

# Review of the Scottish Government procedure for handling harassment complaints involving current or former Ministers

Laura Dunlop QC  
11 March 2021

## **Table of Contents**

Executive Summary.....	3
Chapter 1      Introduction .....	6
Chapter 2      Development of the Procedure .....	8
Chapter 3      Handling of the Complaints.....	19
Chapter 4      Some context .....	26
Chapter 5      Judicial review .....	35
Chapter 6      Comparisons outwith Scotland .....	40
Chapter 7      Comparisons within Scotland.....	52
Chapter 8      Conclusions and Recommendations .....	62
Appendix 1:      Remit .....	73
Appendix 2:      Handling of Harassment Complaints Involving Current or Former Ministers	74
Appendix 3:      Scottish Government.....	77

## **Executive Summary**

This review concerns the first application of the Scottish Government's procedure for 'Handling of Harassment Complaints involving Current or Former Ministers' (HHCm). The review fulfils the remit given to me and announced in August 2020. Drawing out lessons from that first application and advising as to changes required needs to begin with a chronicle of what happened, and I have endeavoured to provide that. That chronicle also needs to be set in a legal context, since there are a number of areas of law which impact on how this type of complaint can and should be handled. Some of these areas of law arose as issues in the Judicial Review which highlighted a need for the procedure to be re-examined. These issues should inform analysis of where change may be necessary. Any procedure needs to be lawful, clear and effective. Particular challenges arise in workplaces where people answer to different employers, or are holders of an office. Looking at other organisations which face analogous difficulties may assist in finding solutions. Consistency with other parts of Scotland's constitution, and fair treatment for everyone across the Scottish Government, matter too.

It is in everyone's interests that complaints are investigated as soon as possible after the events which are the subject of the complaint. I do not think that time limits are appropriate for complaints of sexual harassment. With other kinds of harassment, I recognise that there are many reasons why it may be difficult for a civil servant to make a formal complaint against a Minister but, in general, consideration should be given to setting a time limit, with an option to allow a late complaint to be made in appropriate circumstances.

Harassment complaints may raise issues of possible criminal conduct, and therefore the need to report allegations to the police. Paragraphs 18 and 19 of HHCm make clear that there are circumstances in which Scottish Government will decide it is necessary to report allegations to the police, that it is the complainer's right to do so at any stage and that the complainer will be supported throughout a police investigation. It may be that there are circumstances in which the Scottish Government would respect a complainer's wish not to have the matter reported to the police. I think it would be helpful to make those circumstances as clear as possible in the complaints procedure.

Anyone wishing to make a complaint needs to understand how to do so and both the complainer and the Minister need know what to expect from the process. HHCm is a separate procedure for complaints involving Ministers which is cross-referred to from the Fairness at Work policy but it covers only harassment complaints. A single process for raising and resolving any complaint by a civil servant against a Minister would be preferable, whether as a stand-alone document or part of the Fairness at Work policy.

This single process needs to allow for informal resolution where possible, which could include mediation for some complaints. The single process also needs to allow for the possibility that a complaint raised by a civil servant may raise a question of fitness for office and therefore need to be handled by investigation under the Ministerial Code. This decision about handling should be taken by an appropriate senior person, either a civil servant or a non-Executive Director, following an initial noting of the allegations and responses carried out by a nominated senior civil servant.

The aim of the procedure must be not only to investigate the facts but to attempt to resolve the complaint appropriately where this is possible. One option worth considering is the introduction of a process of 'censure with consent', currently in use in the Church of Scotland, which would involve a formal acceptance of inappropriate conduct on the part of the Minister towards the complainer. The effectiveness of any such process would need to be kept under review.

Support needs to be provided for a serving or former Minister against whom a complaint is made as well as to the complainer, and Scottish Government should ensure that arrangements are in place to support both parties. To preserve a clear position of neutrality, that support must not come from anyone involved in the factual investigation or decision-taking. It may be appropriate to provide a right for a current Minister to seek the appointment of a legally-qualified investigator either instead of or alongside an HR professionally-qualified investigator as an additional demonstration of neutrality.

Demonstrating neutrality in investigation of formal complaints against former Ministers is particularly challenging if that investigation is to be conducted by civil servants bound by their accountability to the government of the day. I see independent investigation and adjudication of such complaints as essential. Possible options would include extending the remit of the Commissioner for Ethical Standards in Public Life in Scotland or extending the remit of the Independent Advisers on the Ministerial Code.

### **Summary of Recommendations**

Recommendation 1: There should be no time limit in any process for investigating complaints of sexual harassment against serving or former Ministers, although consideration should be given to including a time limit, probably of less than three years but with an override provision, in relation to complaints of other types.

Recommendation 2: There should be consideration of whether to include in any policy about complaints against Ministers a provision allowing a complainer's wish to avoid police involvement to be respected.

Recommendation 3: Whether within Fairness at Work, or in a separate document referred to within Fairness at Work, there should be one process governing the raising of a complaint against a Minister by a civil servant.

Recommendation 4: There should be inserted into any Code or policy governing an investigation into the conduct of a Minister an obligation to arrange specific support for the Minister during the investigation process.

Recommendation 5: A screening process ('initial assessment') should be adopted, to decide whether a complaint by a civil servant against a Minister requires to be handled under the Ministerial Code or follow the process of Fairness at Work.

Recommendation 6: The screening process should be along the lines of that which is set out in paragraph 6 of HHC/M, confined to an initial report of a complaint against a Minister and including a brief account of facts alleged by each person without any views as to credibility or reliability. The report should note evidence (witnesses and/or documents) potentially available and record whether there is any agreement as to facts and what the complainer is hoping for by way of resolution.

Recommendation 7: The person conducting the screening process should have access to legal advice.

Recommendation 8: Anyone involved in factual investigation to any extent of a complaint against a Minister should be free of prior involvement with any aspect of the matter being raised and should have no close association with either party before or during the investigation.

Recommendation 9: Consideration should be given to the introduction of a process of censure with consent, to denote an acceptance that there has been unacceptable conduct on the part of a Minister towards a civil servant. If such an innovation does occur, there should be a post-outcome review of any early application.

Recommendation 10: Formal complaints against a former Minister should be investigated and adjudicated (by which I mean reaching conclusions as to facts and as to whether a relevant provision has been breached) independently.

## **Chapter 1**

## **Introduction**

1.1 At the end of June 2020, I was asked if I would conduct a review on behalf of the Scottish Government into the Procedure for the Handling of Harassment Complaints involving Current or Former Ministers. The review was in relation to the first application of the procedure, which had concerned complaints made by members of staff against the Former First Minister, Alex Salmond.

1.2 The review was announced in 2019, after the Judicial Review case in the Court of Session had been conceded. At that time, it was accepted by the Scottish Government that there had been flaws in the process of investigating the complaints. It was important that lessons were learned.

1.3 In July 2020, I indicated that I would be willing to undertake this work, part-time. Over the summer, administrative steps were taken to agree the basis on which I would work and to provide me with IT and other facilities for the task. I was offered the assistance of a former civil servant, who had previously held a senior position, and I accepted that offer. I requested that I also have available to me the assistance of junior counsel, and that was agreed too. It was estimated that the work would take around six months.

1.4 In this review, I have had access to the redacted documents provided as evidence to the committee of the Scottish Parliament enquiring into these matters. I have accessed the documents directly, but wherever possible we have tried to insert references to the versions of those same documents where they are published on the Committee's pages of the Parliament website.<sup>1</sup> Further redaction by the Committee means that on a small number of points I have considered evidence which I am unable to reference in the published material.

