



OFFICIAL REPORT
AITHISG OIFIGEIL

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 25 August 2020

Session 5



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**COMMITTEE ON THE SCOTTISH GOVERNMENT HANDLING OF HARASSMENT
COMPLAINTS**

4th Meeting 2020, Session 5

CONVENER

*Linda Fabiani (East Kilbride) (SNP)

DEPUTY CONVENER

*Margaret Mitchell (Central Scotland) (Con)

COMMITTEE MEMBERS

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

*Jackie Baillie (Dumbarton) (Lab)

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

*Angela Constance (Almond Valley) (SNP)

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

*Alison Johnstone (Lothian) (Green)

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

James Hynd (Scottish Government)

Nicola Richards (Scottish Government)

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 25 August 2020

[The Convener opened the meeting at 10:34]

Development of Policy on Handling Harassment Complaints

The Convener (Linda Fabiani): Good morning, everyone, and welcome to the fourth meeting in 2020 of the Committee on the Scottish Government Handling of Harassment Complaints. We will move straight to evidence in phase 1 of the inquiry, on development of the handling of harassment complaints procedure.

I will not repeat my statement from the start of last week's meeting, but I refer members, witnesses and media to its terms. In summary, we are bound by the terms of our remit and the relevant court orders. That includes the need to avoid contempt of court that might be caused by identifying certain individuals, including through jigsaw identification. The committee as a whole has agreed that it is not our role to revisit events that were a focus of the trial in a way that could be seen to constitute a rerun of the criminal trial.

Our remit is quite clear. It is

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

The more we get into specifics of evidence, the more we run the risk of jigsaw identification. As I have previously explained, I would be grateful if members' questions and witnesses' answers could reflect those terms. In return, I will endeavour to let the evidence sessions flow, within our legal limits.

Wherever possible, please avoid naming specific Government officials, unless they were central to development of the policy. Lastly, for ease of navigation, where possible please mention the document reference number and footnote reference when asking about a particular record that has been submitted by the Government.

With that, I welcome James Hynd, who is head of the Cabinet, Parliament and governance division of the Scottish Government.

James Hynd *took the oath.*

The Convener: I invite Mr Hynd to make a brief opening statement to explain his role in the Scottish Government and in the development of the policy

James Hynd (Scottish Government): Thank you, convener, and good morning, committee members. I will make some brief opening remarks, just to explain my role within Government and in relation to development of the procedure.

I began my current role in early 2013, and I have a wide range of responsibilities within Government. The ones that are most relevant to today's meeting are my role as head of the Cabinet secretariat and my role in giving advice on matters relating to the Scottish ministerial code.

My involvement with what was to become the procedure began following the First Minister's commission, in October 2017, of the Government to review its policies and procedures in order to ensure that they were fit for purpose and that they gave confidence to people who might raise concerns.

Given my role in relation to the ministerial code, it fell to me to lead the process that led, in due course, to the creation of the procedure. Drawing on legal and human resources advice, we had a number of underpinning objectives: the procedure had to be lawful; it had to reflect best HR practice; it had to be fair and to balance the interests of all parties involved; and it had to respect the responsibilities of the permanent secretary and the First Minister. Throughout the drafting process, we tested the procedure against each of those criteria. The procedure was approved by the permanent secretary, given her duty of care for the staff of the Scottish Government, and by the First Minister, as the arbiter of ministerial standards of behaviour.

In answering questions, I will draw from the report that the Scottish Government has provided to the committee, as well as from the supporting documentation and the chronology of events that we have also supplied. For the avoidance of doubt, I note that I am giving evidence to the committee on behalf of ministers, and not in a personal capacity.

I note that, at the request of the committee, the Public and Commercial Services Union—the PCS—has submitted written evidence. In the interests of full disclosure, I declare that I am a member of that union.

The Convener: The first question is from our deputy convener, Margaret Mitchell.

Margaret Mitchell (Central Scotland) (Con): Good morning, Mr Hynd. Have you, from 2008 to the present day, prior to your taking up your current position, which I think you said was in early

2013, been employed in any other role or capacity that might be relevant to the committee's inquiry?

James Hynd: Immediately prior to my current role, I held a role in the corporate centre of the organisation and had responsibility for, among many other things, the buildings and estates of the Scottish Government. That meant that, for a time, I was responsible for the functioning of Bute house, as well as many other Scottish Government buildings around the country. In that role, I would occasionally have contact with the former First Minister.

Margaret Mitchell: Is it your position that you do not have any experience or anything else from those former roles that might be relevant to our inquiry?

James Hynd: In terms of the procedure, no—there was nothing that would be relevant to the procedure in terms of the matters that the committee is considering.

Margaret Mitchell: There is a partnership agreement between the council of Scottish Government unions and the Scottish Government. Have you had any direct involvement in issues that the partnership looks at, in particular with regard to employee relations?

James Hynd: Have we moved on to my current role?

Margaret Mitchell: Yes, absolutely.

James Hynd: In my current role, I have no direct involvement with the CSGU.

Margaret Mitchell: In your current position, are you aware of any specific employment relations issues regarding bullying or sexual harassment that surfaced, were reported or talked about anecdotally or informally, or which were the subject of a formal complaint?

James Hynd: Certainly there was nothing relating to a formal complaint, other than the material that has emerged subsequently. I do not feel that I am in a position to make any comments about things that might be hearsay or anecdote regarding such matters.

Margaret Mitchell: By “anecdotally”, I mean via any other form of communication, such as a phone call or a text.

James Hynd: Oh, I see. No—there was nothing like that.

Margaret Mitchell: So, you are quite clear that from 2013 to the present, you were aware of nothing that would have caused you concern in terms of informal or formal complaints about bullying or sexual harassment.

James Hynd: No—I am racking my mind to think whether there was anything. It is a very long period. There is nothing that I can identify about which I would be able to say to the committee that I was personally involved in it, nor is there any factual information that I have that I could provide to the committee regarding those matters.

Margaret Mitchell: Do you have sight of the people survey? It is an annual survey.

James Hynd: Yes. All staff are invited to take part in the people survey. As the head of a division, I receive results about my division and—along with every other senior manager—I consider the results very carefully in terms of what they tell me about the operation and staff sentiment among colleagues who work for me. The people survey is a very important milestone for the Scottish Government in the course of the year.

Margaret Mitchell: From 2013 to 2016 and onwards, did the people surveys raise any concerns about bullying and sexual harassment? If so, how did that develop over that period?

James Hynd: There are two levels. There are the corporate results for the SG as an overall entity, on which the people survey reports. The permanent secretary spoke about that last week.

In addition, most business areas in the Scottish Government get local reports. As the head of a division, I get a local report about my division, which numbers about 25 staff. That report will be particular to my circumstances, and I, along with my team leaders, spend a lot of time analysing what it means and what staff are telling us, at both the corporate level and the business area level, about things that we, as managers, should be thinking about in respect of how we can make sure that our staff's experience of working in the Scottish Government is as positive as possible.

Margaret Mitchell: What about specifically on sexual harassment and bullying?

James Hynd: As I said, the permanent secretary identified the actions that were to be taken at corporate level. My division is relatively small, so the results involved about 25 people, and no individual could be identified. The process was about understanding what the results meant for how I should manage my division more effectively, in light of what staff said.

10:45

Alex Cole-Hamilton (Edinburgh Western) (LD): Last week, we learned that concerns had been raised informally about the conduct of the former First Minister, which may or may not have influenced the development of the policy. I am not asking whether those claims were based on fact; I am just keen to understand what happened.

You said to Margaret Mitchell that you were not personally involved in dealing with, and do not have factual information on, allegations of misconduct. However, when did you first learn that there were concerns about alleged bullying by the former First Minister?

James Hynd: Tell me if this does not answer your question, but I first learned about the concerns and complaints that were raised under the procedure in August 2018, when there were newspaper reports about that. I knew nothing about those concerns—

Alex Cole-Hamilton: Forgive me for not being clearer, but that is not what I was asking about. I am not talking about the procedure; I am talking about the scuttlebutt, the rumour mill or the general quiet mutterings and understandings about the culture of the time. We know that there were mutterings of that kind and that there were concerns about alleged misconduct, such as bullying or inappropriate sexual behaviour by the former First Minister. I am not asking about the procedure. I am asking when you learned about those rumours or mutterings.

James Hynd: I find that quite a difficult question to answer, because you are inviting me to comment or reflect on rumour or hearsay.

Alex Cole-Hamilton: To dial back, I say that I am trying to establish information on the culture in which the procedure was designed. Cultures have a formal process, but they also have an informal process—they have the organisational discussions that happen by the water coolers. Thinking about such discussions, when were you first made aware that there were informal concerns that had not materialised into complaints about the former First Minister's behaviour?

James Hynd: I was not told anything of that sort in relation to the work that I was doing on the procedure.

Alex Cole-Hamilton: I am not suggesting that you were told directly, because, given your seniority, that might have been seen as an escalation. Were you aware that people in various arms of the civil service had concerns about the conduct of the First Minister?

James Hynd: Well, yes—things were said, but I have no idea whether they were true or not.

Alex Cole-Hamilton: Did you ever share awareness and knowledge of those concerns with a high-ranking official in the Scottish National Party?

James Hynd: No, never.

Alex Cole-Hamilton: Did you ever share those concerns with ministers or Government special advisers?

James Hynd: No. They would not be concerns. You mentioned scuttlebutt and rumour; they are hardly things to start raising formally with senior colleagues.

Alex Cole-Hamilton: To your knowledge, was an informal investigation of any of those concerns ever undertaken?

James Hynd: No—not to my knowledge.

Alex Cole-Hamilton: To your knowledge, were any informal measures adopted to mitigate those concerns or rumours?

James Hynd: I have no knowledge of any such measures.

Alex Cole-Hamilton: Convener, I have a couple more questions, but perhaps you want to bring in another member.

The Convener: I will bring you back in again later.

Angela Constance (Almond Valley) (SNP): Last week, the permanent secretary said in her statement:

“As civil servants, every process that we create must be robust and fair and open to ... challenge and scrutiny”.

She went on to say:

“Creating the new human resources procedure was no different.”—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints*, 18 August 2020; c 10.]

However, first, it appears that trade union engagement was limited. We know from the Public and Commercial Services Union that there was only one formal meeting of the harassment working group.

Secondly, it is clear that the work was done at pace, from its being commissioned at Cabinet on 31 October to its being signed off on 20 December.

Thirdly, it appears to be that there was no formal wider staff engagement, other than an email from the permanent secretary at the beginning of November.

Fourthly, we know that the draft policy was sent to one person—a potential complainant—before it was signed off by the First Minister. Were you, then, confident that the policy was fair and robust, given that you were leading the work?

