Ms B about her complaint and how it may be progressed<sup>cclxxvi</sup>.

**8 December 2017:** The Head of People Advice emails Ms B about options in terms of next steps<sup>cclxxvii</sup>. The Director of People emails the Head of People Advice an update on the procedure<sup>cclxxviii</sup>.

**14 December 2017:** The Head of People Advice is copied into an email from the Director of People to Ms A stating that she should consider what she wishes to do next, attaching the draft procedure and indicating they should reconvene in the New Year<sup>cclxxix</sup>. The Head of People Advice contacts Ms B<sup>cclxxx</sup>.

**19 December 2017:** The Head of People advice is copied into an email from Ms A saying that she would like to proceed to a formal complaint but that she would like some more information and was content to pick up in January. The Head of People Advice responds to confirm that she would arrange to meet in January<sup>cclxxxi</sup>.

**16 January 2018:** The Director of People sends a calendar invite for this day to the Head of People Advice and Ms A titled "Policy Review"<sup>cclxxxii</sup>. Ms A's formal complaint is received by the Director of People<sup>cclxxxiii</sup>. The Head of People Advice is appointed Investigating Officer for Ms A's complaint and arranges a meeting<sup>cclxxxiv</sup>.

**17 January 2018:** The Head of People Advice writes to Ms A inviting her to a meeting on the same day and referring back to their meeting the day before (16 January 2018). The email indicates that they had discussed Ms A's experience following which she made a formal complaint<sup>cclxxxv</sup>.

**23 January 2018:** Ms B notifies the Director of People of her intention to make a formal complaint. The Director of People appoints the Head of People Advice as the Investigating Officer<sup>cclxxxvi</sup>. The Head of People Advice gets in touch with Ms B via text<sup>cclxxxvii</sup>.

**24 January 2018:** Ms B's complaint is received by email<sup>cclxxxviii</sup>.

## Annexe G – Interlocuter of Lord Pentland, 8 January 2019

P850/18      Pet: Alex Salmond for J/R

DAC Beachcroft Scotland LLP

Scottish Government

8 January 2019

Lord Pentland

Act: Clancy, Q.C. *et* D. Hamilton  
Solicitor Advocate

Alt: R. Dunlop, Q.C. *et* C. O'Neill,

The Lord Ordinary, having heard counsel, on the petitioner's motion, of consent, and in terms and in respect of the Joint Minute for parties No. 39 of process,:-

- (i.) finds and declares that the decisions of the first named respondent, *viz.* Leslie Evans, as set out in:-
  - (a) a Decision Report written by her dated 21 August 2018 entitled "Formal complaints against Former First Minister, Alex Salmond" (production No. 6/2 in the petitioner's First Inventory of Productions); and
  - (b) a letter from her to the petitioner's solicitors dated 22 August 2018 (production No. 6/1 in the petitioner's First Inventory of Productions)are unlawful in respect that they were taken in circumstances which were procedurally unfair and in respect that they were tainted by apparent bias by reason of the extent and effects of the Investigating Officer's involvement with aspects of the matters raised in the formal complaints against the petitioner prior to her appointment as Investigating Officer in respect of each of those complaints;
- (ii.) reduces the decisions of the first named respondent contained in the aforementioned Decision Report dated 21 August 2018 and letter dated 22 August 2018;
- (iii.) refuses the petitioner's opposed motion, made at the bar, for production of the three investigation reports prepared by the Investigating Officer dated 22 February, 18 July and 23 July 2018; thereafter, without production of the aforementioned reports requiring to be satisfied in these circumstances, reduces the aforementioned three investigation reports dated 22 February, 18 July and 23 July 2018;
- (iv.) finds the respondents liable to the petitioner:-
  - (a) in the expenses of the petition and proceedings following on from the order for commission and diligence pronounced in the interlocutor dated 14 December 2018, including the expenses of the open commission, all on an agent and client client paying scale; and
  - (b) except in so far as already dealt with, including as already dealt with in the foregoing expenses order of even date, in the expenses of the petition and proceedings;remits the account of expenses, when lodged, to the Auditor of Court to tax;
- (v.) allows the undertaking offered on behalf of the respondents to be recorded in the minute of proceedings of even date;
- (vi.) discharges the substantive hearing fixed for Tuesday 15 January 2019 and the

ensuing three days;  
(vii.) *quoad ultra* dismisses the petition and decerns.

8 January 2019

Lord Pentland

The Lord Ordinary decerns against the respondents for payment to the petitioner of the expenses referred to in the foregoing interlocutor, of even date, as the same shall be taxed by the Auditor of Court.

## **Annexe H – Parliamentary Privilege**

### **Introduction**

1. As set out at the beginning of this report, the Committee must operate within the legal parameters in its statement on the handling of information and evidence, including the orders made by the courts under the Contempt of Court Act 1981 in both the judicial review and the criminal trial. This has prompted commentary on the nature and extent of what is commonly referred to as “parliamentary privilege” in the Scottish Parliament.

2. This Annexe sets out the position on privilege in relation to the Scottish Parliament and the background to it. It also briefly covers the position at Westminster, given there is often confusion between the differing positions.

### **Parliamentary Privilege – Scottish Parliament Position**

3. The Scottish Parliament was created by statute – the Scotland Act 1998. Therefore, the protections and powers available in the Scottish Parliament are limited to those set out in the Scotland Act 1998 and are reviewable by the courts.

4. At the time of the establishment of the Scottish Parliament, consideration was given to the powers and protections that it would be appropriate for MSPs to have. That consideration took place against the background of the incorporation of the European Convention on Human Rights into domestic law, and the decision that the Scottish Parliament should be subject to the new constitutional principle that individuals’ rights should be protected.

5. The aim of the Scotland Act 1998 provisions was to address the point at which individual rights conflict with traditional rights of free speech in Parliament. The resulting powers and protections in the Scotland Act 1998 were designed to give sufficient protection to the Parliament to enable it properly to conduct its business, and there is a degree of protection for proceedings of the Parliament in relation to defamation and contempt of court, explained further below. The Parliament and its members are not beyond the law.