1.5 The approach which I decided to adopt was to assemble a factual narrative, examine other ways of dealing with allegations of misconduct against senior figures and develop conclusions and recommendations. The final tranche of documents was not made available to us until December 2020, which had an impact on my ability to complete the factual narrative. I therefore concentrated initially on the comparative work. That work within Scotland has consisted of looking at the other two parts of the constitution, the legislature and the judiciary, and at longstanding institutions where there are different systems of accountability among people who work together. The non-Scottish comparisons involved discussions with senior public servants in Cardiff, Belfast and Wellington, as well as study of publicly available material about the UK government.

1.6 Chapters 2 and 3 represent the factual narrative, chapter 2 being concerned with the development of the Procedure and chapter 3 with the investigation of the complaints. Chapter 4 offers some orientation, looking at workplace policy and the standards of behaviour for Ministers in the Scottish Government; at remedies for harassment in civil and criminal law; and at inquisitorial processes and what they require by way of fairness.

1.7 In chapter 5, I look at what happened in the Judicial Review in the Court of Session, over the Autumn of 2018 and into January 2019. Chapter 6 sets out comparative material relating to the UK government, to Wales, to Northern Ireland and to New Zealand. New Zealand is around the same size as Scotland but operates rather differently in its approach to Ministerial conduct. Chapter 7 deals with comparative material from within Scotland, including from two parts of Scottish society with which I am particularly familiar, the Church of Scotland and the justice system. Finally, in chapter 8, I set out my conclusions and recommendations.

1.8 There are three Appendices to the report. Appendix 1 explains my remit, and Appendix 2 is the Procedure which was applied in the investigation of the complaints against the former First Minister. Appendix 3 is an organogram showing reporting relationships between selected people in Scottish

---

<sup>1</sup> <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111057.aspx>

Government as these stood from autumn 2017 to early 2018, and an explanation of the different trade unions which represent those who work for the government.

1.9 There are conventions about the naming of civil servants above a certain level. Rather than following those conventions, however, I have referred to everyone by their job titles, in order to afford equality of treatment. This achieves consistency in description, possibly at the expense of linguistic flow.

1.10 As part of my investigation into the factual history of matters, I interviewed three civil servants: Nicola Richards, Director for People; James Hynd, Head of Cabinet, Parliament and Governance Division; and Leslie Evans, the Permanent Secretary to the Scottish Government. For these interviews with individuals, I was comprehensively assisted by junior counsel, Alyson Forbes. Eleanor Ryan, former civil servant, assisted me with the rest of my work and unstintingly gave of her time, energy and expertise, in everything from detailed research to the hyperlinking in footnotes. I am hugely grateful to Eleanor and to Alyson for their support.

1.11 In the comparative work, whether from the Royal Mile or the Southern hemisphere, those who spoke to us shared their thoughts and experiences for no reason other than to be helpful. The senior public servants in Scotland and in the three other administrations who assisted did so when there were many other demands on their time, during a public health emergency. Representatives of the Trade Unions contributed their knowledge and their suggestions in discussion, and in some cases also in writing, in order to improve processes for the benefit of those they represent. Individuals in other organisations assisted when I needed specific information. I pay tribute to everyone who helped by giving their time in this way.

1.12 I am also grateful to those who read over the text of this report and tidied its presentation and grammar. Any errors which remain, of whatever nature, are my responsibility.

## Chapter 2

## Development of the Procedure

- 2.1 In 2006, the “me too.” movement was founded by survivor and activist Tarana Burke.<sup>2</sup> She founded the movement because, as someone who had experienced sexual assault, she wanted to help women and girls — particularly women and girls of colour — who had also survived sexual violence.<sup>3</sup> Work continued, to increase the provision of support and to build a sense of solidarity.
- 2.2 On 5 October 2017, the New York Times published an article detailing allegations of sexual offences against the film producer Harvey Weinstein.<sup>4</sup> Further allegations emerged and were covered extensively in the media. These included allegations made by British women and in relation to assaults occurring in the UK. Following a tweet by Alyssa Milano on 15 October, the #metoo hashtag went viral.<sup>5</sup>
- 2.3 Allegations were made against British politicians, sometimes in relation to behaviour dating back years. By the beginning of November, at Westminster, those who were accused included a serving Secretary of State (Michael Fallon), a former Secretary of State (Stephen Crabb) and an Under Secretary of State (Mark Garnier), as well as Opposition politicians. The then Prime Minister, Theresa May, wrote to the then Speaker, John Bercow, urging reform of the House of Commons disciplinary regime.<sup>6</sup>
- 2.4 On 29 October 2017, in the Sunday Herald, it was alleged that women at all levels in the Scottish Parliament had been sexually harassed.<sup>7</sup> Mark McDonald, a serving Minister in the Scottish Government, resigned on 4 November 2017, and specific allegations were made against others, including in opposition parties. Mark Garnier was investigated under the Ministerial Code of Conduct, even though the events predated his holding Ministerial office.<sup>8</sup>
- 2.5 On Monday 30 October, the First Minister asked for a letter to be drafted for her to send to the Presiding Officer<sup>9</sup> concerning the ongoing sexual harassment issue. She viewed it as important that the right procedures were in place to give confidence to those wishing to raise concerns or complaints and asked that the Presiding Officer respond with information about the consideration given to these issues by the Parliament. She suggested that a cross-party meeting might be required. The letter was drafted by James Hynd,<sup>10</sup> Head of Cabinet, Parliament and

---

<sup>2</sup> <https://metoomvmt.org/get-to-know-us/history-inception/>

<sup>3</sup> <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/>

<sup>4</sup> <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>

<sup>5</sup> A small sample of media reports charting the progress of ‘me too.’ on social media as at mid-October 2017 follows: <https://www.bbc.co.uk/news/blogs-trending-41633857>;

<https://www.independent.co.uk/news/world/americas/me-too-facebook-hashtag-why-when-meaning-sexual-harassment-rape-stories-explained-a8005936.html>;

<https://www.telegraph.co.uk/technology/2017/10/16/metoo-thousands-women-identify-victims-sexual-harassment-assault/> According to research from academics based in England, there were 3,450 articles in nine major UK newspapers between 11 October 2017 and 31 March 2018 (De Benedictis, S., Orgad, S. and Rottenberg, C. (2019) '#MeToo, popular feminism and the news: A content analysis of UK newspaper coverage'. *European Journal of Cultural Studies*, 22 (5-6). pp. 718 - 738. ISSN: 1367-5494).

<sup>6</sup> <https://www.bbc.co.uk/news/uk-politics-41796477>

<sup>7</sup> <https://www.heraldscotland.com/news/15626154.sexual-harassment-of-women-at-the-scottish-parliament-is-a-ticking-time-bomb-says-top-lawyer-aamer-anwar/>

<sup>8</sup> See paras 6.4 and 6.5.