James Hynd: Yes, is the direct answer. There was a team of colleagues, as was said in the statement that was submitted and as I said in my opening remarks, who were professional advisers on legal and HR matters and were closely involved in working with me on a collaborative basis to develop the procedure and to engage, as appropriate, with other parties that might have

something to contribute to development of the procedure.

We did the work at pace. As you will know, when a commission comes from the Cabinet, it concentrates the mind and we move quickly to deliver what Cabinet and the First Minister are asking for. The engagement that took place with the trade unions was led by my colleague Nicola Richards, who will be appearing after me.

On staff engagement, a number of messages, not just one, were issued by the permanent secretary about the review work that had been commissioned. In some ways the procedure was unlike other HR procedures because it was not something for general application by local managers; it was a procedure that would be dealt with by the centre of the organisation. Its development was perhaps therefore taken forward in a slightly different way from that for a normal HR policy of that sort.

So, the answer is yes, I am sure that the policy was robust, lawful and reflected best HR practice, courtesy of the expert professional input that we had in development of the procedure.

Angela Constance: What would have been your sources of information for best HR practice?

James Hynd: The sources would have included professional advice within the Government from the relevant part of the Government in the people directorate who give HR advice. Clearly, legal advice that was informed by employment law was also taken at all appropriate moments, and the Advisory, Conciliation and Arbitration Service's guidance was influential in terms of the design of the procedure and how it was developed. I am therefore convinced in my mind that all relevant sources of expert advice were consulted and fed appropriately into the procedure.

Angela Constance: What can you tell us about the advice that the Government received from ACAS, given that the information that came to the committee was pretty heavily redacted?

James Hynd: Yes. Without trying to dodge the question, I say that that might be—this is where I was relying on my HR advisers to help me with development of the parts of the procedure to reflect best HR practice—something that Nicola Richards, who will be here after me, would, given her role, be better placed to talk about in detail.

Angela Constance: Okay. I am sure that we will ask her to do that. Throughout the permanent secretary's contribution last week, she repeatedly stated that policy development was "informed by legal" and HR advice. At what points would policy development specifically engage with legal advice? How does that work?

James Hynd: As I said in my opening remarks and as you know, there are constraints on what I am able to talk about in terms of legal advice: I cannot talk about the content or the source. However, I can confirm to the committee that legal advice was taken from the very first moment that the procedure began to be drafted on 7 November, all the way through to its publication.

Angela Constance: Okay. When people talk about the policy development being informed by legal advice, what exactly does that mean? Does it mean wholesale acceptance, or does it mean that legal advice is taken and then adapted?

James Hynd: I think that development of the procedure was an iterative process. Many versions of the procedure were produced during the period up until it was signed off on 20 December. Legal advice was sought at every stage and at every point in its development, in order to help to shape the procedure, so that what we ended up with was lawful.

Angela Constance: Okay. I suppose what I am trying to have clarified is whether, when legal advice informs a process, that is implicit acceptance of the legal advice.

James Hynd: I think that all that I can say is that we have ended up with a procedure that the Government regards as lawful. It would not be lawful if it was not to the satisfaction of the appropriate legal advisers. So, you may reasonably infer that the procedure that was produced was informed on the basis of legal advice that was accepted in order to ensure that the procedure was lawful.

Angela Constance: Okay. Just to be clear about the policy work on which you were leading, was the legal advice internal or did it come from an external source?

James Hynd: I do not think that I am allowed to say what the source of the legal advice is.

Angela Constance: I am not asking you to tell me what the source is; I am asking you whether it was provided in-house or out of house.

James Hynd: I think that that would indicate whether the advice was, by definition, in-house or had been outsourced, so I do not think that I will be drawn on that, if that is okay.

Angela Constance: Okay. I have no further questions at the moment, convener.

The Convener: Murdo Fraser has a supplementary to Ms Constance's questions.

Murdo Fraser (Mid Scotland and Fife) (Con): On the issue of legal advice that my colleague was pursuing, and specifically on the question of whether former ministers would be considered as

part of the policy, did you have sight of that specific legal point?

James Hynd: Yes. I am pausing not because we did not have legal advice but because I was considering whether my answer would disclose something that it should not.

Every aspect, including the first procedure that was produced on 7 November, dealt only with former ministers. As I said to Ms Constance, we had legal advice from the outset. Given the fact that the first procedure focused purely on former ministers, you can, again, reasonably assume that legal advice was taken on that.

Murdo Fraser: Was that advice definitive in its view that including former ministers in the policy would be legal?

James Hynd: Again—and I am sorry if this sounds as though I am answering in the question in a slightly roundabout way—the final procedure provides for former First Ministers. We regard that as a lawful document and a lawful procedure. Therefore, again, you can reasonably assume that legal advice was taken that supported that view.

Jackie Baillie (Dumbarton) (Lab): I think that you would be accurately described as a career civil servant.

James Hynd: Correct.

Jackie Baillie: Excellent. Thank you. Your knowledge will undoubtedly be extraordinarily helpful.

I understand you saying that, when a Cabinet commissions something, a degree of speed is required. You produced a first draft of the policy in a week. Is that correct?

James Hynd: Yes.

Jackie Baillie: Okay. The Cabinet paper on 31 October and, indeed, the statement made to Parliament by, I think, John Swinney on 31 October made no mention of former ministers. When were former ministers first included? If that aspect appeared in your very first document, who did you have the discussion with about that, and when?

James Hynd: You are right. The Cabinet paper and Mr Swinney's response to the topical question that day do not refer, from memory, to former ministers. My involvement is that I attended Cabinet that day, as I normally do—apart from today—and I heard the discussion. In the days running up to that, the First Minister wrote to the Presiding Officer on Monday, the day before Cabinet, to express concerns.

The concerns that were expressed were generated by, frankly, the rather unsavoury headlines that were emanating from Westminster

and Whitehall about alleged behaviour down there. Given my ministerial code responsibilities, I was already thinking about what we would do here if we had the same kind of allegations surfacing in Scotland. Therefore, my mind was already in that space. When the commission came from the First Minister and the Cabinet to review the policies and procedures, I was already in the space of thinking that the gap that we had in Scotland was in respect of allegations made against former ministers.

11:00

As set out in the Scottish Government's report to the committee, a complaint against a current minister could be considered using two approaches. The First Minister could consider it under the ministerial code, and we had the fairness at work policy, which had a section that related to complaints against ministers. However, there was nothing about former ministers. That was a gap that I identified, and it was my decision to take forward work on the development of our procedure, which referred at that stage only to former ministers.

Jackie Baillie: That is a very significant inclusion. I am keen to understand whether you just conjured that up yourself or you had any discussions before putting that into the first draft.

James Hynd: The discussions that were had were at the official level with people such as Nicola Richards and others in the people directorate who were looking at a wider review of Scottish Government policies and procedures in line with the Cabinet commission. My involvement is with the Scottish ministerial code and giving advice on ministerial standards of behaviour.

Jackie Baillie: I absolutely get that, but what I am trying to identify is whether you spoke to anybody about that quite significant inclusion in the first week. Did you send a minute, a memo or anything at all, or was that entirely down to you? You could not have been unaware of the significance of the inclusion, so I would have thought that you would have checked with some of your civil service colleagues. You mentioned Nicola Richards and others. Who were the others?

James Hynd: Colleagues in the people directorate and ones from whom I sought legal advice on those matters.

Jackie Baillie: Did you speak to the permanent secretary?

James Hynd: I did not speak to the permanent secretary at that point because a draft procedure that would, in due course, come forward for the permanent secretary and the First Minister to sign off was being developed. I was developing a

proposition; it was not the settled procedure at that point. It would not be settled for a number of weeks to come.

Jackie Baillie: You have said that you based that on discussions that you heard around the Cabinet table. Were former ministers mentioned in those discussions?

James Hynd: No. I would need to look again in detail at the Cabinet minute extract that we have supplied but, from memory, there was no reference to former ministers in that discussion.

Jackie Baillie: Thank you.

Who drove that process? In our previous meeting, the permanent secretary seemed to suggest that she was not really that involved. I am curious to know what the communication was between you during that process. Was it fairly regular? Was it daily? Was it by email or verbally? How did you report back?

James Hynd: The communication with whom, Ms Baillie?

Jackie Baillie: With the permanent secretary.

James Hynd: I spoke to the permanent secretary probably two or three times over the course of the development of the procedure. I spoke more frequently with her private office. It was clear that her private secretaries were keeping a close watch on the overall review and my contribution to it. There was some direct involvement with the permanent secretary and indirect involvement through her private office.

Jackie Baillie: Thank you.

I want to ask you about independence in the process. I refer to the memorandum from Judith Mackinnon dated 7 November 2017 in document YY073. It suggests that allegations against former ministers should be investigated independently. You agreed with that, did you not?

James Hynd: Which footnote is that?

Jackie Baillie: I have no idea which footnote that is. I have it as a memo from Judith Mackinnon on 7 November. The document number is YY073.

James Hynd: I will take a moment to locate that.

That is a note from Judith Mackinnon dated 7 November at 10:38.

Jackie Baillie: It could well be 10:38. You are far more precise than I am.

James Hynd: Do you have the document?

Jackie Baillie: I have a whole pile of documents.

James Hynd: It is okay if you are prepared to accept that I have tracked down the right one.

Jackie Baillie: I believe you. I cannot believe that there would be more than one email at 10:38. I will defer to you on that.

The content of the memo suggests that allegations against former ministers should be investigated independently. My understanding is that you agreed with that. Why did that never happen?

James Hynd: On what are you basing the idea that I agreed with that? I am not sure that I did agree.

Jackie Baillie: My understanding is that there are further emails that the committee does not have, which came from you, in which agree you with that proposition. You might want to go back and look for those emails so that you can furnish the committee with them.

James Hynd: I cannot immediately identify those emails.

Jackie Baillie: Okay. Let me pose the question. Did you think that independent investigation of former ministers was a useful thing to have?

James Hynd: I suppose that I would ask what that meant in practice. The procedure provided at paragraph 10 of the procedure guide is that somebody who is not involved in the matter under investigation would act as the investigating officer. That would be somebody who is independent of the allegations. There is another way to read it, which is that that would involve some third party, from outside Government. I am not sure whether that is what Judith Mackinnon meant there.

My view—and I remember discussing it with Nicola Richards—is that the procedure is essentially an internal HR document from within Government. Most HR procedures of that sort would be dealt with internally, before any external, independent role might be envisaged. On the basis of the advice that I had, including the legal advice and HR best practice, it felt that the appropriate way to design the procedure was by having an investigating officer who was not directly involved in the incident. That was where we ended up.