6. The most relevant provisions of the Scotland Act 1998 in relation to ‘privilege’ are:

- Section 41 - for the purposes of the law of defamation, any statement made in “proceedings of the Parliament” and the publication under the authority of the Parliament of any statement are absolutely privileged;
- Section 42 - proceedings of the Parliament are subject to the law of contempt of court, including the “strict liability” rule which treats conduct as a contempt of court where it tends to interfere with the course of justice in particular proceedings, regardless of intent. Section 42 disapplies the strict liability rule as regards any publication made in (a) “proceedings of the Parliament” in relation to a Bill or subordinate legislation or (b) to the extent that it consists of a fair and accurate report of such proceedings made in good faith.

7. These protections cover specific situations. They do not exempt MSPs, Committees, witnesses or the Scottish Parliamentary Corporate Body from complying with court orders preventing the publication of particular information, such as information likely to disclose the identity of those making complaints of sexual offences.<sup>10</sup>

### **Parliamentary Privilege – Westminster Position**

8. The two main components of parliamentary privilege in relation to the UK Parliament are namely freedom of speech and sole control of all aspects of Parliament's affairs. It has been described as:

“the right of each House to control its own proceedings and precincts, and the right of those participating in parliamentary proceedings, whether or not they are Members, to speak freely without fear of legal liability or other reprisal”. [Report of the Joint Committee on Parliamentary Privilege, 2013, para 3.](#)

9. Parliamentary privilege in the UK Houses of Parliament has its origins in Article 9 of the Bill of Rights of 1689 which provided that “the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”.

10. In the last 20 years the UK Parliament has established two Joint Committees to consider parliamentary privilege, but there has been no legislation to address some of the tensions that emanate from a definition of parliamentary privilege rooted in the 17th-century Bill of Rights operating in a 21st-century context.

11. In recent years, Members of both the [House of Commons](#) and the [House of Lords](#) have relied on parliamentary privilege to circumvent court orders by naming individuals where the media and general public have been prohibited from doing so. This has raised questions over whether it is an ‘abuse’ of privilege to undermine the rule of law.

---

<sup>10</sup> For an explanation of the rationale of such orders see paragraph 16 of the Lord Justice Clerk, Lady Dorrian’s Statement of Reasons in the Incidental Application by The Spectator magazine in the case of [HMA v Alexander Elliot Anderson Salmond \[2021\] HCJ 1](#)



## **Annexe I – Scottish Parliament work on sexual harassment and sexist behaviour comparisons**

This annexe provides information on the work of the Scottish Parliament to address sexual harassment and sexist behaviour. Information is also provided on the complaints regimes in place at the House of Commons and UK Government and at the Welsh Senedd and Welsh Government.

### **Scottish Parliament's work on sexual harassment and sexist behaviour**

As part of its work on diversity and inclusion and in response to the #MeToo movement, the Scottish Parliament issued a survey to all building users (including Members, their staff, parliamentary staff and contractors) in December 2017 to find out the extent to which people had experienced sexual harassment and sexist behaviour.

The findings were published at the end of February 2018. These showed that while the majority of respondents (78%) had never experienced sexual harassment or sexist behaviour, a fifth overall (20%) had experienced such behaviour while working at the Parliament. When the results were broken down by gender, 30% of women and 6% of men reported experiencing this behaviour in some form.

The survey also showed that while knowledge of the different reporting procedures was high, the percentage of those actually reporting anything was low. Further, those who had experienced such behaviour were the least likely to have confidence in the reporting process.

The Scottish Parliamentary Corporate Body set up a Joint Working Group on Sexual Harassment comprising senior Parliament staff, representatives from each political party and an external expert with the remit 'to consider and agree any actions that need to be taken on a joint or individual basis between the Parliament and political parties in light of the survey on sexual harassment and sexist behaviour.'

The [Joint Working Group's report in December 2018](#) contained a range of recommendations and set out a revised policy on sexual harassment and sexist behaviour, including the standards of behaviour expected, applying to everyone who works in or for the Parliament. As complaints against Members are governed by the MSP Code of Conduct, any changes to the way in which complaints are dealt with must be agreed by the Standards, Procedures and Public Appointments Committee (SPPA) and by the Parliament. Therefore, the Joint Working Group made recommendations to the SPPA Committee about changes to the Code of Conduct which were accepted.

Some changes to the Code of Conduct were able to be made by amending guidance but others had to be changed by legislation. To do this, the SPPA Committee brought forward the [Scottish Parliamentary Standards \(Sexual Harassment and Complaints Process\) Bill](#) which was passed by the Parliament on 4 March 2021.

The main changes as a result of the Joint Working Group's report are:

- An independent support service set up to provide ongoing support to anyone experiencing sexual harassment or sexist behaviour, irrespective of whether or not they submit a formal complaint. This service is run by a third party.
- Formal complaints will be investigated independently of the Parliament and political parties. In practice, complaints against anyone bar Members will be investigated by an independent investigator appointed by the Parliament.
- Formal complaints against Members are investigated by the Ethical Standards Commissioner for Scotland and considered by the SPPA committee which may propose sanctions which are ultimately considered by the Parliament as a whole.
- There is no time limit on people making a complaint. While it is always better to raise an issue as soon as possible after it has happened, the Joint Working Group recognised that this might not always happen for legitimate and understandable reasons. Having no time limit means that complaints can be taken against former members of staff and against former MSPs.
- The policy suggests ways in which complaints can be dealt with informally but, as sexual harassment can often stem from a power imbalance, it is not always possible or desirable to deal with an issue informally. Therefore, there is no expectation that someone has to exhaust informal routes before making a formal complaint.
- Where someone considers it is more appropriate to deal with an issue formally, or where informal processes have been used but have not resolved the issue, a formal complaint can be made.