<sup>9</sup> [Phase1FN10/YY001](#)

<sup>10</sup> [ibid](#)

Governance division ('HCPG') in the Scottish Government, and sent early in the afternoon.<sup>11</sup> The Presiding Officer responded to the First Minister's letter on the same day, explaining the steps being taken in the Parliament.<sup>12</sup>

- 2.6 A copy of the joint letter which the Presiding Officer and Chief Executive of the Parliament had sent to Parliament staff was shared with the Permanent Secretary's Office and, from there, forwarded to Nicola Richards, Director of People ('DP'), and Judith Mackinnon, Head of People Advice ('HPA'), late on the afternoon of 30 October.<sup>13</sup> The covering email acknowledged that DP and HPA were already looking at what the Scottish Government needed to do as an employer to make sure that expected standards of behaviour and the way to raise a concern were both clear. The email also referred to statistics on the number of complaints of sexual and verbal harassment made in Scottish Government which were due to be released and the Permanent Secretary's concern that, in light of experience in other organisations, these might not reflect the true picture.
- 2.7 At the meeting of the Scottish Cabinet on Tuesday 31 October,<sup>14</sup> under AOB, the First Minister introduced a discussion of sexual harassment. She referred to her letter to the Presiding Officer of the previous day and the meeting which the Presiding Officer was convening with leaders of all parties and noted that she had asked the Permanent Secretary to undertake a review of Scottish Government policies and processes to ensure they were fit for purpose. The First Minister stressed the importance of everyone taking responsibility in challenging unacceptable behaviours. The Deputy First Minister proposed that, as the most senior man in the Government, he should answer a topical question on this subject in Parliament that day.
- 2.8 Later on Tuesday 31 October, the Permanent Secretary's office emailed Sarah Davidson, the Director General Organisational Development and Operations, and DP, copying the email to every other Director General, to confirm that, as previously discussed, Cabinet had asked the Permanent Secretary to review the approach taken in Scottish Government to addressing any complaints of sexual harassment.<sup>15</sup>
- 2.9 DP responded later the same day,<sup>16</sup> saying that following helpful discussion at the Executive Team meeting that morning she had now spoken to HPA and they would take forward a series of actions. One step would be to prepare an article for publication on Saltire, the Scottish Government intranet, to set out the Scottish Government's position on sexual harassment including reference to media coverage, encouraging reporting, mentioning support available and explaining longer term work.
- 2.10 On the afternoon of Thursday 2 November, the Permanent Secretary issued her staff message via email.<sup>17</sup> She responded to media reports of alleged harassment at the Scottish and UK Parliaments and informed staff that she had agreed with the First Minister that policies around dealing with complaints of sexual harassment would be reviewed. Her message explained how this review fitted with wider work on culture and behaviour and included contacts for help and support for any staff who might need it.
- 2.11 On Friday 3 November, Sir Jeremy Heywood, UK Cabinet Secretary, wrote to 'Wednesday Morning Colleagues' (Permanent Secretaries of UK departments and the devolved

---

<sup>11</sup> [Phase1FN10/YY001](#) and [Phase1FN5/ZZ012](#)

<sup>12</sup> [Phase1FN10/YY001](#) and [Phase1FN6/ ZZ013](#)

<sup>13</sup> [Phase1FN10/YY001](#)

<sup>14</sup> [Phase1FN7/YY093](#)

<sup>15</sup> [Phase1FN10/YY002](#)

<sup>16</sup> [ibid](#)

<sup>17</sup> [Phase1FN40/YY004](#)

administrations) and HR Directors,<sup>18</sup> about these issues. He referred to ‘sexual harassment and inappropriate behaviour … particularly in respect of those in powerful positions over others’.

- 2.12 On 6 November the Convener of the FDA (First Division Association)<sup>19</sup> emailed the Permanent Secretary<sup>20</sup> welcoming the strong stand she had taken on harassment and saying that the FDA was keen to see the Permanent Secretary remind all staff that the Fairness at Work policy already in place applied to Ministers and Special Advisers in their interactions with civil servants.
- 2.13 HPA sent emails early on the morning of Tuesday 7 November,<sup>21</sup> referring to a conversation with Private Secretary 1<sup>22</sup> the previous evening and asking for quick feedback on her proposed response to the Permanent Secretary’s request for information about planned work. HPA proposed that the Fairness at Work and disciplinary procedures would be reviewed by Christmas, with full Trade Union engagement. She also proposed that in the meantime: sexual harassment would be re-categorised as an example of Gross Misconduct; any allegation of sexual harassment would be prioritised, with HPA overseeing this work, providing daily updates to DP if required; any allegations of sexual harassment against Ministers or former Ministers would be escalated to the Permanent Secretary and Scottish Government should seek to engage an independent party to investigate the issue; and that these interim arrangements should be communicated to staff. Following some correspondence around these points, HPA emailed Private Secretary 1 later that morning<sup>23</sup> with a response for the Permanent Secretary which included all the points proposed and in addition highlighted the need for legal advice on complaints against former Ministers and the need to communicate the ongoing support available to staff.
- 2.14 Private Secretary 1 met with the Permanent Secretary later that day and discussed the points raised in HPA’s email. A document which appears to contain notes from that meeting<sup>24</sup> suggests that the Permanent Secretary was content to accept the proposed approach with the longer-term revision to policy and the shorter-term actions in the meantime. The notes also refer to: process; support for complainants; investigation; whether any Minister against whom a complaint might be made should continue in post; the roles of the First Minister and the Permanent Secretary; and the need to prepare for the possibility that allegations could wind up in the public domain. It is noted that the Ministerial Code did not apply to former Ministers. There appear to be agreed actions, one of which was to obtain legal advice in relation to handling complaints against former Ministers. Other agreed steps were to create a map and process setting out how any complaints would be handled and to set out the longer-term plan on processes and organisational culture.
- 2.15 In the early afternoon of Tuesday 7 November, the Permanent Secretary’s office sent an email to various individuals,<sup>25</sup> following up on an earlier conversation and confirming that HPA and Head of Branch 2 would sketch out a route map for handling complaints. The route map (see Figure 1) was created later that day and distributed.<sup>26</sup>

---

<sup>18</sup> [Phase1FN9/YY006](#)

<sup>19</sup> The unions which comprise the Council of Scottish Government Unions, CSGU, are identified in Appendix 3.

<sup>20</sup> [Phase1FN31/YY017](#)

<sup>21</sup> [Phase1FN11/YY019](#)

<sup>22</sup> The structure of the office of the Permanent Secretary is explained in Appendix 3.