I accept that there are other arguments. We are not blind to those. Other organisations do use independent investigators.

Jackie Baillie: Did you yourself not in fact suggest three names of independent people who could provide advice?

James Hynd: Yes.

Jackie Baillie: You did. The committee does not have that email, unfortunately.

James Hynd: They were Scottish Government civil servants. They were not independent third parties. That was what I agreed with. I took a procedure that the investigation would be done by a Scottish Government official who was unconnected to the matter being investigated and I offered some names of who those individuals might be. They were not external to Government.

Jackie Baillie: I have a final short question in this section.

You sent an email to the Cabinet Office, seeking its opinion on the policy to include former ministers. You got quite an uncomfortable response. Did you go back to the Cabinet Office? Did you even reply to the point about including former civil servants? I am curious about what happened after that.

James Hynd: To be honest, I did not go back to the Cabinet Office. Cabinet Office colleagues were expressing a high degree of caution. They were referring me to a process that was under way within Whitehall and was being led by a now former permanent secretary down there. They were asking whether it would make sense for us to await the outcome of that review before taking action.

Given the commission from the Cabinet, given that the First Minister had written to the Presiding Officer and was keen to take national leadership on the matter and given that the permanent secretary was keen that her duty of care to staff was as full and comprehensive as it might be, delaying until what turned out to be until September 2018 did not feel like an option to me.

Jackie Baillie: Thank you.

The Convener: There are short supplementaries from Alex Cole-Hamilton and Maureen Watt.

Alex Cole-Hamilton: On the role of Judith Mackinnon, when were you first aware, Mr Hynd, that drafts of the procedure had been shared with people who would go on to become complainants?

James Hynd: It was later in 2018 and I think that it was possibly connected to the judicial review process, when it became known to me that the draft procedure had been shared with people who were raising concerns.

Alex Cole-Hamilton: Is that common practice?

James Hynd: I think that the permanent secretary covered that point last week when she talked about the increasing tendency for Government to share drafts of procedures in development with people who might have experience to offer. I was not involved in any decision about sharing with any of the people who

were raising concerns, so I do not have the context as to why that was done on that occasion.

Alex Cole-Hamilton: I have two more questions, convener—

The Convener: I will try to bring you back in, but I am very aware of the time. I will bring in Maureen Watt.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): I want to tease out some issues to do with the people survey, which found that 10 per cent of Scottish Government staff had experienced bullying or harassment—that is 10 per cent of roughly how many?

James Hynd: Again, I do not want to be unhelpful, Ms Watt, but Nicola Richards will be much better placed to answer such questions, given that she acts at corporate level in the people directorate.

Maureen Watt: Okay.

Given that you have a role in marrying the internal policy on harassment with the Scottish ministerial code, it is important that I ask about this. According to our briefing paper,

“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).”

Where do Government ministers fit into that?

James Hynd: I cannot answer that question, I am afraid. It is not my area of responsibility.

Maureen Watt: It seems important, because those numbers represent quite a lot of instances of people saying that they had experienced bullying or harassment, and it would be interesting to know how those were followed up, in the context of not just Government ministers but the organisation as a whole.

James Hynd: I am sure that Nicola Richards will be able to give you chapter and verse on that.

The Convener: Before I bring in Alison Johnstone, I have a query. We discussed the Westminster review last week with Leslie Evans. What was the outcome of that review?

James Hynd: A report was produced by Dame Sue Owen, a former permanent secretary, in which she described her findings and some of the cultural issues that had been identified as a result of her work. She produced some recommendations but not a procedure of the sort that we have for dealing with complaints against current or former ministers.

I think that it remains the case in Whitehall—as far as I know—that complaints against current ministers will be considered under the ministerial code and there is no bespoke, stand-alone

procedure for dealing with such complaints. I am not aware of anything at all for former ministers.

Sue Owen produced quite a descriptive report, which contained some recommendations. I did not see—and I still do not see—any hard product coming out of it.

The Convener: Thank you.

Alison Johnstone (Lothian) (Green): The minute of the Scottish Cabinet meeting of Tuesday 31 October, to which Jackie Baillie referred, says, in paragraph 38:

“While there was no suggestion that the current arrangements were ineffective, the First Minister had also asked the Permanent Secretary to undertake a review of the Scottish Government’s policies and processes to ensure that they were fit for purpose.”

Mr Hynd, is it correct that you led the development and drafting of a new procedure that could be applied in respect of former ministers?

James Hynd: Yes.

11:15

Alison Johnstone: You have already referred to this, but the timeline prepared by the Scottish Government indicates that the internal assessment identified that there was

“a gap in terms of having a procedure that could be deployed should any historical complaints arise in Scotland.”

Is that correct?

James Hynd: Yes.

Alison Johnstone: The convener has touched on this point, but I am interested in the methodology for drafting the policy and any precedent used to inform the drafting process. What discussions did you have with other Administrations or Governments in the United Kingdom on that? You have noted that there is no similar policy in place at UK Government level. Did you discuss the issue with civil service colleagues within other Governments?

James Hynd: We reached out to the Cabinet Office, but we got nothing back, if I can put it that way, in the form of a template that we could use here. We looked around other Administrations as well and there was nothing obvious that we could use. Effectively, I was starting from scratch in developing the procedure. As far as we know, it remains the only procedure of its type.

I was using my experience of several years of offering advice on the ministerial code. I knew what kind of areas I should be drafting. I was getting advice from legal and HR colleagues. I sat down one day with a blank sheet of paper and started writing and that was the process that led to

the development of the final procedure, as agreed by the First Minister and the permanent secretary.

Alison Johnstone: Is it the case that, currently, the procedure that can be applied to former ministers is unique to the Scottish Government?

James Hynd: Yes, as far as I know. We have not seen any others since that would be relevant for former ministers. I know that there was also engagement—although not by me directly—between people directorate colleagues and the Scottish Parliament, which was going through the same process and thinking about its own procedures in relation to harassment and bullying. The Parliament has produced its own stand-alone procedure. Many organisations were grappling with those issues in the aftermath of the #MeToo campaign, particularly within the Scottish Government in light of some of the allegations emerging from Westminster.

Alison Johnstone: Did you have any feedback or input, even if it was informal, from colleagues at Westminster? Were any concerns expressed about the development of the policy in Scotland or were they looking at the work that you were undertaking and thinking that it was something that they might wish to pursue in the future?

James Hynd: As I said in my exchange with Ms Baillie about the engagement with the Cabinet Office, it was clear that they were, as they said in their email, uncomfortable about where we were getting to. I think that that was potentially because we were ahead of them in the development of such a policy.

Alison Johnstone: Do you think that their concern was purely that they would be perceived as being inactive?

James Hynd: I do not want to put words in their mouths. It was never expressed in that way. In light of that response, we took the decision that we had been given a direct commission by the First Minister, supported by the permanent secretary, to ensure that we had a comprehensive suite of up-to-date, fit-for-purpose policies and procedures. I identified the gap in respect of former ministers, and it was subsequently agreed by the permanent secretary and the First Minister that that needed to be filled.

Alison Johnstone: Why was it that, until then, there was no such policy?

James Hynd: Do you mean in respect of former ministers?

Alison Johnstone: Yes.

James Hynd: It is not a straightforward thing to do in respect of some of the practical issues. By the end of 2017, a former minister of another party would not have been in office for more than 10

years, so we were dealing with issues that are quite historical in nature, and considering the understanding and the evidence within Government for any allegations that are raised. It is not simple. I think that it was right to fill the gap, but perhaps it had not been addressed in times gone by because of the difficulties and complexities in drafting such a procedure. Of course, the catalyst for us and for ministers to want to do something at that time was the #MeToo movement and some of the specific allegations.

Alison Johnstone: My final question relates to the robustness of the application of the procedure, when we finally have it—colleagues have touched on that, too—and the need to designate a senior civil servant as an investigating officer to deal with complaints. It is essential that that person is seen to be wholly independent and is not involved in any way, shape or form with anyone who is involved in the case. Do you agree that there was a clear failure to implement that procedure robustly, and that that led to the outcome of the judicial review?

James Hynd: Yes. The permanent secretary has been clear that the way in which the procedure was applied and that part of the procedure could give the appearance of there being bias. There was not bias, but the way in which that part of the procedure was applied could give the appearance of bias. That had consequences for the judicial review case. The procedure remains extant and lawful in the way that I have described, so there are no fundamental concerns about the procedure. The issue was how it was applied and the potential for apparent bias.

Alison Johnstone: While this was happening in real time, were any concerns raised about the perceived lack of independence in this situation?

James Hynd: What time are we talking about?

Alison Johnstone: Did any colleagues raise concerns about the independence of the investigating officer, or did those come to light only as a result of the judicial review?

James Hynd: I was not involved, so I did not know that there was any contact or that any people were coming forward with concerns or complaints. I did not know that there was engagement with them by the person who would be appointed as the investigating officer. I had no first-hand knowledge of those things.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): At our previous meeting, the permanent secretary explained what she called the “iterative process”—I think that you have called it that, too—that led to the development of the policy. She indicated that there was very limited involvement by ministers in that process. Had there been some involvement from special advisers?

James Hynd: Yes. As is noted in the report that has been submitted, the First Minister’s chief of staff had involvement at one or two points in the development of the procedure.

Dr Allan: Am I right in thinking that special advisers are regularly copied into very large numbers of emails on the development of Government policy? Was there something unusual about the degree to which special advisers were involved in this policy?

James Hynd: The development of the procedure did not generate large volumes of emails to large copy lists. The work was not secret. The First Minister and Mr Swinney had talked about it in public, and the permanent secretary had indicated to the organisation that the review was under way, so it was not being done in secret. Nevertheless, a reasonably small number of colleagues had a business reason to be involved in the development of the procedure.

I did not routinely copy in Liz Lloyd, the First Minister’s chief of staff, but there were a couple of occasions when she was copied into emails and commented on them. I think that those emails have been disclosed to the committee.

Dr Allan: On that point, I note one occasion when the chief of staff was included. I refer to document XX013. I think that you will be familiar with it without needing to thumb through it, but you are welcome to take a pause to do so if you wish. In that email exchange, it was commented on that some tricky questions had still not been agreed. Are you able to say a little more about what some of those tricky questions were?

James Hynd: Could you remind me which document you are referring to?

Dr Allan: The document reference number is XX013. It is part of a draft letter from the First Minister to the permanent secretary.

James Hynd: I am not sure that I am able to put my hand on that paper immediately; however, I do know that exchanges that were had with the chief of staff around that time—was it 17 November?

Dr Allan: Yes.