The [report from the Joint Working Group plus revised policy and procedures can be accessed on the Scottish Parliament website.](#)

The SPPA Committee has published a number of reports on sexual harassment:

- [Code Of Conduct Rule Changes – Treatment Of Others](#)
- [Code of Conduct for MSPs – proposed revisions to implement the recommendations contained in the Joint Working Group’s Report on Sexual Harassment and Sexist Behaviour](#)
- [Proposal for a Committee Bill – Complaints against MSPs – amendment of the Scottish Parliamentary Standards Commissioner Act 2002](#)
- [Sexual harassment and inappropriate conduct](#)

## **Examples from other legislatures and Government**

### **UK Parliament**

The House of Commons put in place an Independent Complaints and Grievance Scheme (ICGS) in July 2018 to deal with complaints of bullying and harassment

Elements of the scheme common to both the House of Commons and the Scottish Parliament are: an independent support service providing advice and advocacy and independent investigation of formal complaints.

One area of difference was that, when the House of Commons scheme was introduced, only complaints relating to incidents after the start date of the 2017 Parliament could be considered under it. Complaints pre-dating that could still be raised but would be dealt with under the procedures that were in place at the time of the action being complained about. Under old and new procedures, the Parliamentary Commissioner for Standards could only look at historic allegations dating back up to seven years.

Changes were made in response to [a report by Dame Laura Cox DBE](#) on bullying and harassment of House of Commons staff and it was agreed in June 2019 that historic cases could be taken under the ICGS, meaning it would apply to former Members as well as current Members.

One other area of difference between the House of Commons and Scottish Parliament schemes is how complaints against Members are considered and sanctions proposed.

When the House of Commons scheme was put in place, the Parliamentary Commissioner for Standards was able to propose sanctions such as recommending an apology be made or training undertaken. Where a Member rejected such recommendations or where the behaviour warranted stronger sanctions, it would be referred to the Committee on Standards (which, unlike the Standards Procedure and Public Appointments Committee at the Scottish Parliament, has lay members).

In June 2020 it was agreed that an Independent Expert Panel would deal with bullying and harassment complaints rather than the Committee on Standards. The panel's role is:

- a) to determine the appropriate sanction in ICGS cases referred to it by the Parliamentary Commissioner for Standards;
- (b) to hear appeals against the decisions of the Parliamentary Commissioner for Standards in respect of ICGS cases involving Members of the House;
- (c) to hear appeals against a sanction imposed under paragraph (a);
- (d) to report from time to time, through the Clerk of the House, on the operation of the ICGS as it relates to Members of the House<sup>cclxxxix</sup>.

It was also agreed that any decisions on sanctions that need to be ratified by the House should be done without a debate in the Chamber.

It is worth noting that there is no authority for sanctioned training; for example, there may be non ICGS cases where it may be felt that suspension is too strong a sanction. A report by the Committee on Standards noted that:

"We have been concerned that in non-ICGS cases the lack of "intermediate" sanctions has been a problem: that is, where a sanction stronger than apology is called for, but

less severe than suspension. It is striking that there is currently no explicit power to require a Member to attend training or to withdraw services or facilities from a Member for a specified period.<sup>CCXC</sup>

In the same report, the Committee commented that:

“Our tables err on the side of caution in their reference (in the final column) to whether a sanctioning power exists already or needs to be authorised by the House. Both the Commissioner and the Committee, and by extension when it comes to being the Panel, have considerable delegated authority implicit in their functions conferred by standing orders, but we feel that it is an appropriate moment for us to seek the House’s explicit approval for the right to impose specific sanctions to ensure that there can be no reasonable challenge to the exercise of that right.<sup>CCXCi</sup>”

## **UK Government**

There was a review of bullying, harassment and misconduct in the civil service, which reported in September 2018.

UK Government departments have their own policies on bullying and harassment in place but there are several “model” policies which are developed and shared with departments as best practice to support consistency. The [Civil Service Code](#) covers the overarching civil service values and standards of behaviour. The [Ministerial Code](#) covers the standards of behaviour expected of Ministers.

UK Government departments each have a dispute resolution policy in place. Complaints of bullying, harassment and discrimination are dealt with under the dispute resolution policy. Additional guidance exists at department level for complaints of sexual harassment. This guidance sits alongside the dispute resolution policy. Complaints can be taken about former Ministers as well as against current Ministers and Special Advisers under the dispute resolution policy. Such complaints should also be escalated to the relevant department Permanent Secretary who will handle the complaint in conjunction with the Propriety and Ethics Team in Cabinet Office. Ministers are bound by the Ministerial Code and complaints may lead to investigation of a breach of the code.

While the dispute resolution policy says that formal complaints should be raised as soon as possible and generally within three months of the relevant event or of trying to resolve the issue informally, it also acknowledges that employees who have experienced sexual or other forms of harassment or severe bullying may not feel able to come forward until significantly after the event. The policy states that managers should ‘normally accept any case in relation to sexual harassment or other forms of bullying, harassment and discrimination, regardless of the time elapsed.’

## **Senedd**

Complaints against Members are taken under the Senedd Code of Conduct for Members and investigated by the Commissioner for Standards. There is a one-year time limit for making a complaint and no provision for complaints to be made against former Members. The Standards of Conduct Committee [launched a consultation on](#)

[proposed changes to the Code](#) in December 2020 and this consultation closed at the end of January 2021. The Committee is proposing the addition of a specific 'respect' principle to reflect the House of Commons inquiries into bullying and harassment and the Senedd's adoption of its Dignity and Respect policy. The Committee is also seeking views as to whether the one-year time limit should be changed and whether there should be a timeframe within which complaints should be made.

## **Welsh Government**

Complaints against current Ministers are taken under the Ministerial Code of Conduct. Complaints can only be taken against former Ministers if they are still a Member of the Senedd. In which case, the complaints can be taken under the Senedd Code of Conduct for Members.