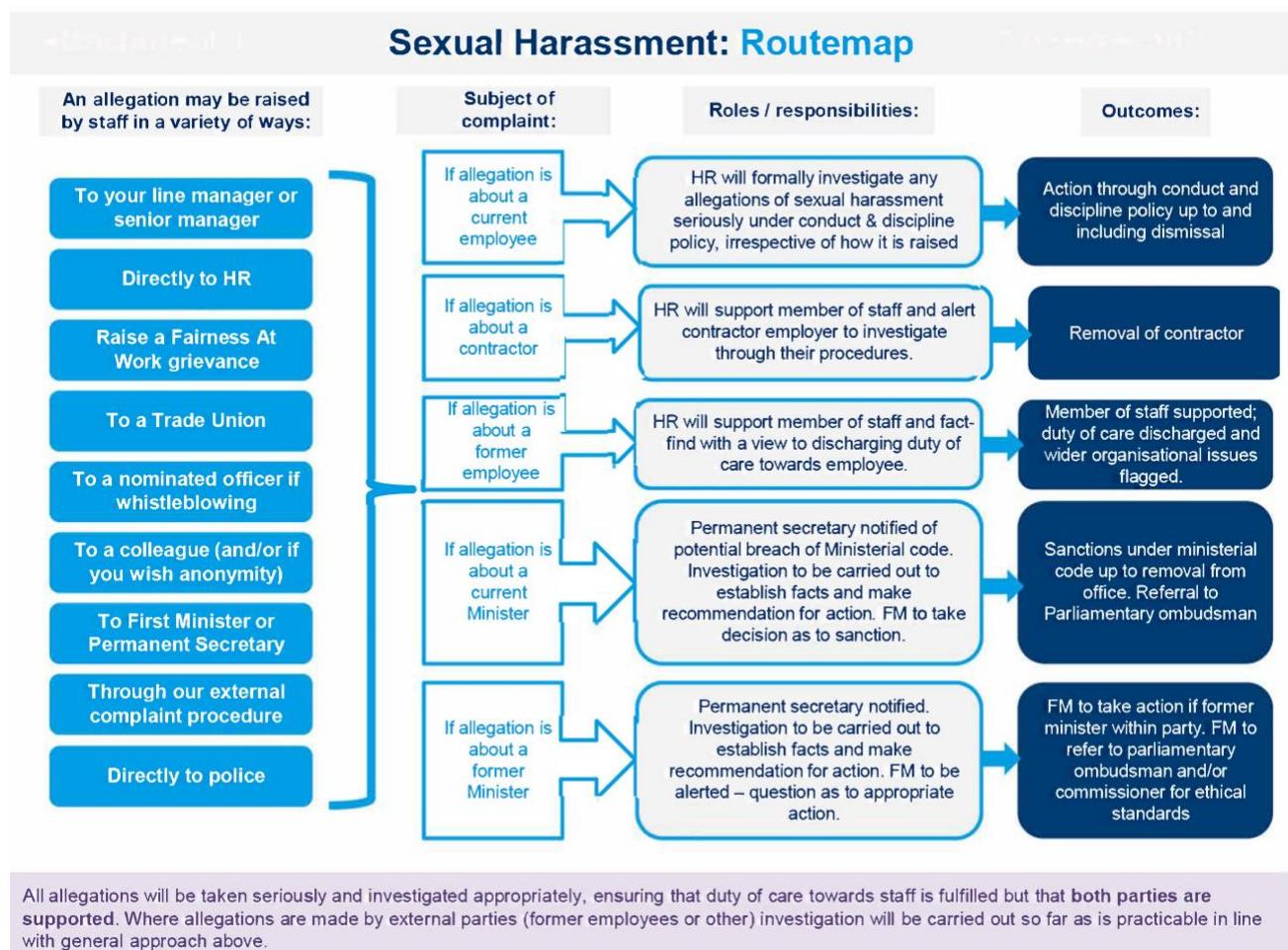
<sup>23</sup> [Phase1FN11/YY021](#)

<sup>24</sup> [Phase1FN11/YY079](#)

<sup>25</sup> [Phase1FN10/YY073](#)

<sup>26</sup> [Phase1FN10/YY040](#)

Figure 1: Route map created on 7 November 2017



- 2.16 DP met with the Permanent Secretary on the afternoon of Tuesday 7 November and emailed HPA and Heads of Branch 1 and 2<sup>27</sup> afterwards to thank them for providing the route map for reference. She suggested that the route map might need some adjustments, in particular to ensure it aligned properly with arrangements under the Scottish Ministerial Code. DP and the Permanent Secretary discussed the phasing of the planned work. They also spoke about the position on handling any complaints against Ministers, particularly the roles of the First Minister and the Permanent Secretary under the Scottish Ministerial Code for complaints against current Ministers and the different position for former Ministers, where any complaint might need to be handled through the relevant political party and where Scottish Government might not have a clear sanction.
- 2.17 Later that evening, HCPG emailed HPA and others<sup>28</sup> with thanks for sending him the route map earlier and raising the question of whether the pathway relating to former Ministers had been informed by legal advice. HPA replied<sup>29</sup> on the morning of Wednesday 8 November to say that Head of Branch 2 had spoken with Lawyer 1 during the afternoon of 7 November and asking if HCPG had any further advice to add. HCPG responded very quickly to say that from his perspective neither of the pathways involving Ministers looked right. It was agreed that he would discuss matters with Private Secretaries 1 and 2 in the first instance.<sup>30</sup>

<sup>27</sup> [Phase1FN11/YY025](#)

<sup>28</sup> [Phase1FN10/YY073](#)

<sup>29</sup> [ibid](#)

<sup>30</sup> [ibid](#)

- 2.18 DP and HPA met on Wednesday 8 November.<sup>31</sup> They noted the need to update the route map and share that with HCPG, and that HCPG was developing a process for handling any complaint about former Ministers, which would need to be shared with lawyers for advice. HPA was due to meet with someone from the Scottish Government Legal Directorate on Thursday 9 November and would update DP afterwards. Other aspects of the handling of complaints were also discussed.
- 2.19 On Wednesday 8 November, HCPG sent a draft of the procedure for handling harassment complaints against Ministers<sup>32</sup> – at that stage relating only to sexual harassment complaints and only against former Ministers – to DP and HPA. DP emailed HCPG, HPA and Private Secretary 2 late in the evening of Wednesday 8 November<sup>33</sup> following up on discussions during the day by offering a further development of an outline process should it be required and noting that they should get this to the Permanent Secretary the following day.
- 2.20 DP updated the Permanent Secretary on the morning of Thursday 9 November.<sup>34</sup> She explained that the process for handling complaints against former Ministers was drafted, that legal input on it was being sought and that it should be with the Permanent Secretary later that day. She also noted that HCPG and Private Secretary 2 were trying to contact someone in the UK Government to consider the process in line with Whitehall practice. DP reported on other aspects of work underway and planned. She noted that there were four specific live issues: one person who had contacted HR and would be meeting them later that day; one person who had offered reflections in response to the Permanent Secretary's staff message; and two people who had reported incidents to others in the organisation.
- 2.21 Later that evening, Private Secretary 2 emailed DP<sup>35</sup> to say that the Permanent Secretary would like to have conversations the following day with several people, including Barbara Allison, Director of Communications, Ministerial Support and Facilities ('DCMSF'), and Gillian Russell, Director for Safer Communities ('DSC'), in relation to roles they might play.
- 2.22 On the morning of Friday 10 November, HCPG sent a revised version (version 3.0) of the draft procedure for handling sexual harassment complaints against former Ministers to DP, HPA, Private Secretary 2 and Murray Sinclair, Solicitor to the Scottish Government.<sup>36</sup> A teleconference was to be set up later that morning to review the draft. DP replied to this message<sup>37</sup> saying that she was content for the draft to go forward. Someone who could act as nominated officer was identified and the merits of that person being someone slightly apart whilst still within the organisation, were recognised for the reasons Lawyer 1 set out the previous day. The Permanent Secretary had mentioned a possible legal or professional background for this role.<sup>38</sup>
- 2.23 Soon after midday on Friday 10 November, HCPG sent a draft of the procedure (version 4.0) to the Permanent Secretary,<sup>39</sup> confirming that the draft had been seen by Lawyer 1 and suggesting possible names for the senior nominated officer role. Very shortly afterwards, he emailed DP,<sup>40</sup>

---

<sup>31</sup> [Phase1FN10/YY074](#)

<sup>32</sup> [Phase1FN23/YY030](#)

<sup>33</sup> [Phase1FN23/YY029](#)

<sup>34</sup> [Phase1FN10/YY032](#)

<sup>35</sup> [Phase1FN10/WW001](#)

<sup>36</sup> [Phase1FN19/XX001](#)

<sup>37</sup> [Phase1FN23/YY035](#)

<sup>38</sup> At this point, the role of the ('senior') nominated officer carried responsibilities regarding support, information, recording of allegations and, as necessary, impartial investigation of facts, reporting to the Permanent Secretary and First Minister as required.