James Hynd: The procedure was still in draft at that point. We had been working on it, clearly, for 10 days or so and it had gone through various iterations. By—if I can just check my notes—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.

The chief of staff’s interest at that time—and I think that that is identified in the report that has been submitted—was to ensure that there was an

appropriate recognition of the First Minister's responsibilities and a separation of responsibilities between the First Minister and the permanent secretary.

During the exchanges that I had with the chief of staff, particularly 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.

In some ways, it was a strengthening of the independence of the procedure from the First Minister that put the responsibility to decide whether to initiate an investigation against a current minister on to the permanent secretary. In the engagements that I had with the chief of staff, she was reflecting what she felt was the First Minister's view that the First Minister should have less and less involvement in the operation of the procedure at an operational level.

The Convener: Everyone has supplementaries to this section of the questions.

I am very aware that Maureen Watt and Murdo Fraser have not been able to ask their questions. I will give them the opportunity to do that first, and then I will do a round-up.

Maureen Watt: Can I get a flavour of how much independence you have from the rest of the UK civil service in developing policies? For example, how much does the internal bullying and harassment policy have to align with the policies in other parts of the UK, given that civil servants can move around the UK as a whole?

James Hynd: There is no obligation on the Scottish Government to follow the same policies and procedures that are developed by other Government departments. The permanent secretary has a responsibility for ensuring the health and wellbeing of staff and she has a duty of care to all Scottish Government staff. She therefore has an obligation to ensure that all policies and procedures are appropriately judged to deliver her duty and responsibilities.

11:30

Like other parts of Government, when we develop policies and procedures, we want to make sure, as we did in this case, that they reflect best practice. My colleagues in the people directorate speak to their counterparts in other Government departments and in the Cabinet Office on a regular basis about the development of policies. However,

as we saw in this instance, when there was a need for a distinctive Scottish solution, we proceeded on the basis of developing something that suited Scottish circumstances.

Maureen Watt: You were responsible for the revision of the ministerial code in the light of the survey and the internal civil service review of the policies. How much did the ministerial code have to be revised, and what exactly were those revisions?

James Hynd: The ministerial code was revised, and a fresh version was published in February 2018. For the most part, the First Minister—it is her code—decided that the revisions in the 2018 edition would reflect, almost to the letter, the changes that the Prime Minister was making to the UK ministerial code. Those changes reflected particular instances of behaviour on the part of ministers and former ministers.

The parts of the code that were strengthened concerned the behaviour of ministers in relation to the civil service and others in respect of bullying and harassment. Some changes were also made in relation to the notification of meetings, on the back of the issues that caused Priti Patel to resign. We—or rather, the First Minister—added some distinctive entries to the Scottish ministerial code in respect of the Lobbying (Scotland) Act 2016. A number of quite discrete changes were made to the Scottish ministerial code, which, by and large, reflected the changes that were made at UK level.

Maureen Watt: In your experience, have those changes resulted in a change in the culture of the organisation and in interactions with ministers? In other words, have subsequent staff surveys shown a difference, and a decline in the numbers of staff experiencing bullying and harassment?

James Hynd: Again, at the risk of sounding unhelpful, I am probably not the right person to give you a data analysis of the corporate people survey results and what the trends are. The permanent secretary talked a little about those last week and indicated that the results for the Scottish Government are at their highest level ever in terms of positive outcomes, which suggests that we are getting something right. I am sure that Nicola Richards will be able to give you more detail on those issues than I can.

Maureen Watt: From your day-to-day experience, do you think that there has been a shift?

James Hynd: In our day-to-day experience, ministers' compliance with the Scottish ministerial code remains very high. Ministers take the ministerial code very seriously indeed and make every effort to ensure that they comply with it at all times.

Murdo Fraser: I have a follow-up to Alasdair Allan's line of questioning and one other substantive question. My follow-up question is on the involvement of the First Minister's chief of staff, Liz Lloyd, in relation to the policy's development. It is clear from the information that we have seen that she was involved in the development of the policy. Is it typical for a special adviser—a political appointment—to be involved in drawing up a policy of that nature?

James Hynd: For the reasons that I gave earlier, the policy is quite distinctive. It engages the responsibilities of the permanent secretary in her duty of care to staff, so there is a human resources dimension to it, but it also engages directly with the First Minister's responsibility under the Scottish ministerial code.

I do not think that a normal HR process would go anywhere near a special adviser, but Nicola Richards would be able to say more about that than I can. Those processes would be a matter for the civil service function of the organisation. They are unlikely to be matters that we would engage a special adviser about, but you should remember that we are also dealing with the First Minister's responsibilities under the Scottish ministerial code, and it would be entirely legitimate for the chief of staff to become engaged with that.

Murdo Fraser: In effect, therefore, there are two distinct parts to this. It was the latter part where you would expect a political appointment to be involved.

James Hynd: Yes.

Murdo Fraser: I will ask one more question, convener, and then I am done. I want to go back to the question of Cabinet oversight of the policy and its formation. We know that the Deputy First Minister, John Swinney, was the Cabinet lead on the matter. As the most senior male figure, he was the one who was asked to respond to the topical question in Parliament on 31 October 2017. However, from the information that we have heard, it appears that he did not have any role in development of policy. Is that not unusual?

James Hynd: It is not unusual in this case. Mr Swinney's decision, as agreed at Cabinet on 31 October 2017, was that he would lead for the Government in the answer to the topical question to signal quite clearly that the #MeToo campaign and the allegations that had been made required men to review their own behaviour. He was signalling that on behalf of the Government. He did not, as a consequence, take on responsibility for the whole of the review or for the Scottish ministerial code. It is ultimately a matter for the First Minister to decide how her responsibilities under the code are discharged.

The Convener: There are some quick supplementary questions from members who have been listening. I would appreciate it if they were quick.

Margaret Mitchell: At that Cabinet meeting on 31 October 2017, the permanent secretary indicated that issues about former ministers were not discussed at Cabinet specifically, but the context of the commission made it clear that it could cover historical matters of concern, and it referred to the fact that many of these issues were long standing. Given that you led the development of drafting of the new procedure, which could be applied to former ministers, did you seek more information to better understand how the procedure would work?

James Hynd: I will break that into two parts. 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 a gap in relation to former ministers.

I was producing a draft that would then be put for approval to the permanent secretary and the First Minister. I was not deciding myself on what would be the procedure for the Scottish Government. For the reasons that I have just explained to Mr Fraser, the permanent secretary and the First Minister have separate and distinct responsibilities under the procedure, so they were asked to sign it off at the appropriate point.

In terms of the development of the procedure, as I said earlier, a small team of us were working on it collaboratively, pulling in appropriate professional advice. We developed the procedure in the way that we thought best reflected the gap that had been identified.

Margaret Mitchell: Did you just accept that the procedure would inform the ministers without requiring any more information about why?

James Hynd: Yes. I was acting on the basis of the commission. I was interpreting the requirements in the way that I thought would be most helpful and give some added value to the review and options that could then go up to the First Minister and the permanent secretary about how the totality of policies and procedures could be as comprehensive as possible.

Alex Cole-Hamilton: We now know that the procedure would be tested in its infancy, and that, before its ink was even dry, it would trigger probably the most explosive allegations in Scottish political history. Given that the procedure was ultimately your brainchild—it was your commission—were you consulted by the director

of people on the appointment of an investigating officer?

James Hynd: I was not.

Alex Cole-Hamilton: Did you seek to intervene proactively to ask about the status of those complaints, given their gravity and given your knowledge that the document had been shared with people who would later go on to become complainers?

James Hynd: To be clear—if I was not earlier—the first that I heard about any allegations was, I think, on 24 August 2018, when there were press reports. I knew nothing before then about any complainer or anybody raising concerns. I knew nothing about the appointment of any investigating officer or about any sharing of the draft procedure with any individuals. Once I had developed a procedure and it had been signed off, I stood back—rightly so—from any application of the procedure.

Jackie Baillie: When the First Minister wrote on 22 November to the permanent secretary to commission the policy, she included the phrase,

“former Ministers, including”

those of

“previous administrations regardless of party”.

Was that not the exact phrase that was suggested by the chief of staff to the then principal private secretary of the permanent secretary, in an email exchange which is, I believe, XX013 and—your response—XX014?

James Hynd: Do you have a footnote number?

Jackie Baillie: No. I do not follow the footnotes; I follow what the clerks give us.

James Hynd: I will never find it.

Jackie Baillie: Okay. I am happy to send it to you.

James Hynd: Thank you.

If I may correct one point, I say that the note from the First Minister to the permanent secretary on 22 November was not on the commission. The commission stemmed from the Cabinet meeting of 31 October.

On the note from the First Minister that you referred to, which invited the permanent secretary to make sure that any review reflected former ministers, we were already there. We were doing that from 7 November, so it was already covered. The note did not introduce anything new that we were not already doing.

Jackie Baillie: No. Interestingly, the file name is “Permanent Secretary Review Commission 17

November”. I am just using the language that the civil service used to describe it.

The Convener: It is in footnote 23.

James Hynd: That is the biggest footnote in the whole—

Jackie Baillie: That is the Scottish Government’s submission; it is nothing to do with us.

James Hynd: I will not take up the committee’s time—

Jackie Baillie: I am curious as to whether that was the exact wording that was suggested by the chief of staff, because we have a set of emails, in XX013, to the permanent secretary’s private secretary, which were then forwarded to you, and we have your reply. I am happy for you to write to the committee afterwards.

James Hynd: Yes, I will follow that up.

The note from the First Minister, which issued on 22 November, was circulating in draft before then. From memory, I think that I commented, “We’re doing this.” I think that the First Minister was keen, for the record and for the avoidance of doubt, to make sure that the procedure, or whatever review we were undertaking, covered former ministers.

Jackie Baillie: I just need confirmation that that was the phrase that was used by the chief of staff, which then made it into the letter of 22 November.

James Hynd: I shall look into that.

Jackie Baillie: Thank you. I ask you also to provide the emails that I referred to earlier, which were missing from the bundle that was given to the committee.

James Hynd: In terms of the names of those—

Jackie Baillie: Yes. Clearly, there were other emails, in which you have exchanged information about independent advisers, and, unfortunately, they do not seem to have been provided to the committee.

James Hynd: I will look into that for you.

Jackie Baillie: Thank you.

11:45

The Convener: I would like clarification on a couple of points before we wind up this evidence session. You have said a few times now that you had no knowledge of the complaints and that you were developing the policy as per your role. The committee has heard—and it has been submitted to us—that lived experience was deemed to be very important. One complainant was given a copy of the policy in draft form. When it came back, it

was more than likely reviewed, with changes made. Can you confirm whether you were aware, at that point, that a complainant had been given a copy of the draft policy?