## Endnotes

---

- <sup>i</sup> The full terms of the court order are in Annex G. It goes on to state: “by reason of the extent and effects of the Investigating Officer’s involvement with aspects of the matters raised in the formal complaints against the petitioner prior to her appointment as Investigating Officer in respect of each of those complaints”.
- <sup>ii</sup> All available on [the Committee’s correspondence webpage](#)
- <sup>iii</sup> [Scottish Government guidance notes](#) for officials giving evidence to committees of the Scottish Parliament, paragraph 3.2
- <sup>iv</sup> Available on [the Committee’s webpage on the judicial review phase of the inquiry](#)
- <sup>v</sup> [Notes of written advice from external counsel](#) released on 2 March 2021
- <sup>vi</sup> All documents are available on Scottish Government website at [Legal advice related to the Parliamentary Inquiry into the Scottish Government’s Handling of Harassment Complaints \(SGHHC\) - gov.scot \(www.gov.scot\)](#)
- <sup>vii</sup> Correspondence includes letters by the Convener to the Deputy First Minister on 21 December 2020 and 22 January 2021. These letters and the replies are [on the Committee’s webpage on the judicial review phase of the inquiry](#).
- <sup>viii</sup> Correspondence is available on [the Committee’s correspondence webpage](#).
- <sup>ix</sup> Notices issued under section 24 of the Scotland Act 1998 by the Clerk of the Parliament on behalf of the Committee are available on [the Committee’s written evidence webpage](#).
- <sup>x</sup> [Official Report](#), 8 December 2020
- <sup>xi</sup> A [copy of the procedure](#) is available on the Scottish Government website
- <sup>xii</sup> See phase 1 footnote 52 [document YY085](#)
- <sup>xiii</sup> [FDA written evidence](#)
- <sup>xiv</sup> [FDA written evidence](#)
- <sup>xv</sup> [Official Report](#), 18 August 2020, column 25
- <sup>xvi</sup> [Official Report](#), 8 September 2020, column 11
- <sup>xvii</sup> [Official Report](#), 1 September 2020, column 34
- <sup>xviii</sup> [Official Report](#), 15 September 2020, column 7
- <sup>xix</sup> [Official Report](#), 15 September 2020, column 5
- <sup>xx</sup> [Official Report](#), 8 September 2020, column 10
- <sup>xxi</sup> See phase 1 footnote 10 [document YY001](#)
- <sup>xxii</sup> [Scottish Government Written Statement on the development of the procedure](#), 19 June 2020
- <sup>xxiii</sup> [Official Report](#), 18 August 2020, column 20
- <sup>xxiv</sup> See phase 1 footnote 5 [document YY004](#)
- <sup>xxv</sup> [Official Report](#), 18 August 2020, column 13
- <sup>xxvi</sup> [Official Report](#), 8 September 2020, column 12
- <sup>xxvii</sup> [Official Report](#), 8 September 2020, column 12
- <sup>xxviii</sup> [Official Report](#), 26 February 2021, column 10
- <sup>xxix</sup> See phase 1 footnote 10 [document YY091](#)
- <sup>xxx</sup> See phase 1 footnote 10 [document YY091](#)
- <sup>xxxi</sup> See [Fairness at Work policy](#) paragraph 6.5.5 and [Official Report](#), 25 August 2020, column 36
- <sup>xxxii</sup> [Official Report](#), 3 March 2021, column 16
- <sup>xxxiii</sup> [Scottish Government written statement on the development of the procedure](#), 19 June 2020, paragraph 19
- <sup>xxxiv</sup> See phase 1 footnote 12 [document YY023](#)
- <sup>xxxv</sup> [Official Report](#), 18 August 2020, column 23
- <sup>xxxvi</sup> [Official Report](#), 25 August 2020, column 18
- <sup>xxxvii</sup> [Official Report](#), 25 August 2020, column 18
- <sup>xxxviii</sup> See phase 1 footnote 5 [document ZZ012](#), phase 1 footnote 6 [document ZZ013](#) and phase 1 footnote 10 [document YY001](#)
- <sup>xxxix</sup> See phase 1 footnote 7 [document YY093](#)
- <sup>xl</sup> See phase 1 footnote 10 [document YY002](#)
- <sup>xli</sup> [Official Report](#), 18 August 2020, column 41
- <sup>xlii</sup> [Official Report](#), 25 August 2020, column 30
- <sup>xliii</sup> [Official Report](#), 18 August 2020, column 29
- <sup>xliv</sup> See phase 1 footnote 40 [document YY004](#)
- <sup>xlv</sup> See phase 1 footnote 41 [document YY016](#)



---

xlvi See phase 1 footnote 23 [document YY030](#)

xlvii See phase 1 footnote 23 [document XX009](#)

xlviii [Official Report](#), 25 August 2020, column 26

xliv See phase 1 footnote 23 [documents XX013 and XX015](#)

l See phase 1 footnote 10 [document YY078](#)

li [Written submission by the First Minister's Chief of Staff](#)

lii [Official Report](#), 25 August 2020, column 27

liii See phase 1 footnote 23 [document YY045](#)

liv See phase 1 footnote 30 [document YY092](#)

lv [Official Report](#), 25 August 2020, column 21

lvi [Official Report](#), 26 February 2021, column 30

lvii [Joint note by senior and junior counsel](#) on prospects of success, 26 September 2018

lviii [Official Report](#), 26 February 2021, column 25

lix [Official Report](#), 26 February 2021, column 39

lx [Official Report](#), 3 March 2021, column 24

lxi [Official Report](#), 3 March 2021, column 25

lxii [Scottish Government Fairness at Work policy](#) paragraph 6.55

lxiii [Official Report](#), 25 August 2020, column 36

lxiv [Official Report](#), 25 August 2020, column 23-24

lxv See phase 1 footnote 23 [document YY030](#)

lxvi Dates are also given in [Scottish Government Written Statement](#) on the development of the procedure, 19 June 2020

lxvii See written evidence from [FDA](#), [Prospect](#) and [PCS](#)

lxviii [Official Report](#), 25 August 2020, column 15

lix See phase 1 footnote 36 [document XX060](#)

lxx [Official Report](#), 25 August 2020, column 48

lxxi [Official Report](#), 18 August 2020, column 28

lxxii [Official Report](#), 25 August 2020, column 40

lxxiii [Official Report](#), 26 February 2021, column 44

lxxiv [Official Report](#), 1 December 2020, column 14

lxxv Phase 3 footnote 15 [document JR003](#)

lxxvi [Official Report](#), 26 February 2021, column 32

lxxvii [Official Report](#), 18 August 2020, column 31

lxxviii [Official Report](#), 25 August 2020, column 44-45

lxxix See phase 1 footnote 46 [document YY046](#), an email to Ms A from the Director of People dated 14 December 2017, inquiring if Ms A has made a decision on her position and providing details of what the process would be should she wish to proceed with making a formal complaint, includes a copy of the draft policy on handling complaints involving current or former ministers. The email states "We have now spoken to two other people who are also considering their position."