<sup>39</sup> [Phase1FN24/XX010](#)

<sup>40</sup> [Phase1FN10/WW002](#)

responding to her earlier message, to note his Ministerial Code interests in the work to review the Fairness at Work policy and indicating that he was happy to be involved at the appropriate time.

- 2.24 The Convener of the FDA emailed the Permanent Secretary's office early that afternoon<sup>41</sup> to chase a response to the email sent on Monday 6 November. The Convener wanted to let FDA members know that the union had raised the issue of sexual harassment and noted that they were keen to support the work referred to in Sir Jeremy Heywood's letter of 3 November.
- 2.25 The Permanent Secretary wrote to Sir Jeremy Heywood on Friday 10 November<sup>42</sup> in response to his letter of 3 November, setting out the actions taken in Scottish Government, the importance of organisational culture and the further work being done as part of the People Plan. The letter noted that Scottish Government had recorded fewer than five formally-reported cases of sexual harassment since January 2013.
- 2.26 Later on Friday 10 November, the Permanent Secretary's office emailed DCMSF<sup>43</sup> setting out a proposed role for her to provide pastoral care, particularly to staff in Private Offices and Communications, which had been discussed with the Permanent Secretary. The proposal was that DCMSF should help inform any work required to set standards of behaviour and culture in these work areas in future, to signpost professional support or provide 'a listening ear' and advice to any staff being approached by the press. HPA and her team would provide details of sources of support to DCMSF so that she would be able to signpost these, and would also arrange legal advice around the limits of confidentiality and the circumstances under which anything might have to be reported to People Directorate or to the police. The Permanent Secretary's office also sent an email to DSC<sup>44</sup> setting out a proposed role for her to act as a confidante and sounding board for staff who had had experience of sexual harassment in addition to established mechanisms, as discussed with the Permanent Secretary. HPA and her team would work with DSC to shape how the role would operate and ensure that DSC had access to practical information and legal advice as well as advice on agreeing expectations and exit points. Both DCMSF<sup>45</sup> and DSC<sup>46</sup> replied later that day indicating that they were content with the proposals.
- 2.27 DP sent an email late in the afternoon of Friday 10 November,<sup>47</sup> clarifying the distinction between DSC's role and the role of the senior nominated officer. She noted that it would be important for the senior nominated officer to be separate because they could not also be in the support role.
- 2.28 On the morning of Monday 13 November, there was an email discussion of the position should a complaint be made by a former member of staff about a serving Minister. HCPG thought that, in those circumstances, they would need to alert the First Minister that a complaint had been received against one of her Ministers and to take the First Minister's mind on how it should be handled. One option would be for the Permanent Secretary to investigate the complaint, including holding interviews with the serving Minister, the complainant and any witnesses, with the outcome of that process reported to the First Minister for her to decide what, if any, action would be appropriate under the Ministerial Code.<sup>48</sup>

---

<sup>41</sup> [Phase1FN31/YY071](#)

<sup>42</sup> [ibid](#)

<sup>43</sup> [Phase1FN45/YY063](#)

<sup>44</sup> [Phase1FN45/YY064](#)

<sup>45</sup> [Phase1FN45/YY063](#)

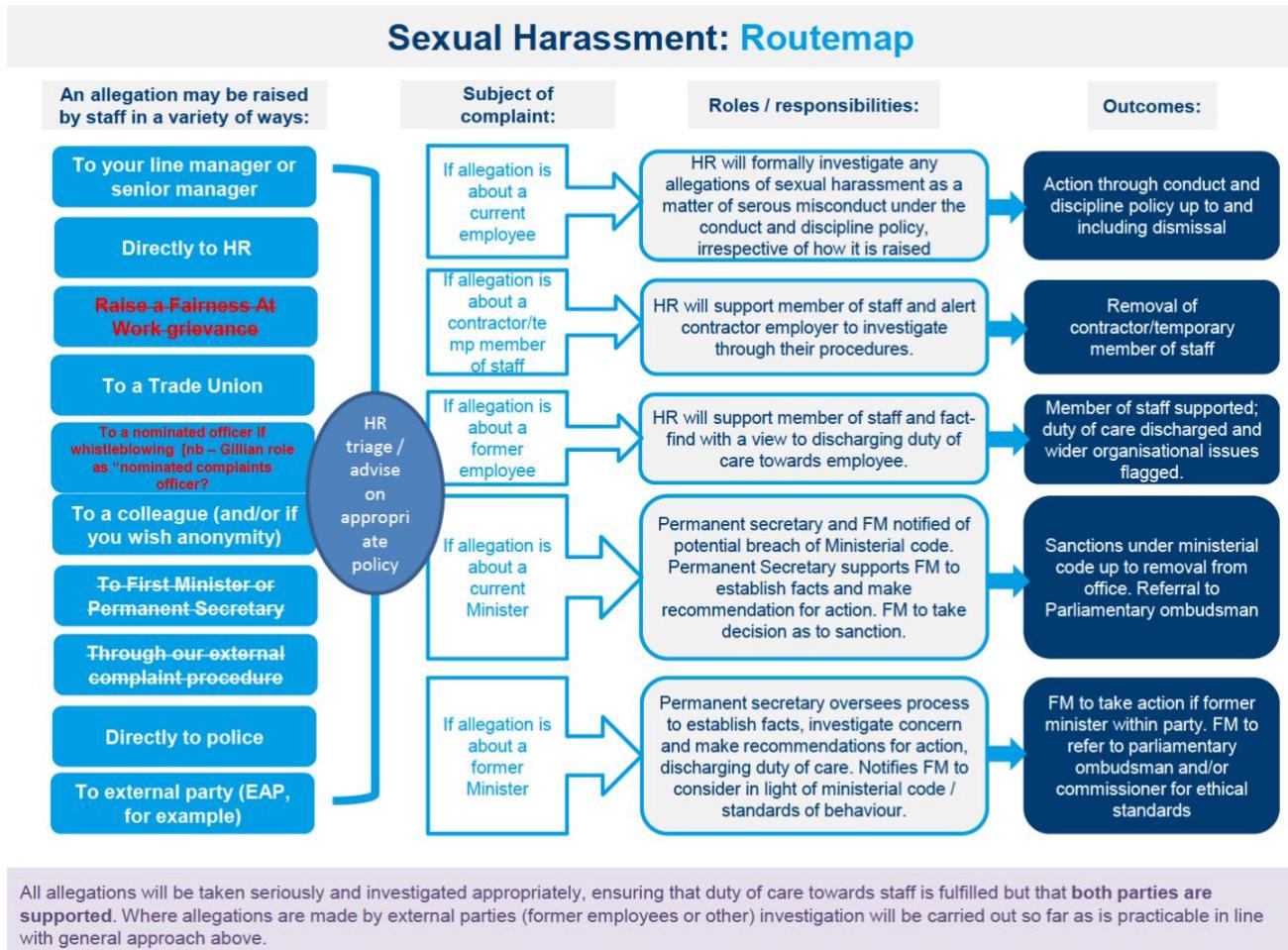
<sup>46</sup> [Phase1FN45/YY064](#)

<sup>47</sup> [Phase1FN45/YY087](#)

<sup>48</sup> [Phase1FN23/YY068](#)

- 2.29 Late on the afternoon of Monday 13 November, updates to the route map were proposed (see Figure 2 below).<sup>49</sup> The Permanent Secretary's office emailed the FDA Convener on the evening of Monday 13 November<sup>50</sup> in response to the emails sent on 6 and 10 November. The email thanked the FDA Convener for timely messages and referred to earlier discussions and agreement to engage with the Council of Scottish Government Unions (CSGU). Meetings with DP would take place. A copy of the Permanent Secretary's letter of 10 November to Sir Jeremy Heywood was also provided.