James Hynd: I was not aware at the time, during the development of the procedure, and I was not aware for many months thereafter. In the light of the discussion last week and the timeline that we have produced, I have reviewed the point when that document was shared with one of the individuals who was to become a complainer. I think that it was shared on 14 December. The procedure, after all those iterations, was at or very close to being in its final form. My memory of looking at the drafting of the procedure is that nothing came back—that I could see—as a result of that sharing that caused any changes to be made to the procedure.

The Convener: My final point follows on from what Ms Baillie was saying about the missing documents. There have obviously been a lot of key meetings at which policy development changed as a result of comments. Are you aware of additional records that have not been provided to the committee?

James Hynd: Clearly, we have identified one. Are there others? I am happy to go back and have a look. I do not know how many documents there are—there are 150-plus—but it feels to me that there is a clear setting out of the process for the development of the procedure from its earliest days—from 7 November through to sign-off on 20 December. It felt to me, from reading it, that all the material points were covered in what has been disclosed. All I can say is that I am happy to go back, with colleagues, and have a look.

The Convener: No doubt you will be looking at the *Official Report* and supplying the information that has been requested.

James Hynd: Yes, of course.

The Convener: Thank you for your offer to have a look at other material and send it on to us.

All that is left to do is to thank you for your contribution. Thank you for coming along to the committee.

11:47

Meeting suspended.

11:54

On resuming—

The Convener: I welcome Nicola Richards, director of people in the Scottish Government. I begin by inviting Ms Richards to make a solemn affirmation.

Nicola Richards *made a solemn affirmation.*

The Convener: I invite Ms Richards to make a brief opening statement, explaining her role in the Scottish Government and the development of the complaints procedure.

Nicola Richards (Scottish Government): Thank you, convener, and good morning, members. These opening words aim to give context about my role and responsibilities as director of people, specifically with regard to the development of the harassment complaints procedures. I have been in the Scottish Government's people directorate since late 2010, initially on the learning and organisational development side, and I have led the overall directorate since May 2016. The directorate has around 250 staff, covering a wide range of responsibilities and technical expertise, so my role is one of strategic direction and management oversight.

The Scottish Government is a fair work employer, and that is reflected in our approach to equality, mental health and wellbeing. We have a public sector duty under the Equality Act 2010 to eliminate unlawful discrimination, which includes sexual harassment.

Bullying and harassment are not and never have been acceptable in the workplace. As the permanent secretary set out in her earlier evidence, the #MeToo movement in 2017 added momentum to a range of work, which was already under way through our people plan, to tackle bullying and harassment and to promote inclusiveness in the workplace. During that period, which the Cabinet described as a "watershed moment", my role involved co-ordinating various strands of work, from staff communications to accelerating internal policy reviews and ensuring that the permanent secretary was regularly briefed across the full range of activity.

In relation to the review that was commissioned by the Cabinet on the development of the ministerial harassment procedure, I worked in close partnership with Cabinet secretariat, legal and human resources professional colleagues on its development, to ensure that the commission was fulfilled.

As was set out last week, I am giving evidence to the committee on behalf of ministers and not in a personal capacity. This is complex legal territory,

so I ask the committee's forbearance if I have to seek advice or follow up with detail in writing, to ensure accuracy and that all the Government's legal duties are fulfilled.

Given that it has been invited to engage with the inquiry, I also wish to declare that I am a member of the union FDA.

The Convener: Thank you, Ms Richards. I invite committee members to ask their questions.

Margaret Mitchell: Ms Richards, you indicated that you took on your present role in May 2016 but were in the directorate before that. Can you confirm that that previous experience helped you to understand how the fairness at work policy was working in practice and any potential gaps?

Nicola Richards: To clarify, my role in the people directorate between 2010 and 2014 was largely on the learning and development side. I would have had less involvement at that point with the fairness at work policy.

Around August 2014, I expanded my role, which then took on some more of the HR policy side but not the direct investigation of bullying and harassment—my role was less in that area.

On fairness at work more generally, I think that it serves us reasonably well as an overall policy. It is reasonably unremarkable in that regard. With regard to the provision relating to ministers, which has existed within the fairness at work policy since 2010, I think that by early 2017 there was starting to be a sense that we should look at that again, partly because it does not lock in with the ministerial code as clearly as it could. That was one of the issues that we sought to resolve through the new procedure.

We have a commitment to review our wider policies, including fairness at work. Over time, we will probably move towards a stand-alone set of policies and procedures instead of having one overall setting in that way, but these things are always open to continued development.

Margaret Mitchell: Thank you for that. Given your role in complaints as the head of HR, did you have involvement in the partnership arrangements and in talks or informal discussions with the council of Scottish Government unions? If so, what issues regarding complaints—either informal or formal—about bullying or sexual harassment were raised with you from your taking up the post in May 2016 until about August 2017?

12:00

Nicola Richards: Just to clarify, do you mean all bullying and harassment across the civil service or just in relation to ministers?

Margaret Mitchell: I mean complaints regarding current and former ministers and any other general issues that were raised and that you would like to flag up as being of concern.

Nicola Richards: You will understand that it is probably not appropriate for me to go into the detail of individual cases.

Margaret Mitchell: I mean just generally.

Nicola Richards: Under the ministerial process, we have handled two issues under the fairness at work process involving current ministers. One of those was resolved at the informal stage. That occurred in the early part of 2017. There is another complaint that is still in progress, so I will not go into further detail about that, but it is still at the informal stage.

Margaret Mitchell: Finally, I want to ask about the people survey. Is that a UK survey? Is the survey in Scotland changed in any way, or are there standard questions? Were any new questions added in 2016?

Nicola Richards: The people survey is a UK civil service initiative that covers about 109 organisations, including all the big UK departments and all the agencies and bodies, so it very much has a core question set. Every year, there is a bidding process through which we can try to get local questions included in the wider question set. At various points, we have added questions that we felt were particularly relevant to initiatives that we had under way. For example, we have included questions on the monthly conversations process, which is a wellbeing-led process for our staff. I think that those questions would have come in before 2016.

The major change that has been made to the survey at a UK level in recent years and that might be of interest to the committee came in 2019, which was the first year in which the survey gave a breakdown of different sorts of harassment. The question on bullying and harassment was quite a big catch-all that covered a lot. In this year's survey, that was broken down so that sexual harassment was an individual item in a wider list. My recollection is that that was a UK initiative. I do not think that we would have had an opportunity to shape those particular kinds of questions.

Margaret Mitchell: Just to be clear, are you saying that no question was added to the 2016 survey, at the instigation or request of the Scottish Government, about former complaints and historical issues?

Nicola Richards: I would need to check what local questions we put forward that year. We put forward local questions each year. It would be unusual for us to ask such specific questions, because it is a general survey that is widely

responded to—we get a very good response rate. It is not for individuals; it is clear that it is an anonymous survey. It is a route for people to identify concerns at a broader, cultural level; it is not the route by which an individual would raise an individual issue. It is always important that staff understand that.

Margaret Mitchell: I would be grateful if you could check and confirm that point.

Nicola Richards: I will do so.

Angela Constance: We heard earlier from James Hynd, who advised that you led the work in relation to trade union agreement and engagement with regard to policy development. Can you therefore explain why it appears that trade union engagement was quite limited, given that there was only one informal meeting of the harassment working group?

Nicola Richards: As James Hynd set out, the harassment policy was quite unusual. Normally, when we bring in a policy, we have an extensive process with the trade unions. For example, a full refit of the fairness at work policy would be a significant undertaking. However, this policy was slightly different because, in essence, the First Minister got to decide, so the degree of union involvement was slightly different from normal.

From the earliest stages, it was very clear from the exchanges with the unions that their absolute commitment was that the Scottish Government would not step away from having a policy related to complaints about ministers. Their overriding concern was that we stuck with the commitment in fairness at work, which had been in place since 2010. My sense, from all the engagements that we had with the unions during that time, was that their concern was that we did not water that policy down or step back from it, although they were perfectly content with there being procedural changes and improvements to it. I did not perceive any particular difficulties there. The reassurance that we were seeking to give the unions throughout that time was that the Scottish Government was not looking to step away from having a process by which policies around ministers would be handled.

Angela Constance: Okay. We will hear more directly from the trade unions at a future session. However, the submission that the committee received from—I think—PCS expressed some commentary around the fact that there was stage 1 of the policy development but stage 2 was paused and shelved. Can you explain why that was and whether work around stage 2 is proceeding?

Nicola Richards: Yes. That is a good question. Part of the answer is that this is part of stage 2, and stage 2 will also be the external review of the

procedure that Laura Dunlop will take part in. Because of the way in which circumstances have developed, it has been very difficult to finalise our work on fairness at work so that we are able to take the ministerial aspect out of fairness at work and put it into a new stand-alone policy. Because the procedure that you are looking at today was under such a lot of scrutiny, it was very difficult to do further work on it until all these processes had completed. So, there is still unfinished business there.

Angela Constance: In her opening remarks last week, the permanent secretary said:

“We have already learned early lessons”.—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints*, 18 August 2020; c 11.]

She was referring to your experience of procedural failures and the fact that lessons had been learned from those as part of the work that is being led by our people directorate. So, what have you learned?

Nicola Richards: A lot—to get another job and that kind of thing. It has been a pretty exceptional period. I have learned that, although you can be fairly clear about all the ground that you are standing on in terms of the advice and the legal position, there are times when you may have to step very carefully in how things are applied if that is going to meet some of the very significant tests that might be placed on it. It would be very challenging for any workplace policy to withstand the kind of scrutiny and test that this policy has been through. Certainly, in the work that you would do to set out a set of operating principles or guidance if you were putting this kind of thing in place, you would go into a lot of detail, particularly about roles and exceptions.

Angela Constance: That is very reflective of you, but I am more interested in the specifics in and around process and tasks. I put it to you that it appears that wider, more formal staff engagement was limited. We know that at least one message to staff emanated from the permanent secretary, but, in terms of formal two-way engagement with staff above and beyond engagement with the trade unions, where was the meaningful engagement?

Nicola Richards: We would have that absolutely at the heart of all our policy development. In relation to the standard policies that we would work through, that would need to be applied by local managers. We would want to have a very extensive range of engagement based on that.

Angela Constance: Yes, but was it applied? It is not apparent in the information—

Nicola Richards: Sorry—in the development of this procedure?

Angela Constance: Yes.

Nicola Richards: No. As I explained, in the development of this procedure, because of its unique nature—

Angela Constance: So, this one was a bit outside the norm.

Nicola Richards: Yes, because of the First Minister's role.