lxxx See phase 1 footnote 46 [document YY012](#)

lxxxi See phase 1 footnote 46 [document YY008](#)

lxxxii See phase 1 footnote 46 [document YY046](#)

lxxxiii [Official Report](#), 18 August 2020, column 31

lxxxiv [Official Report](#), 25 August 2020, column 31

lxxxv [Official Report](#), 25 August 2020, column 39

lxxxvi [Official Report](#), 25 August 2020, column 51

lxxxvii [Official Report](#), 25 August 2020, column 39

lxxxviii See phase 1 footnote 46 [document YY012](#) (also provided as phase 2 footnote 13 [document INV021](#))

lxxxix Phase 1 footnote 40 [document YY004](#)

xc [Official Report](#), 15 September 2020, column 36

xc i [Official Report](#), 1 December 2020, column 36

xc ii [Official Report](#), 1 December 2020, column 38

xc iii [Official Report](#), 1 December 2020, column 50

xc iv [Official Report](#), 8 September 2020, column 16

xc v [Official Report](#), 1 December 2020, column 56

xc vi [Report of Laura Dunlop QC's review of the Scottish Government procedure on the handling of harassment complaints involving current and former Ministers](#), paragraph 8.60

---

xcvii [Official Report](#), 27 October 2020, column 30

xcviii [Official Report](#), 18 August 2020, column 17

xcix [Official Report](#), 1 December 2020, column 41

c [Official Report](#), 1 December 2020, column 75-76

ci See phase 2 footnote 17 [document INV350](#) (also provided as phase 1 footnote 46 [document YY008](#))

cii [Official Report](#), 25 August 2020, column 40

ciii Phase 2 footnote 18 [document INV287](#) (also provided as phase 1 footnote 46 [document YY046](#))

civ See phase 1 footnote 46 [document YY046](#) and phase 2 batch 2 footnote 18 [document INV016](#) (also provided as phase 3 footnote 15 [document JR012](#))

cv [Official Report](#), 1 December 2020, column 54

cvi [Official Report](#), 27 November 2020, column 7

cvi [Official Report](#), 3 November 2020, column 44

cvi [Official Report](#), 27 November 2020, column 7-8

cix See [Scottish Government written statement to the Committee on the investigation of complaints](#), paragraph 23. See also phase 2 footnote 15 [document INV315](#) (also provided as phase 1 footnote 10 [document XX027](#)), dated 23 November 2017, which is an update provided for the Permanent Secretary from the Director of People. Under “Live issues”, it details that two statements have been taken in relation to allegations against a former Minister. The email also includes updates under the headings “Communications” and “Policy Review”. Phase 2 batch 2 footnote 16 [document INV673](#) is a text message exchange between the Director of Communications, Ministerial Support and Facilities and the Permanent Secretary starting at 08:45 am on 8 November 2017. It suggests the Director of Communications, Ministerial Support and Facilities wishes to discuss a matter with the Permanent Secretary. As it is included in the complaints handling batch, it is assumed these texts relate to the then “causes for concern”. The [letter from Director of Communications, Ministerial Support and Facilities to the Committee dated 9 December](#) states that “The background to the text to Ms B on 22 November is that Ms B had mentioned Ms A to me in my initial conversation with her on 8 November 2017.” Phase 2 batch 2 footnote 19 [document INV080](#) includes a table sent to the Director of People to inform a meeting with the Permanent Secretary on 11 January 2018. It details the causes for concern HR were aware of at the time, including any relating to former ministers. The Director of People is updating a member of her team in the email attached to the table stating that she “didn’t go through [the table] in detail” with the Permanent Secretary.

cx [Official Report](#), 18 August 2018, column 31

cxii Phase 1 footnote 10 [document XX036](#) dated 27 November 2017 lists paperwork which is required by the Permanent Secretary. The bullet point list in that email includes “Draft letters to former and current FMs and Party Leaders”. Phase 1 footnote 23 [document XX040](#) includes an email from the Head of Cabinet, Parliament and Governance dated 28 November 2017. The purpose of the email was to circulate draft letters to former FMs and current party leaders. The circulation list includes the Permanent Secretary’s office. Phase 1 footnote 23 [document XX037](#) is an email dated 28 November 2017. It was sent from the Director of People to the Head of People Advice following a meeting with the Permanent Secretary. The email notes “- If they get a chance tomorrow morning she is going to speak to FM know about the proposed letters to FFMS / party leaders and then send them on so FM can consider.” Phase 1 footnote 32 [document ZZ008](#) is dated 30 November 2017. The document notes that the Permanent Secretary had a regular one-to-one meeting on the previous day (29 November 2017) with an individual whose name is redacted. Under the items which were discussed it is noted that “Perm Sec updated [Redacted] on our possible approach on harassment and letters that might send to former FFMs, Ministers and Party Leaders.”

cxii [The procedure](#) is available on the Scottish Government website.

cxiii See phase 2 batch 2 footnote 29 [document INV520](#). Phase 2 batch 2 footnote 30 [document INV249](#), dated 26 February 2018, is entitled “Perm Sec report”. It is assumed this document was drafted by the Investigating Officer. It appears that the document was prepared ahead of a meeting with the Permanent Secretary to discuss the investigations and next steps. It is noted that those next steps are in direct relation to the investigation of the complaints of Ms A and Ms B, but the document also contains a note of whether the decision report prompts “other actions/concerns beyond extracting lessons to learn”. Under this heading, people survey scores, informal mechanisms for people to raise concerns, and the role of trade unions are all noted.