*Figure 2: Route map 13 November 2017*



- 2.30 HCPG emailed Lawyer 1 and Head of Branch 1 in People Directorate, copying the email to DP, HPA and Private Secretary 2, on the afternoon of Tuesday 14 November.<sup>51</sup> He attached an updated version of the procedure (version 5.0), which included tracked changes. One substantive change in this version was the inclusion of complaints against current as well as former Ministers. HCPG invited comments on the updated version.
- 2.31 DP emailed minor changes that evening.<sup>52</sup> She also suggested reviewing the draft in total once further amendments were agreed. She highlighted the importance of having an easily identifiable process for raising complaints against current Ministers, as that aspect was likely to be of most interest to the Trade Unions and also to have to be incorporated into or cross-referred to from other policy in due course. DP did not think that would be necessary for

<sup>49</sup> [Phase1FN10/YY070](#)

<sup>50</sup> [Phase1FN31/YY071](#)

<sup>51</sup> [Phase1FN23/XX029](#)

<sup>52</sup> [Phase1FN23/XX005](#)

complaints against former Ministers, as these would be unlikely to emerge often and there would be no need to publish a process for this as long as the trade unions were aware and everyone was clear what would be done if a complaint did arise.

- 2.32 DP emailed further comments on the draft procedure on the morning of Wednesday 15 November.<sup>53</sup> She suggested changes, including adding a paragraph from work undertaken earlier in 2017 about informal resolution of complaints. She thought that there would need to be further development to cover the full range of complaints against current Ministers rather than just sexual harassment, but considered that the same basic structure of escalation via the Permanent Secretary to the First Minister for decisions on the approach and any sanction would work.
- 2.33 HCPG replied to DP soon afterwards,<sup>54</sup> attaching the earlier work referred to. It was his expectation that the First Minister would want to know immediately if a complaint against a Minister was received and would also want to decide how any complaint should be handled. An approach involving attempted local resolution might not be an attractive option in the case of more serious complaints. HCPG's suggestion was that it would be better to include a reference in the draft procedure for handling sexual harassment complaints to local resolution being a possible alternative to the process set out at paragraph 14. HCPG circulated version 7.0 of the draft procedure shortly after,<sup>55</sup> with this suggested approach. Later that morning, DP emailed<sup>56</sup> to say that she was content with the draft.
- 2.34 The FDA Convener emailed the Permanent Secretary's office on the morning of Wednesday 15 November<sup>57</sup> thanking her for the copy of her letter to Sir Jeremy Heywood but disappointed that there had been no reference to reminding staff that the Fairness at Work policy applied to Ministers and Special Advisers. He wanted to say in a message to FDA members that the Permanent Secretary and the First Minister were fully supportive of this. The FDA Convener agreed that it was proper for the CSGU to be engaged on the issue now.
- 2.35 Shortly before midday on 15 November, HCPG sent the updated draft procedure (Final Draft version 1.0) for handling sexual harassment complaints involving current or former Ministers to the Permanent Secretary.<sup>58</sup> He highlighted the key changes, including the introduction of coverage of complaints against serving Ministers. HCPG drew attention to two options included for the text of paragraph 12 relating to the handling of a complaint against a former Minister. HCPG had also added reference to the Permanent Secretary engaging with Scottish party leaders if a complaint were received about a former Minister of their party.
- 2.36 That evening, Private Secretary 1 emailed HCPG<sup>59</sup> with feedback from a conversation with the Permanent Secretary earlier in the day. Amongst other points raised, the Permanent Secretary had suggested that it would be important to note that – depending on the nature of the complaint – it might be necessary for it to be investigated and/or reported to fulfil the Scottish Government's responsibilities as an employer. She also suggested that it would be helpful to distinguish more clearly between a concern and a formal complaint. The Permanent Secretary planned to discuss the procedure with the First Minister on the following Tuesday and was also keen that it should be shared with the Welsh and Northern Irish Governments and with the Trade Unions at the appropriate time.

---

<sup>53</sup> [Phase1FN23/XX005](#)

<sup>54</sup> [Phase1FN23/XX006](#)

<sup>55</sup> [ibid](#)

<sup>56</sup> [ibid](#)

<sup>57</sup> [Phase1FN31/XX008](#)

<sup>58</sup> [Phase1FN24/XX010](#)

<sup>59</sup> [ibid](#)

- 2.37 Late on the evening of Thursday 16 November, HCPG sent a draft of the procedure for handling sexual harassment complaints involving Ministers to an unnamed official at the Cabinet Office.<sup>60</sup> He said that the Permanent Secretary was keen for the Cabinet Office contact to have a chance to see the proposed approach for any thoughts or advice, and in particular to check that it would not cause any difficulties for Cabinet Office. The Cabinet Office recipient replied the following morning, Friday 17 November,<sup>61</sup> saying that this felt ‘very uncomfortable’. Another official was carrying out a quick review for Sir Jeremy Heywood on whether UK Government processes had kept pace with developments and concerns. Would it be possible for Scottish Government to wait for this? The email also asked whether the procedure went further than Scottish Government arrangements for handling complaints involving current or former civil servants. HCPG forwarded this email to Private Secretary 1, who replied<sup>62</sup> expressing concern at the reaction and saying that it was not clear how long the UK Government review would take but the First Minister and the Permanent Secretary were keen to resolve this quickly. Private Secretary 1 noted that the justification for a procedure for handling complaints against Ministers was the action the Scottish Parliament was taking in light of allegations about the conduct of MSPs, including a recent Scottish Government Minister, and suggested asking for DP’s views on the issue of complaints against civil servants. An official in Civil Service Employee Policy (CSEP) in the UK Government emailed a range of contacts in UK government departments and the devolved administrations on the afternoon of Friday 17 November, regarding ongoing work by the CSEP and the Government Legal Department on handling historic cases.<sup>63</sup>
- 2.38 Work continued on an updated presentation of the Fairness at Work policy, on the standards of behaviour and on whether to separate the grievance procedure from bullying and harassment. Definitions of bullying and harassment were needed, as was a fast-tracked approach and/or triage role for People Advisers for complaints of sexual harassment, and inclusion of information about complaints involving Ministers.<sup>64</sup>
- 2.39 Head of Branch 3 in People Directorate emailed DP and HPA, amongst others, on the morning of Wednesday 22 November,<sup>65</sup> reporting a positive meeting with the Scottish Parliament HR team on 13 November at which they had shared initial work on tackling sexual harassment. Head of Branch 3 had emailed Scottish Parliament HR colleagues to set up a further meeting the following week and would follow up on inviting them to the HR Forum session on 4 December.
- 2.40 The First Minister wrote to the Permanent Secretary on Wednesday 22 November<sup>66</sup> referring to the original request for a review of Scottish Government policies and processes on sexual harassment made at Cabinet on 31 October, noting the arrangements that had since been put in place and making clear that arrangements for considering cases of sexual harassment should not be constrained by the passage of time. The First Minister noted that previous Scottish Government Ministers, regardless of party, would not be covered by the current Ministerial Code but she considered it fair and reasonable that any complaints raised about their actions while they held office should be considered against the standards of behaviour expected of Ministers. The First Minister asked for confirmation that this aspect was being included and for an update for Cabinet.