Angela Constance: You will have heard it mentioned before that, on 14 December, the draft policy was sent to one person—someone who, at that time, was a potential complainer. That was before it was signed off by the First Minister. We have heard people make reference to the importance of lived experience, and others have said that that information was shared but no changes were made in the final stages of the policy. Given the absence of wider staff engagement, and just as a point of principle, does it not feel strange or unusual that a draft policy was sent to one individual when there were surely many ways in which, in accordance with best practice, you could have tapped into a much wider lived experience?

Nicola Richards: There were a number of reasons why the policy was shared at that point. It was shared carefully and with an understanding, having taken advice, that the view of a person in that situation might not be objective. 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. It 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. It was also set out to the individual as part of a range of options, one of which was not to make a formal complaint. That option was always there.

The tenor of the conversation, and part of what we were looking at at that point, was about our need to learn lessons quickly, just as many organisations were trying to learn lessons quickly. A big part of the discussion was asking, "Would having this policy have made a difference to you? What elements of these policies would make a difference?" It was very much not about asking, "Would this make a difference to your raising a complaint now?"; it was about asking, "Would this help us to prevent such things from happening in the future?"

Angela Constance: Okay, but you were not making it up as you went along, were you?

Nicola Richards: In what sense?

Angela Constance: There has been much emphasis—in your own commentary, Ms Richards, and in what we have heard from Mr

Hynd—on the fact that, although developing a retrospective process that included former ministers was, in Mr Hynd's view and in the view of others, the right thing to do, it was not straightforward. You were working from a blank sheet. There have been lots of references to this being different or unique work. Nonetheless, it does not occur in a vacuum. There is a wealth of experience elsewhere, surely, such as in the Advisory, Conciliation and Arbitration Service.

Nicola Richards: I understand that the committee wishes to understand the development of the procedure. Although that is important, 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.

Although it is helpful and important to try to be transparent and write your policies out, not having that does not prevent somebody from raising a complaint about something. Complaints about third parties—which is, in essence, what a minister or former minister would be in this instance—are a fairly routine part of other policies and are included in our fairness at work policy. People will have issues with contractors and with people they come across in other organisations. In those instances, you have to make it clear that there are limits to what you can do—there are limits to the degree to which you can compel someone to participate in the process when they are not your employee and you cannot enforce their engagement in the investigation—and that there are limitations to the sanctions that you can apply. It is fairly well worked-out territory, but it is certainly more complex than a civil-servant-to-civil-servant policy.

Angela Constance: This is my final question. Complaints need to be investigated and if there is no process, there needs to be one and a procedure needs to be put in place. However, how do you ensure that it is fair and robust for all parties, particularly when it is done at pace? What have you learned in terms of the here and now?

Nicola Richards: We are clear that the procedure is fair, it still stands and it is legal. The work was done very carefully to make sure that it fitted in all those instances. One could certainly learn lessons from the whole process about being clear, the roles that people play and what is being done at particular times. On whether we had a robust process, I think we can stand by that.

12:15

The Convener: Was anyone else with lived experience asked to comment on the draft policy?

Nicola Richards: I should make it clear that people were not really asked to comment. It was

shared with them for information; they were not asked to give drafting comments.

The Convener: Right. So other people with lived experience were shown copies of the draft policy.

Nicola Richards: Yes. I think that one other person was shown a copy.

Alex Cole-Hamilton: I have two areas of questioning. The first is about development of the policy, and the second is about application of the policy. I am happy to break between those topics and allow others to come in.

James Hynd confirmed to the committee that there was a background of water-cooler conversations and rumours about alleged bullying and sexual harassment and misconduct on the part of the former First Minister, Alex Salmond. You joined the organisation in 2010, four years before Alex Salmond left office. At what point did you first hear that informal chatter about concerns about the former First Minister's behaviour?

Nicola Richards: I am here to give evidence on behalf of Scottish ministers and not in a personal capacity, so I do not think that it is right for me to repeat—

Alex Cole-Hamilton: The civil service code allows us to ask you about your recollection of facts and events. Mr Hynd confirmed that there was background chatter about concerns about the behaviour of the former First Minister. That is a fact. I am just asking you when you first learned of that.

Nicola Richards: Between 2010 and 2014, my HR role was more on the learning and development side, so bullying and harassment was not in my remit, and things were not raised—

Alex Cole-Hamilton: I am asking you about the water-cooler comments that were probably happening in various corners of the building.

Nicola Richards: I think that, in some senses, as someone in a minister-facing role, I was slightly aside from that. I would certainly say that, at any point, in any organisation, there is likely to be chatter and noise. I would certainly—

Alex Cole-Hamilton: When did you first hear the chatter about Alex Salmond?

Nicola Richards: I cannot give you a specific answer to that.

Alex Cole-Hamilton: Was it recently, when all this blew up, or near the start of your term of office in the Government?

Nicola Richards: I am not sure that I can answer that. We can maybe answer that, and

confirm whether the legal advisers are content for me to do so.

Alex Cole-Hamilton: But you did know about it. Okay; that is fine.

The Convener: If you do not want to go any further, that is fine, Ms Richards.

Alex Cole-Hamilton: I will follow on from Angela Constance's question about your handing a copy of the draft to one of the people who would later become a complainant. When did you first learn of the allegations of harassment that were being made by that complainant? There was clearly an informal process under way before a formal complaint was lodged. When did she first reveal to you that she had allegations to make?

Nicola Richards: I would need to check the detail. I think that she did not reveal them or ever give her account to me directly in that way. We had put in place a confidential sounding board, and she came forward to that director to share her experience. That individual then shared a written account with us, as HR, as part of the process. I think that that was on 22 November, but I would want to confirm that.

Alex Cole-Hamilton: There is an email that I will refer to in the second strand of my questions that is at odds with your suggestion that the matter was never raised with you directly prior to the complaint being made formal.

Before I get that—I will allow other members in before then—I want to know whether the draft procedure was shared with the complainant, to give them confidence in the process that would ultimately assess the credibility of the complaint.

Nicola Richards: It was shared to ensure that they were able to make an informed decision. You would want someone to understand some of the process that they would be moving into. As I said, if they had raised a complaint at that point, before the process was in place, we still would have had to deal with it.

Alex Cole-Hamilton: Was the draft shared with the person so that they could help to design the procedure to fit their complaint best?

Nicola Richards: No—not in any direction at all.

Alex Cole-Hamilton: That is it for now.

Alison Johnstone: I would like to understand whether the findings of the 2016 people survey helped to identify the gap, whereby the policy should be applied to former ministers. Did that come up as a result of people's responses to the survey, or was it entirely separate to that process?

Nicola Richards: No, I would not say that it would have come up through that process; it would have been entirely separate to that.

Alison Johnstone: Following on from colleagues' questions on the nature of the informal rules given to individuals around sexual harassment complaints, I would like to understand what was going on in that regard. For example, we have heard that female workers were, potentially, advised to avoid lone working at certain times and in certain situations. Would that be an example of an informal means of dealing with a harassment complaint?

Nicola Richards: Are you asking in the broader sense or about something specific?

Alison Johnstone: I am asking in the broader sense. I would like to understand what informal mechanisms there were to assist those who had raised informal concerns.

Nicola Richards: Generally, when people raise informal concerns they do so in the line, so they would not necessarily come to HR, but there are certainly a range of things that one might do, and recommend that managers to do if issues are raised with them. As ever, it would depend on the seriousness of the matter, which would have a big bearing on whether any kind of informal resolution is appropriate. We would always be guided by the individual who is raising the issue.

The kinds of things that people would generally put in place in such circumstances would be forms of mediation, facilitated conversations, training and so on. Sometimes, people would apply lone-worker type policies; certainly, in our fairness at work policy in relation to engagement with third parties, if someone has regular contact with an organisation that they are finding problematic in some way, there is provision for them to not meet them alone, and those kinds of things. There is a range of measures that might be put in place to ensure that people feel comfortable in their working environment.

Alison Johnstone: There has been much discussion about the sharing of policy with a particular individual. I ask for absolute clarity—at the point when the draft procedure was shared with that individual, was that individual a complainer?

Nicola Richards: No.

Alison Johnstone: You have highlighted the fact that few workplace policies have to withstand the scrutiny that this policy has been put through. We have, throughout the evidence that we have taken so far, heard much reference to legal advice being taken on development of the policy, but it seems that even that level of legal intervention was not sufficient to ensure that the policy was, for

example, applied robustly enough to avoid the outcome of the judicial review. I note, with regard to the policy, that it says that

“the Director of People will designate a senior civil servant as the Investigating Officer to deal with the complaint.”

I would like to understand why the policy was not applied robustly in this case.

Nicola Richards: Our sense at the time—certainly my sense at the time—was that the policy had been applied robustly. We thought carefully about the designation of a senior civil servant to the role of investigating officer, and about the qualities, in the more abstract sense, that we had thought about in advance—their having a legal or professional background or an HR background and having the skills and experience that we were looking to ensure that people would be able to apply.

The person whom I asked to take on the role had many years of professional experience, including in complex and tricky situations. They had been the head of HR at a mental health charity for 10 years, so they were bringing a wealth of experience that is not common across the wider civil service. Our sense was that they were not even in the organisation at the point when the events were alleged to have occurred, so they had no engagement in any way with those events. Also, as the Cabinet Office's wider guidance says, in complex and historical cases it might be appropriate for cases to be handled within HR. From my perspective, we were applying the process robustly and clearly, in line with the advice and intention that had been set out.

Alison Johnstone: Would you do the same thing again?

Nicola Richards: I think that I would be very cautious in terms of the clarity of the roles that people were playing at particular points. It is clear in retrospect, from the judicial review process, that paragraph 10 could be interpreted in a different way and, therefore, that even the contact that somebody had in their role as an HR professional could be misconstrued. I would be cautious about that now, but at the time that was certainly not a concern that we had.

Alison Johnstone: Finally, is it the case that complaints were being received at the same time as the policy was being drafted?

Nicola Richards: In response to the permanent secretary's staff messages that came through at that time—in the October to December period—around 10 people came forward to raise issues. Most of those were about civil servants, and were issues around harassment and sexual harassment. Some of those issues 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.

Alison Johnstone: Obviously, it is really important that there is an appropriate distance between those who are drafting a policy and those who are responsible for implementing it. Is it your view that lines were blurred between the two workstreams, whereby a policy that was being drafted was shared with someone who went on to become a complainant? Do you not see that as a blurring of lines that should be avoided?

Nicola Richards: The drafting of a process and the application of it happens frequently in HR departments. The HR policy team will develop a policy, put it in place and apply it. I am not sure that that is an unusual arrangement.