cxiv Phase 2 batch 2 footnote 30 [document INV300](#), dated 26 February 2018, is entitled “report review”. It appears that the document was created on 23 February 2018, but it provides a note of a meeting between the Investigating Officer and the Permanent Secretary held on 26 February 2018. The note includes reference to “LE thoughts” [presumed to mean the response of the Permanent Secretary]. The section includes a reflection that “CS [presumed to mean civil service/servants] cover and misplaced loyalty and tolerance due to the best of professional intelligence” and continues “Points to an absence of challenge and lack of diversity of views”.

cxv Phase 2 batch 2 footnote 30 [document INV140](#) is an email dated 26 February which suggests the meeting between the Permanent Secretary and the complainers would be “Monday probably” (5 March). Phase 2 footnote 28 [documents INV333 and INV533](#) show that on 26 February 2018 contact details for both women were given to the Permanent Secretary’s office and that on 5 March 2018 Ms A was given the Permanent Secretary’s mobile phone number.

cxvi [Scottish Government written statement on complaints handling](#), 18 December 2020, paragraph 23

cxvii See documents provided in [phase 2 footnote 29](#). These reflect the iterative drafting process of the 7 March letter to the former First Minister. Phase 2 batch 2 footnote 30 [document INV249](#) also reflects that “LE” made amendments to this letter. Phase 1 footnote 29 [document INV160](#) includes an email from a Private Secretary to the Permanent Secretary to the Investigating Officer. It relates to the draft of the 7 March letter to the former First Minister on the complaints and states “I have re-drafted the letter. It looks substantial, but some is re-ordering”.

cxviii See documents provided to the Committee in [phase 2 footnote 33](#). This set of evidence includes a series of letters exchanged between the Permanent Secretary and Levy & McRae during the course of the investigation, where the Permanent Secretary is seeking the former First Minister’s compliance with the complaints process, including asking for a response on the complaints as well as details of any witnesses the former First Minister wishes the Investigating Officer to interview. Levy & McRae’s letters detail issues with the process from the former First Minister’s perspective and includes the offer of mediation and the offer of arbitration amongst other matters. In phase 2 footnote 33 [document INV277](#), Levy & McRae seek a lawyer to lawyer discussion and a Private Secretary to the Permanent Secretary responds “a formal process is underway and it is best if you continue to make representations direct to the Permanent Secretary and she’ll consider.”

cxix See, for example, phase 2 footnote 33 [document INV256](#)

cxx See phase 2 batch 2 footnote 38 [document INV421](#)

cxxi [Official Report](#), 12 January 2021, column 5

cxvii Dates provided in the [Scottish Government’s written statement on the handling of harassment complaints](#), 18 December 2020

cxviii Phase 2 footnote 45 [document INV325](#)

cxvii [Dunlop review report](#) 11 March 2021, paragraphs 8.28-8.29. Recommendation 6 introduces the idea of a screening step in the investigation of complaints.

cxv [Dunlop review report Recommendation 8](#): Anyone involved in factual investigation to any extent of a complaint against a Minister should be free of prior involvement with any aspect of the matter being raised and should have no close association with either party before or during the investigation.

cxvi See the [Scottish Government procedure on handling of harassment complaints involving current and former Ministers](#), paragraph 18 onwards

cxvii [Letter from the Head of People Advice](#) dated 31 October 2020, following oral evidence on 27 October 2020

cxviii [Official Report](#), 1 December 2020, column 33

cxix Phase 2 batch 2 footnote 11 [document INV006](#)

xxx Phase 2 footnote 43 [documents INV076, INV179, INV650, INV171, INV604, INV320](#) and phase 2 batch 2 footnote 47 [document INV130](#)

xxxi Phase 2 footnote 43 [document INV320](#)

xxxii Phase 2 batch 2 footnote 47 [document INV130](#)

xxxiii Phase 2 footnote 49 [document INV316](#). The referral letter is dated 20 August 2018 and was provided as phase 2 footnote 45 [document INV325](#).

xxxiv [Official Report](#), 2 March 2021, column 25

xxxv [Dunlop review report](#), 11 March 2021 paragraphs 8.15-8.17

xxxvi [Scottish Government procedure on handling of harassment complaints involving current and former Ministers](#), paragraph 10

xxxvii See [website of the Ethical Standards Commissioner for Scotland](#)