---

<sup>60</sup> [Phase1FN30/YY092](#)

<sup>61</sup> [ibid](#)

<sup>62</sup> [ibid](#)

<sup>63</sup> [Phase1FN39/XX016](#). See also discussion in paras 6.6 to 6.15.

<sup>64</sup> [Phase1FN10/XX025](#)

<sup>65</sup> [Phase1FN21/XX023](#)

<sup>66</sup> [Phase1FN21/XX021](#)

- 2.41 A note of the Permanent Secretary's mid-year review on 22 November with Sir Jeremy Heywood<sup>67</sup> included reference to a discussion about harassment and processes, the Permanent Secretary's 'dilemma' and that Scottish Government were including past Ministers in their refresh. It is noted that Sir Jeremy also had issues.
- 2.42 On the afternoon of Thursday 23 November Head of People Branch 2 distributed a summary of work to date and work planned.<sup>68</sup> At present, minor additions to the Fairness at Work policy would be made. Stage 2 would involve further reorganisation of the various policies and processes. Coordination of different related pieces of work was occurring and would continue.
- 2.43 Private Secretary 1 emailed DP on the evening of Friday 24 November<sup>69</sup> sharing a copy of the covering note and draft of the procedure that had been sent by the Permanent Secretary to the First Minister that day. The draft of the procedure (labelled version 5.0) had by that stage been updated to cover sexual or physical harassment complaints. The covering note highlighted several key points for the First Minister's awareness and consideration. These included that it might turn out to be difficult to sustain the separate policy for handling sexual or physical harassment complaints, since bullying and discrimination often accompany sexual harassment. Also highlighted was the proposal that the Permanent Secretary would take forward automatically investigation of any complaint against a current Minister. The First Minister would be informed, without any role in deciding whether an investigation should be carried out. The same automatic approach would also apply to former Ministers whether SNP or from another party. There was an issue of how to link the new procedure to the Ministerial Code.
- 2.44 HCPG emailed various individuals on the evening of Monday 27 November<sup>70</sup> confirming that he had been commissioned to draft letters from the Permanent Secretary to former First Ministers, the current First Minister and party leaders. He and Lawyer 1 had corresponded and amended the procedure since 24 November. The main change was to remove reference to 'physical harassment'. Broadening the application of the policy beyond sexual harassment added to the complexity and it would be simpler to defend if kept narrowly focused. The latest draft (version 6.1) was attached to the email.
- 2.45 On Tuesday 28 November, a reply was sent to HCPG's email<sup>71</sup> confirming the paperwork which the Permanent Secretary would like. In addition to the letters mentioned by HCPG this included: an updated draft of the Scottish Ministerial Code with proposed amendments; an updated version of the draft procedure; and an update on options for investigation or action in the current circumstances.
- 2.46 On the morning of Thursday 30 November<sup>72</sup> an email narrating a meeting between the Permanent Secretary and an individual, P, at the Scottish Parliament the previous day was sent to DP. The Permanent Secretary had outlined the possible approach to harassment complaints. P would like to be told if the letters to former Ministers and current party leaders were sent. The Scottish Parliament was looking at the Members' Code of Conduct. A 'campus survey' was to be launched, to gain better insight into the experience of those working in the Parliament, whatever their employment status. The results were likely to be available by early February, so a further meeting around that time would be helpful.
- 2.47 By the afternoon of Thursday 30 November, HCPG had sent Private Secretary 2 a pack of material which included: a further iteration of version 6.1 of the draft procedure with the three

<sup>67</sup> [Phase1FN10/YY078](#)

<sup>68</sup> [Phase1FN10/XX025](#)

<sup>69</sup> [Phase1FN26/XX032](#)

<sup>70</sup> [Phase1FN10/XX038](#)

<sup>71</sup> [ibid](#)

<sup>72</sup> [Phase1FN32/ZZ008](#)

introductory paragraphs now included in a separate background note; suggested changes to the Scottish Ministerial Code; and a new letter to go to all former Ministers with further copies of the letter to former First Ministers and current party leaders.<sup>73</sup>

- 2.48 Work to refine the procedure continued in December, with the scope eventually settled as all harassment complaints rather than only sexual harassment complaints. Further amendments were made once comments were received from the Unions. The Permanent Secretary sent the revised procedure to the First Minister for her approval on Wednesday 20 December,<sup>74</sup> with a covering note explaining the intention of the new procedure and how it related to the First Minister's request of 22 November. The Permanent Secretary indicated that she would be happy to provide an update for Cabinet also.
- 2.49 In the afternoon of 20 December, a copy of the final version sent to the First Minister was shared with those who had worked on it.<sup>75</sup> The final version mostly reflected a discussion with Head of Branch 2 earlier in the day and changes proposed by colleagues, and an early readout from further discussion with the Trade Unions was requested. Shortly afterwards, the First Minister's office confirmed that the First Minister had approved the procedure as set out by the Permanent Secretary.<sup>76</sup>
- 2.50 As planned, engagement with the Trade Unions and work towards updating the Fairness at Work policy continued in the New Year. This included follow up with the Trade Unions on the version of the procedure signed off by the First Minister. On the morning of Tuesday 9 January 2018, Head of Branch 2 from People Directorate emailed HPA<sup>77</sup> adding a sentence to the final paragraph of the procedure to state that the Scottish Government would not inform the police about a complaint made by an employee without the 'knowledge/consent of the employee'.<sup>78</sup> This was to be discussed with HCPG. Some changes to the Fairness at Work policy, including a cross-reference to the procedure for handling harassment complaints against Ministers, were agreed with the Trade Unions and published in February 2018.<sup>79</sup> The further work envisaged to fully integrate the handling of harassment complaints against Ministers into a revised Fairness at Work policy has not so far been completed. The version of the procedure signed off by the First Minister on 20 December has therefore remained in force.

---

<sup>73</sup> [Phase1FN10/XX038](#)

<sup>74</sup> [Phase1FN28/YY058](#)

<sup>75</sup> [Phase1FN51/XX069](#)

<sup>76</sup> [Phase1FN29/XX064](#)

<sup>77</sup> [Phase1FN23/XX068](#)

<sup>78</sup> [ibid](#)

<sup>79</sup> [Phase1FN51/YY090](#)

## **Chapter 3**

## **Handling of the Complaints**

3.1 On 3 November 2017, in response to the all-staff message from the previous day, Ms A contacted the Permanent Secretary's office.<sup>80</sup> Her contact was general in nature. She thought that the review of sexual harassment policies was a hugely welcome development, particularly as the outpouring of responses to allegations at Westminster, Holyrood and beyond had made clear how worryingly common harassment in the workplace was. She was keen to support the work, although expressed reservations about the idea of contacting HR, given that there had been past reluctance to use this method of reporting.