Alison Johnstone: Obviously, there are many employees in the civil service, but the draft policy was shared with only two individuals specifically.

Nicola Richards: The policy is on our intranet, so it is available more widely.

Alison Johnstone: I have no further questions at this point.

Jackie Baillie: I would like to follow up that point. You shared the draft with only two people. That is correct, is it not?

Nicola Richards: Yes—well, we engaged with the unions on it, and we are engaging with legal—

Jackie Baillie: Absolutely—but that was after the event. As the policy was being developed, you shared it with two people.

Nicola Richards: Yes, because—

Jackie Baillie: Okay. That is fine. I simply wanted to establish that, because the point about the intranet came much later. That came in February, after which time you had received two complaints.

From an HR perspective, you are making a distinction between concerns and complaints. Is that not a false distinction, given the seriousness of the allegations?

Nicola Richards: It is a distinction in policy terms, in that—

Jackie Baillie: It is not a distinction in the real world, is it?

Nicola Richards: You are right in that, should individuals have decided not to pursue a formal complaint, organisationally we still would have had significant things to think through. If a person had said that they did not want to proceed with a

formal complaint, but we had a reasonably detailed set of allegations, organisationally we would have had to find a way of establishing some closure on that.

Jackie Baillie: So, you shared a draft policy on 14 December with people who had expressed concerns—not complaints, although I do not recognise the distinction—before the policy was approved. That is correct, is it not?

Nicola Richards: Yes.

Jackie Baillie: Why did you do that?

Nicola Richards: I think that I set that out in an earlier answer, but I am happy to go through that again.

Jackie Baillie: Yes. It would be useful if you would do that briefly.

Nicola Richards: The reasons why we shared it were that we were trying to establish for our learning, as an organisation, whether it would have made a difference to them at the time; whether it would have made it more possible to have raised issues about an incumbent First Minister; and whether it would have made it more straightforward for them had a policy of that nature been in place. That was done so that, if they decided to proceed to a formal complaint, they had an awareness of the policy that was likely to be applied.

Jackie Baillie: You did not consult women's groups or anti-bullying groups, for example.

Nicola Richards: We spoke very closely with the Scottish Parliament, and we spoke to Police Scotland. They provided a range of advice on charities relating to sexual violence.

Jackie Baillie: Okay. So you did not speak to those groups themselves.

I want to move on. Did you tell any potential complainants that Judith Mackinnon would be appointed as the investigating officer under a policy that had not yet been approved?

Nicola Richards: I think that I told one of the complainers that if they decided to move to a formal complaint it was likely that Judith Mackinnon would take on the role of senior officer.

Jackie Baillie: On what date did you do that?

Nicola Richards: I do not know. I would need to check the specific date.

12:30

Jackie Baillie: Please do that. I am very conscious that, in the civil service, everything is written down, yet, I cannot seem to find a piece of paper that tells me that information. When you

check the date, would you provide the committee with that information, as well?

Nicola Richards: Yes, of course. I thought that it had been submitted.

Jackie Baillie: Well, I cannot find it.

Last week, the permanent secretary suggested that she was not deeply involved in developing the policy process. As director of people, did you not keep her updated? What contact did you have with her or her private secretary? How often did you have contact with them?

Nicola Richards: My contact with the permanent secretary is generally quite frequent. At this stage, there was a lot of different work going on, including a lot of staff communications. My role was to keep her abreast of the full range of activities. She was very concerned that, as she would say, we should show a clean pair of heels, as an organisation, in relation to our position on sexual harassment and harassment, in order to ensure that we were setting out an exemplar position across all these areas—our internal policies, communications with staff, the wider cultural shift and the ministerial policy. I would have been in contact with her office at least weekly.

Jackie Baillie: Thank you. I have a final question. I do not know whether you heard Mr Hynd's evidence earlier, but he was very clear that the policy itself was lawful, but the implementation was not lawful. Given that implementation is an HR function, is that an accurate reflection or has he thrown you under the bus?

Nicola Richards: Mr Hynd was speaking accurately in relation to the judicial review. We conceded the judicial review on the basis of one aspect of the application. In that one aspect, the application was deemed to be unlawful by the standards that were applied by a judicial review.

The Convener: Alasdair Allan has a short and very specific supplementary question.

Dr Allan: I want to pick up on the point that Ms Baillie made on the distinction between a concern and a complaint. From what you have just said, would I be right to say that the distinction has nothing to do with the seriousness of the issue but is to do with the attitude of the person involved? I do not want to put words into your mouth, but I presume that not everyone who wishes to make known their concerns about something wishes to pursue a formal complaint.

Nicola Richards: Yes.

Maureen Watt: Good afternoon, Ms Richards. You said that you joined the civil service in late 2010 and worked in learning and development. What qualifications did you come with?

Nicola Richards: My background was that I spent five years running a leadership development charity. I came into the learning and development side of the work in the people directorate with that background in leadership, learning and organisational development.

Maureen Watt: Do you have qualifications in HR?

Nicola Richards: Not specifically from the Chartered Institute of Personnel and Development.

Maureen Watt: Are you a member of the CIPD?

Nicola Richards: No, I am not.

Maureen Watt: It was said that external advice was taken. Did any of that come with a cost? If so, how much?

Nicola Richards: Do you mean during the set-up of the procedure?

Maureen Watt: Yes.

Nicola Richards: I do not recall that. I do not think that there were costs. 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. I do not think that the Scottish Parliament's HR department sent us a bill. There was lots of exchange.

There is a wider HR forum of professionals from across all the agencies and non-departmental public bodies. We would get together and share material. I do not recall whether there were any costs on the legal side.

Maureen Watt: It strikes me that it would have been helpful for someone to have been a member of the professional HR body during the process.

Our background information says that 10 per cent of Scottish Government staff had faced bullying or harassment. That is 10 per cent of roughly how many?

Nicola Richards: The current survey covers about 6,500 people.

As a point of information on your previous point, a number of HR-qualified and employment law-qualified people were involved in the development of the process.

Maureen Watt: To follow up on that, you said that the investigating officer had some background in dealing with such matters, but she is not an HR professional in the true sense. To me, an HR professional is somebody who has gained a recognised qualification.

Nicola Richards: I am sorry; I am not CIPD qualified, but Judith Mackinnon is a fellow of the CIPD.

Maureen Watt: Okay. That is good to know. Thank you.

It seems to me that, in much of what we are investigating, the HR department or directorate has been downgraded and it could have had a more proactive role.

You talked about 10 per cent of 6,500 people. In the survey, respondents were able to select multiple categories in relation to the bullying or harassment that they had encountered. The majority of incidents of bullying or harassment came from colleagues, direct managers and managers in the same part of the organisation: 117 came from colleagues, 117 came from direct managers, and 123 came from managers in the same part of the organisation. Were the multiple categories just those three, or were there further categories that could drill down into whether the incidents were from heads of service or ministers?

Nicola Richards: The full list under the question “Who bullied and/or harassed you?” in the UK civil service survey includes colleagues in your area, colleagues in a different area, your manager, another senior member of staff, someone whom you manage, someone who works in a different civil service organisation, someone who works for a non-civil service organisation, a contractor, a service user, a member of the public, and someone else who is not listed.

Maureen Watt: What category would ministers fall into?

Nicola Richards: They would probably come under something like “another senior member of staff in the Scottish Government”. However, as I said, we do not get to decide on the categories. In those kinds of settings, a relatively small number of people would be involved, so I am not sure that any of the UK civil service policies would set out ministers in such an explicit way.

Maureen Watt: Was whether there should be a specific category for ministers if we are going to be open and transparent ever discussed among HR professionals throughout the country?

Nicola Richards: I am happy to suggest that. I have never been in one of those conversations.

Maureen Watt: You have not been in a conversation about the development of the survey.

Nicola Richards: I have in more general terms, but not specifically in a conversation about adding ministers to that list.

Maureen Watt: That seems a bit odd. However, I will leave it at that just now.

The Convener: Earlier, we talked with Mr Hynd about the UK Parliament review. Do you know whether ministers being clearly defined in the interests of transparency was a particular aspect of the discussion?

Nicola Richards: I am sorry; you said the UK Parliament.

The Convener: I am sorry. The UK Government did a review, which was under discussion at the same time as the Scottish Government was putting its policy together. Was the definition of ministers part of that review in the interests of transparency?

Nicola Richards: I believe that that had a section in the material that was put together, but I might be confusing the Sue Owen review with more detailed guidance. There is a section that covers complaints against ministers or special advisers in that material.

The Convener: Following on from the questions that Maureen Watt asked, I would be interested to know whether the need for further clarity in that regard would be required, because that makes the figures quite difficult to interpret.

Nicola Richards: Again, it is important to recognise that the survey is not a mechanism for people to raise individual issues. It is a mechanism by which we get an overall sense of the culture of an organisation. It is quite wide ranging in that way.

Across the 100-plus organisations that are covered, the bullying and harassment scores in particular vary from 5 per cent to 20 per cent. This year, we were at 11 per cent and, among the big organisations with which we compare, the average was 12 per cent. Although that figure sounds very disturbing—it is disturbing, because we would not want anybody to experience bullying and harassment as part of their on-going work—the picture is fairly consistent across most organisations.

The Convener: Please refresh my memory. Do bullying and harassment come under the one heading?

Nicola Richards: Yes, they do. That area is quite wide ranging although, in 2019, as I said, there was a breakdown so that we could get more specific information on the nature of the harassment. In 2019, the biggest category was micromanagement. That was the key issue in relation to which people most regularly said that they felt that they had experienced bullying and harassment.

The Convener: If someone ticks more than one of the boxes to indicate what they have been suffering, how is that reflected in the figures when

they are put together? I am thinking of the same person ticking four boxes, for example.

Nicola Richards: I do not know. I would need to check the exact way in which people are able to do that, and whether they can do so.

I can see from the survey results that there is a reference to “multiple selection”, so respondents would have been able to select more than one category.

The Convener: Yes, but how would that response be counted? Would it count as four instances or just one instance?

Nicola Richards: I assume that it would count as four instances.

The Convener: Right. So the figures may not reflect the number of people.

Nicola Richards: Yes, although we also get the numbers of people, so we could probably do a comparison across the two—

The Convener: Thank you for that clarification.

Dr Allan: We heard from Mr Hynd about the iterative process that was involved in producing the policy. Can you say a bit more about your role in determining the content of the various stages of that process?

Nicola Richards: As James Hynd set out, he led on the drafting, with a lot of engagement across the legal department and with members of my team on setting out in particular how we would bring together the ministerial code responsibilities with the responsibilities of the employer, and in particular the duty of care to staff. The key part that I played in that process was to ensure that we were linking the policy to the duty of care to staff and our responsibilities as an employer.