cxxxviii See [Levy & McRae productions 6/4 and 6/6](#) and also phase 2 footnote 30 documents [INV119 and INV125](#)  
 cxxxix Phase 2 footnote 29 documents [INV059 and INV522](#). Document INV522 appears to be an earlier version of the draft letter.  
 cxl See [documents provided by Levy & McRae](#), and in particular, [production 6/16](#) which notes that the former First Minister does not have access to his Ministerial Diary of the time, and [production 6/19](#), which makes a subject access request for the same.  
 cxli [Levy & McRae productions](#) page 145, [Note of Argument for the petitioner](#), paragraph 27  
 cxlii [Official Report](#), 12 January 2021, column 16  
 cxliii Phase 2 footnote 46 [document INV255](#) and [Levy & McRae production 6/26](#)  
 cxliv Phase 2 batch 2 footnote 41 [document INV530](#)  
 cxlv Phase 2 footnote 50 [document INV175](#)  
 cxlvi Phase 2 batch 2 footnote 41 [document INV215](#), which is an email from the Head of People Advice to Ms B about the receipt of the FOI request, and phase 2 batch 2 footnote 41 [document INV530](#), which is a similar email of the same date to Ms A.  
 cxlvii Phase 2 footnote 33 [document INV280](#)  
 cxlviii Phase 2 footnote 40 [document INV199](#)  
 cxlix Phase 2 footnote 38 [document INV661](#)  
 cl [Official Report](#), 2 March 2021, column 24  
 cli Phase 2 footnote 50 [document INV234](#)  
 clii Phase 2 footnote 50 [document INV232](#)  
 cliii Phase 2 footnote 52 [document INV331](#) and phase 2 footnote 53 [document INV221](#)  
 cliv Phase 2 footnote 53 [document INV221](#): former First Minister noted concerns over detail of what was put to him about complaints by journalist  
 clv Phase 2 footnote 53 [document INV221](#)  
 clvi [“Scotland’s top law officer advised government to send Alex Salmond misconduct claims to police”](#), The Sunday Post, August 26 2018  
 clvii Phase 2 footnote 53 [document INV252](#)  
 clviii [Official Report](#), 12 January 2021, column 33  
 clix [Official Report](#), 26 February 2021, column 35  
 clx [Official Report](#), 26 February 2021, column 36  
 clxi [Official Report](#), 3 March 2021, column 41  
 clxii [Official Report](#), 3 March 2021, column 41-42  
 clxiii Phase 4 footnote [document MC3](#)  
 clxiv Phase 2 footnote 42 [document INV675](#)  
 clxv [Official Report](#), 26 February 2021, column 33  
 clxvi Phase 2 footnote 29 [document INV059](#)  
 clxvii [Official Report](#), 3 March 2021, column 45  
 clxviii ACAS, [What mediation is and how it can help: Mediation at work](#)  
 clxix [Standards, Procedures and Public Appointments Committee, 4<sup>th</sup> Report, 2018 \(Session 5\)](#), Sexual harassment and inappropriate conduct, 5 June 2018  
 clxx [International Bar Association Arbitration Guidance for Scotland](#), January 2018, paragraph IV(i)  
 clxxi Phase 2 footnote 32 [document INV146](#)  
 clxxii Phase 2 footnote 32 [document INV292](#)  
 clxxiii [Open record](#), page 34  
 clxxiv [Open record](#), page 31  
 clxxv [Official Report](#), 27 October 2020, column 21  
 clxxvi Phase 2 footnote 31 [document INV272](#) and [Levy & McRae production 6/10](#)  
 clxxvii Phase 2 batch 2 footnote 35 [document INV128](#) shows Ms B rejecting mediation, and phase 2 batch 2 footnote 35 [document INV129](#) shows Ms A rejecting mediation.  
 clxxviii [Official Report](#), 27 October 2020, column 40  
 clxxix [Official Report](#), 26 February 2021, column 57  
 clxxx [Scottish Government procedure on handling of harassment complaints involving current or former Ministers](#), paragraph 4.  
 clxxxi [Official Report](#), 3 March 2021, column 20  
 clxxxii [Dunlop review report](#), 11 March 2021, paragraph 8.21  
 clxxxiii Phase 2 footnote 33 [document INV279](#)  
 clxxxiv [Official Report](#), 3 November 2020, column 3

---

clxxxv [Official Report](#), 26 February 2021, column 48

clxxxvi [Official Report](#), 3 March 2021, column 58

clxxxvii [Official Report](#), 3 March 2021, column 58

clxxxviii Further background on the judicial review process can be found in [SPICe briefing 16/62](#)

clxxxix UK Supreme Court judgment, [paragraph 183](#)

cxc This is set out in the in the Interlocuter of Lord Pentland, 8 January 2019, provided at Annexe G.

cxci [Official Report](#), 8 September 2020, column 46

cxcii [Official Report](#), 8 September 2020, column 40

cxci [Official Report](#), 3 November 2020, column 28

cxci [See notes from counsel dated 17 September 2018 and 18 September 2018](#)

cxci [See note from the Lord Advocate to the First Minister and Permanent Secretary](#) dated 17 September 2018

cxci [Ibid](#), paragraph 11

cxci [Official Report](#), 2 March 2021, column 32

cxci [Official Report](#), 26 February 2021, column 63

cxci [Official Report](#), 3 March 2021, column 92

cc [Email of 30 October 2018](#) at 14:53

cci [Email of 30 October 2018](#) at 15:11

ccii [Email of 31 October 2018](#), 22:50

cciii [See written evidence](#) from the First Minister's Chief of Staff

cciv [Official Report](#), 3 March 2020, column 83

ccv [Urgent note from Senior Counsel dated 31 October 2018, paragraph 14](#)

ccvi [Email of 31 October 2018](#), 22:37

ccvii [Official Report](#), 3 November 2020, column 18

ccviii [Official Report](#), 3 November 2020, column 15

ccix [Official Report](#), 3 November 2020, column 17

ccx [Official Report](#), 3 November 2020, column 17

ccxi [Official Report](#), 3 November 2020, column 7

ccxii [Official Report](#), 3 March 2021, column 82-83

ccxiii [Joint note from senior and junior counsel](#), 6 December 2018

ccxiv [Joint note from senior and junior counsel](#), 6 December 2018, paragraph 32

ccxv [Email of 11 December 2018](#), 08:37

ccxvi [Joint note from senior and junior counsel](#), 16 December 2018

ccxvii [Official Report](#), 26 February 2021, column 53

ccxviii [Joint note from senior and junior counsel](#), 17 December 2018

ccxix [Joint note from senior and junior counsel](#), 17 December 2018, paragraph 32

ccxx [Joint note from senior and junior counsel](#), 19 December 2018

ccxxi [Official Report](#), 3 November 2020, column 53

ccxxii [Email from junior counsel](#), 21 December 2018

ccxxiii [Email from senior counsel](#), 22 December 2018

ccxxiv [Official Report](#) 3 November 2020, column 53

ccxxv [Report of the Director General for Organisational Development and Operations](#), 29 December 2018

ccxxvi [Official Report](#), 3 November 2020, column 31

ccxxvii [Official Report](#), 17 November 2020, column 64

ccxxviii [McKie v Scottish Ministers – 2006 CSOH 54](#), paragraph 3

ccxxix [Official Report](#), 3 November 2020, column 7

ccxxx [Official Report](#), 3 November 2020, column 30

ccxxxi [Official Report](#), 26 February 2021, column 10

ccxxxii [Official Report](#), 3 March 2021, column 27

ccxxxiii [Dunlop review report](#), 11 March 2021

ccxxxiv [Previous reports by the independent advisers on the Ministerial Code](#) are published on the Scottish Government website

ccxxxv [Scottish Government news release on Ministerial Code: Referral to Independent Advisers](#), 13 January 2019

ccxxxvi [Parliamentary Question S5W-32470](#)

ccxxxvii [Letter from the First Minister to the Standards Procedures and Public Appointments Committee](#), 26 November 2016

---

ccxxviii [Written submission on the Ministerial Code by the former First Minister](#), paragraph 29

ccxxix [Official Report](#), 3 March 2021, column 50

ccxl [Official Report](#), 3 March 2021, column 6

ccxli [Official Report](#), 26 February 2021, column 81

ccxlii [Official Report](#), 8 January 2019, column 68

ccxliii [Official Report](#), 10 January 2019, column 10

ccxliv [Written submission on the Ministerial Code by the former First Minister](#), paragraph 31

ccxlv [Written submission on the Ministerial Code by the former First Minister](#), paragraph 31

ccxlvi [Official Report](#), 3 March 2021, column 144

ccxlvii [Official Report](#), 8 January 2019, column 68-69

ccxlviii [Official Report](#), 10 January 2019, column 11

ccxlix [Written submission on the Ministerial Code by the former First Minister](#), paragraph 32

ccl [Official Report](#), 26 February 2021, column 91

ccli [Written submission from Duncan Hamilton](#)

cclii [Official Report](#), 3 March 2021, column 126

ccliii [Official Report](#), 3 March 2021, column 75

ccliv [Official Report](#), 3 March 2021, column 126

cclv [Written submission from the First Minister](#)

cclvi [Official Report](#), 26 February 2021, column 90

cclvii [Official Report](#), 3 March 2021, column 6-7

cclviii [Official Report](#), 3 March 2021, column 145

cclix [Written submission on the Ministerial Code by the former First Minister](#), paragraph 8

cclx [Official Report](#), 26 February 2021, column 67

cclxi [Official Report](#), 3 March 2021, column 7

cclxii [Official Report](#), 3 March 2021, column 3

cclxiii [Official Report](#), 2 March 2021, column 26-27

cclxiv Referenced in the [open record](#). See also phase 1 footnote 10 [document YY022](#).

cclxv Referenced in the [open record](#). See also phase 1 footnote 23 [document XX002](#) and footnote 19 [document XX001](#), and footnote 45 [document YY087](#)

cclxvi See phase 1 footnote 45 [document YY062](#)

cclxvii Referenced in the [open record](#). See also phase 1 footnote 45 [document YY064](#) and phase 1 footnote 45 [document YY063](#)

cclxviii Referenced in the [open record](#). See also phase 1 footnote 45 [document YY072](#) and [phase 2 footnote 11](#) document INV008

cclxix Referenced in the [open record](#). See also phase 1 [footnote 46 document YY008](#) and phase 2 batch 2 footnote 15 [document INV295](#).

cclxx Referenced in the [open record](#). See also phase 1 footnote 23 [document XX037](#).

cclxxi See phase 2 footnote 19 [document INV351](#) (also provided as phase 1 footnote 10 [document XX036](#))

cclxxii See phase 2 footnote 19 [document INV009](#) and footnote 17 documents [INV010](#) and [INV293](#)

cclxxiii See phase 2 footnote 16 [document INV354](#), footnote 17 documents [INV010](#) and [INV350](#), and footnote 23 [document INV015](#) (also provided as phase 3 footnote 15 [document JR001](#))

cclxxiv See phase 2 batch 2 footnote 18 documents [INV135](#) and [INV161](#) (also provided as phase 3 document [JR004](#) and [JR005](#))

cclxxv See phase 2 batch 2 footnote 18 documents [INV016](#) and [INV017](#) and footnote 23 [document INV015](#)

cclxxvi See phase 3 footnote 15 [document JR013](#) (also provided as phase 2 footnote 18 [document INV017](#))

cclxxvii See phase 2 footnote 24 [document INV113](#) (also provided as phase 3 footnote 15 [document JR017](#)), phase 2 batch 2 footnote 18 [document INV286](#), phase 2 footnote 19 [document INV346](#) (previously provided as phase 3 footnote 15 [document JR002](#))

cclxxviii See phase 2 batch 2 footnote 18 [document INV286](#)

cclxxix Referenced in the [open record](#). See also phase 2 footnote 18 [document INV071](#) (also provided as phase 3 footnote 15 [document JR006](#)) and phase 3 footnote 18 [document INV287](#) (also provided as phase 1 footnote 46 [document YY046](#))

- 
- cclxxx See phase 2 batch 2 footnote 18 [document INV016](#) (also provided as phase 3 footnote 15 [document JR012](#)) and phase 2 footnote 18 [document INV645](#)
- cclxxxi See phase 2 footnote 18 [document INV071](#) (also provided as phase 3 footnote 15 documents [JR003](#), [JR004](#) and [JR006](#))
- cclxxxii See phase 2 footnote 20 [document INV121](#) (also provided as phase 3 footnote 15 [document JR008](#))
- cclxxxiii Referenced in the [open record](#). See also phase 2 footnote 20 [document INV019](#) (also provided as phase 3 footnote 15 [document JR009](#)) and phase 2 footnote 23 [document INV015](#) (also provided as phase 3 footnote 15 [document JR001](#))
- cclxxxiv See phase 2 footnote 21 [document INV103](#) (also provided as phase 3 footnote 15 [document JR010](#)) and phase 2 footnote 22 [document INV112](#) (also provided as phase 3 footnote 15 [document JR007](#))
- cclxxxv See phase 3 footnote 15 [document JR011](#)
- cclxxxvi See phase 2 footnote 23 [document INV015](#)
- cclxxxvii See phase 3 footnote 15 [document JR012](#)
- cclxxxviii See phase 2 footnote 24 [document INV113](#) (also provided as phase 3 footnote 15 [document JR017](#))
- cclxxxix On 25 November 2020, the House [approved](#) the appointment of the first eight members of the Panel
- ccxc See the Committee on Standards report [Sanctions in respect of the conduct of Members](#), 21 July 2020, HC 241 2019-21, paragraph 55 and tables 2 and 3, pp 26-27
- ccxci See the Committee on Standards report [Sanctions in respect of the conduct of Members](#), 21 July 2020, HC 241 2019-21, paragraph 94