Dr Allan: I will be careful about how I ask this question; I am not asking about individuals. On the duty of care, we have heard that people with “lived experience” were sought out, or were contacted in any case. I take it that some kind of support was offered to those individuals.

Nicola Richards: 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.

Dr Allan: With regard to your own role, can you tell us where you came in when decisions were made about including former ministers in the policy?

Nicola Richards: [*Inaudible.*—that was already included.

Dr Allan: Do you concur with what we heard from Mr Hynd about the fairly limited role of special advisers? Were you in touch with SPADs throughout the process?

Nicola Richards: No—there was no engagement at all.

The Convener: I will bring in Murdo Fraser. We will then go back to Alex Cole-Hamilton, who has kindly kept some of his questions in reserve.

Murdo Fraser: I have only one question, which is a follow-up to Alasdair Allan’s question about the involvement of special advisers. We heard from Mr Hynd that, in his view, it would be unusual for a special adviser to be involved in the preparation of a policy based on HR. From your experience, would that be a reasonable position?

Nicola Richards: Yes.

Murdo Fraser: Thank you. I am done, convener.

The Convener: Sorry—I was distracted. How dare I be? Mr Fraser, do you want to continue?

Murdo Fraser: I am done.

The Convener: You are done. My goodness—that is so unlike you. [*Laughter.*]

I will bring in Alex Cole-Hamilton.

12:45

Alex Cole-Hamilton: Ms Richards, before I ask about the application of the procedure, I want to say that I know that this meeting is stressful for you and that I appreciate your coming to give evidence. This must jar against everything that you have been taught about protecting the civil service and the Government.

However, it is important that we get to the truth in all this. The civil service code does not preclude your doing that but, from some of the answers that you and James Hynd have given, I have to say that the committee seems to be encountering what I would describe as a grey wall of silence. I ask you to be as straight as possible in answering these final questions.

When Alison Johnstone asked whether complainers had come forward during development of the process, you said that they had not done so. However, they were not complainers at the time, obviously, because there was no procedure for them to complain by.

We know from an email that you wrote on 12 December that there were three such people—for the record, that is document YY0046. You wrote an email to Ms A asking whether, after your discussion with her, she had come to a decision on whether to raise a formal complaint. In the

email, you kept using the term “we”, by which you meant yourself and Judith Mackinnon, who was copied in. You suggested that Ms A wait until after the new year if she wanted to proceed. Did you do that so that you could be sure that the new policy on handling complaints against former ministers would have been signed off and would be live?

Nicola Richards: I think that I was going on holiday the next day. Even civil servants are allowed holidays.

I would like to clarify a couple of points. I said that the procedure was shared, but the person was not a complainer at that point; they had raised a concern, but had not formally raised a complaint. At any point, she could have decided to say, “This is the formal complaint.” We might or might not have had the procedure in place at that time, but we would still have had to deal with the complaint. The procedure is an issue, but not really the deciding issue.

Alex Cole-Hamilton: In the same email you said:

“We”—

by which you mean you and Ms Mackinnon—

“have now spoken to two other people considering their position”.

Had either of the other two potential complainers been given a draft of the procedure?

Nicola Richards: I do not recall specifically, but my recollection is that we had a hard copy with us when we spoke to one of the others. They did not come forward with a complaint.

Alex Cole-Hamilton: Okay. You chose in the email to reveal to Ms A the existence of other complainers. Was it your intention to share that knowledge with Ms A so that she might seek out the other complainers?

Nicola Richards: No, it was not. We had taken advice from Police Scotland about how to take a victim-led approach, part of which was an indication that we could say whether other people were considering complaints, which might be of help to a person. I would say—actually I probably cannot say, because it would get us into the territory of the complainers. I am sorry.

Alex Cole-Hamilton: I—

The Convener: I am sorry. Can I stop you there? The document to which you referred has not been published by Parliament.

Alex Cole-Hamilton: In which case, I am not entirely sure on what basis we are meant to use the documents, if we are not allowed to use them to cross-examine witnesses.

The Convener: The documents are for your information. I draw your attention to the court restrictions and the potential for jigsaw identification. The committee took a decision that we would not refer directly to anything that has not been published by Parliament. If you want to carry on, please do so in very general terms, but do not be specific, because I understand Ms Richards’ concerns.

Alex Cole-Hamilton: I accept that we agreed that we would not discuss things that had not been published. Nevertheless, this is an important point and an important exchange. Forgive me if I have overstepped the mark; I will not refer to the email again.

It says in paragraph 10 of the procedure that a senior civil servant will be designated as investigating officer. It goes on to say that

“That person will have had no prior involvement with—”

or knowledge of—

“ ... the matter being raised.”

Given that Judith Mackinnon had already had discussions with complainers, and given the gravity of the allegations, did you at any point consider her appointment in that role to be problematic under the terms of paragraph 10?

Nicola Richards: I did not—and it was the gravity and sensitivity of the issues that made it so important that we were able to handle them very confidentially in HR, and to do so very carefully with people who were highly skilled.

The engagement that Judith had had with the individuals in advance was absolutely in her role as an HR professional; it was about setting out options. In earlier drafts of the procedure, we had had more detail about what that senior officer role might include. That included setting out their options and providing access to sources of support. In my mind, her appointment was completely consistent with that.

Alex Cole-Hamilton: Did you consult any other senior civil servant, senior member of the SNP or special adviser on the appointment of Judith Mackinnon as the investigating officer for those complaints?

Nicola Richards: I spoke to my line manager and the other people who were engaged at that time, but to no one on the political side, at all.

Alex Cole-Hamilton: I have no further questions.

Margaret Mitchell: Ms Richards, I direct you to document YY0062—the emails on 10 November 2017. They appear to appoint two senior officials to the informal role of “pastoral” support and “confidante”. There was also an email to staff that

offered senior Government official contact informally to talk over any issues. Was that put in place as a result of the gap analysis that HR had carried out, establishing that there was a reluctance among people to come forward? If so, roughly how many people did come forward? Of those people, did any end up being formal complainers, at the end of the day?

There is one other aspect—I know that I have asked three questions, but I hope that you will answer this one, too. If that was good practice and a good way of giving people the support to come forward, why was it not included in the formal development of policy? Without that, it looks as though the measures were set up for a niche reason, which was nothing to do with putting in place the very best policy to encourage individuals who had been treated so badly to come forward.

Nicola Richards: On the pastoral support and the confidential “sounding board”, as it became known, I think that at that point a lot of organisations were trying to understand what creates reluctance in people to come forward, particularly around sexual harassment, but also more generally. I think that the Scottish Parliament was putting in place an independent helpline; a lot of organisations at that time were thinking about how to bridge the gap.

For us, putting in a senior person who could be contacted in such a way seemed like an opportunity to be sure that we did not have a big issue that we were not aware of—that there was not something lurking that we did not fully understand.

It is a valuable process. The Scottish Government already has, and has had for some time, an employee assistance programme, which includes a 24/7 line that people can phone to seek advice and support on any issue. It is completely separate from the Government, so if an individual raises an issue in that setting, there is not a route back to the organisation knowing about it, unless the individual decides to take that step.

The confidential sounding board is in a slightly greyer area, in that people are not entirely independent and outside the organisation, so they are not unconnected back to the core organisation.

Margaret Mitchell: [*Inaudible*—is that the case?

Nicola Richards: No. There are opportunities for us to continue with that. Very quickly—

Margaret Mitchell: At present, if someone came forward, they would not have the opportunity to speak to that informal person or to have that person there to encourage them to have the confidence to go forward; that does not exist.

Nicola Richards: I would need to check, but I think that it may well be still on our intranet.

Margaret Mitchell: The permanent secretary suggested that the appointment was a one-off on the back of #MeToo. That seems incredible—it begins to look like a niche arrangement for a specific purpose.

Nicola Richards: Certainly, that was described as the watershed moment. Provisions were put in place at the time of #MeToo. About 10 people came forward during that time—I do not know whether they all approached the individual directly or some of them went to HR. Some of those did proceed to formal complaints and some were resolved through other means. I think that it came to a point at which no one was contacting her any more, so that fell away more naturally as people were not coming forward directly in that way. Certainly, we would want to have—

Margaret Mitchell: I think that it is a moving feast, with people, and not a moment in time when people are not coming forward. I do not find that answer very persuasive.

Nicola Richards: We would be very keen and happy to continue to have that kind of arrangement in place.

The Convener: I will ask a final question. I am still interested in the matter of the draft policy being shared with potential complainers. Why was it not shared with other members of staff who had raised concerns about bullying or harassment and had been through the process previously, in order to see whether they felt that the policy was an improvement on the situation that they went through or would not have been much better? Their experiences could have fed into development of the policy. Why was sharing of the policy not widened in any way?

Nicola Richards: We had had no formal complaints about ministers until those had been raised. At that point, one issue had been raised and dealt with under the informal policy, but that would not have been covered by this policy because it was not a sexual harassment incident. We did not have a wide staff group with relevant experience on whom we could draw.

The Convener: It was really just about ministers.

Nicola Richards: The policy is just about ministers.

The Convener: You were not interested in gathering wider information about the organisation in general, as part of all this.

Nicola Richards: That was all under way at the same time. A lot of work was going on on our internal policies and civil servant to civil servant

behaviours. We refreshed our standards of behaviour. We created a new route map, so that individuals in the organisation could understand all the routes by which harassment considerations could be raised. A wide range of work was going on with the wider staff group, but that was more general work that was not specific to ministers.

The Convener: You had a staff group that you consulted on wider issues of such policy.

Nicola Richards: We tend to do all that work directly and more specifically with our trade unions, because they have the role of representing staff. More generally, we have the people panel. Topics might be tested with that panel and through the wider people survey. We also typically include our staff networks and equality groups in development of new policies.

This was a specific policy that the First Minister needed to sign off. In that instance, it was slightly different from normal HR policies, for which we would go through that range of activity.

The Convener: You dealt with the policy very much in isolation.

Nicola Richards: We saw it as part of an overall package of work that was under way, but it was specific in that sense.

The Convener: Thank you.

Alex Cole-Hamilton: Following on from the convener's questioning, I will ask a question for clarification. Did the second person with whom a draft of the procedure was shared go on to make a formal complaint, or were they a potential complainer who then decided not to take forward a complaint?

Nicola Richards: That person did not proceed to a formal complaint.

The Convener: I thank Ms Richards very much for her attendance. When we have looked through the *Official Report*, we will no doubt expect a written submission on some issues.

That concludes the public evidence session.

12:58

Meeting continued in private until 13:39.

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