3.2 On 7 November, Ms B contacted Barbara Allison, then Director of Communications, Ministerial Support and Facilities ('DCMSF'), and arranged a conversation for the following day.<sup>81</sup> During that conversation, Ms B shared allegations concerning the former First Minister. She was willing that these allegations be passed to the Permanent Secretary, though asked that they go no further at that point. On 9 November, DCMSF passed the information to the Permanent Secretary. On 10 November, DCMSF was asked by the Permanent Secretary to take a role providing 'pastoral care', particularly to staff in Private Offices and Communications. Gillian Russell, Director of Safer Communities ('DSC'), was asked to accept a role as a confidante and sounding board for staff who had experienced sexual harassment.<sup>82</sup> Both agreed to serve in these roles.

3.3 On 13 November, DCMSF contacted Ms B again, referring to the staff message from the Permanent Secretary that day.<sup>83</sup> She also advised that she had spoken to DSC about possible contact. On 14 November, Ms B indicated that she did not think she would contact DSC.

3.4 Also in November, Ms A made an appointment to speak to John Somers, the principal private secretary to the First Minister. Ms A saw him on 20 November, during which meeting she made specific allegations in relation to the former First Minister. Mr Somers indicated to Ms A that he needed to speak to his line manager about this, and undertook to do so and revert to her the following day. He told his line manager, DCMSF, what had occurred. She indicated that Ms A should be advised to talk to her. Mr Somers passed this information back to Ms A the next day.<sup>84</sup>

3.5 Ms A had a meeting with DSC and DCMSF on 22 November.<sup>85</sup> That day, DCMSF contacted Ms B; she thought Ms B was aware that DCMSF had met a colleague to hear of their past experiences. DCMSF wanted to make Ms B aware that she could speak to DSC on Monday 27 November. She also indicated her willingness to prepare a written note of what Ms B had told her.

3.6 On 23 November, DSC expressed concern about what circumstances might trigger an obligation to report allegations to the police, and concern lest such reporting might deter people from making complaints in future.<sup>86</sup>

3.7 On 27 November, HPA sent to DP some thoughts on what would be involved in a further discussion with the complainants. This included plans to share with the complainants the latest version of the procedure on the handling of complaints against Ministers or former Ministers. It was intended to ask them about the position had such a procedure been in place at the time of the incidents alleged

---

<sup>80</sup> [Phase1FN46/YY012](#)

<sup>81</sup> [Scottish Government Written Statement 18 December 2020](#) at para 16

<sup>82</sup> See para 2.26

<sup>83</sup> [Phase2FN16/INV005](#)

<sup>84</sup> [Taken from evidence of John Somers to SP committee on 1 December 2020, shortly after 16:51](#)

<sup>85</sup> [Phase 2 \(Batch 2\) FN15/INV355](#)

<sup>86</sup> [Phase2FN11/INV352](#)

by them: would such a procedure have assisted them? HPA also recorded the view that any formal process in relation to the current complaints would have to be led by HR.<sup>87</sup>

3.8 On 28 November, DP thanked HPA for this work; it was helping to draw out questions about what might be possible without a formal investigation.<sup>88</sup> Later that day, DP emailed DSC and DCMSF, thanking them for making themselves available to staff affected by harassment. She had been keeping the Permanent Secretary updated and had agreed next steps with her. In cases involving former Ministers, DP would like to ask if DSC and DCMSF would contact the members of staff making allegations to check if they would be prepared to speak to HR. This would be with the aim of responding to them on a more formal organisational footing.<sup>89</sup>

3.9 On 29 November DSC shared a draft of what she proposed to send to people who had confided in her.<sup>90</sup> In her text, she was trying to ensure that they felt that their concerns were being dealt with appropriately and in accordance with their wishes. As agreed, she had sent narratives on in confidence to DP and HPA. She had now been asked by DP and HPA if complainants would be prepared to speak to them. The purpose of such a conversation was not to revisit narratives but rather to respond on a more formal organisational footing – free of any assumptions – to consider and agree next steps. DSC explained the practical arrangements for such a meeting. As part of the discussion, DP would like to share the developing policy for handling complaints against former and current Ministers. It would be an opportunity to test whether this would have helped at the time, and also to explain the options open now. DP responded with minor revisions to DSC's draft.<sup>91</sup> Later that day, DSC remarked that people coming forward were cynical about whether anything would be done.<sup>92</sup> She sent the notes to Ms A and one other person.<sup>93</sup>

3.10 A meeting involving Ms A, DP and HPA was duly arranged and took place on 5 December. At the meeting reference was made to 'an internal inquiry and a holding to account' being the right thing to do.<sup>94</sup>

3.11 On 7 December, HPA spoke to Ms B on the phone. Ms B said that she would be prepared to make a formal complaint if that was what was required to effect change.<sup>95</sup> Also on 7 December, DP spoke to the Permanent Secretary; the Permanent Secretary had agreed with the First Minister that no change to the Ministerial Code was required and that the new procedure on handling complaints against Ministers needed to go to the First Minister for sign-off because she was essentially agreeing that authority was passed to the Permanent Secretary for investigations under the Code for current Ministers.<sup>96</sup>

3.12 On 8 December, HPA followed up with Ms B. As they had agreed, HPA was setting out options for Ms B: to make a formal complaint with or without disclosure of her name, with explanations of likely scenarios once that had happened. She indicated that the investigation was likely to be led by her. Statements would be taken and then a report compiled for the Permanent Secretary. The former Minister would then be provided with details of the complaint, including names, and given an opportunity to respond. At this point, the former Minister might wish to provide a statement setting out their recollection of events to add to the record. They could also request that statements be taken from other witnesses, although they could also decline to take part in the process. If additional

---

<sup>87</sup> [Phase2FN19/INV009](#)

<sup>88</sup> [ibid](#)

<sup>89</sup> [Phase2FN17/INV010](#)

<sup>90</sup> [Phase2FN17/INV012](#)

<sup>91</sup> [ibid](#)

<sup>92</sup> [Phase2FN17/INV293](#)

<sup>93</sup> [Phase2FN17/INV012](#)

<sup>94</sup> [Phase 2 \(Batch 2\) FN18/INV161](#) and [Phase 2 \(Batch 2\) FN18/INV135](#)

<sup>95</sup> [Phase2FN15/JR013](#)

<sup>96</sup> [Phase 2 \(Batch 2\) FN18/INV286](#)

statements were collected, the senior officer would review the report to include this information and submit it to the Permanent Secretary, who would consider the revised report and decide whether the complaint was well-founded. The outcome of the investigation would be recorded within the Scottish Government.<sup>97</sup>

3.13 On 14 December, HPA followed up with Ms B, and DP made contact with Ms A, offering similar explanations to those offered by HPA to Ms B and indicating that it was likely that the investigation would be led by HPA.<sup>98</sup> On 19 December, Ms A indicated that she would like to proceed with a formal complaint but had not yet decided on whether or not to disclose her name.<sup>99</sup>

3.14 Both complainants considered matters over the Festive break. A meeting was arranged with Ms A for Tuesday 16 January but bad weather necessitated changes in the practical arrangements.<sup>100</sup> HPA advised lawyer 1 that a formal complaint was being made.<sup>101</sup> Around lunchtime, Ms A advised DP that she wished to make a formal complaint, and sent as the written intimation the note of her meeting with DSC from November 2017.<sup>102</sup> HPA was appointed senior investigating officer by DP that day.<sup>103</sup> Also that day, DCMSF contacted Ms B to thank her for her Christmas card and wish her a happy New Year. HPA began her investigation, arranging to meet Ms A on 17 January and also contacting witnesses.

3.15 On 23 January, DP mentioned to HPA that Ms B had indicated in a WhatsApp message that she wished to make a formal complaint.<sup>104</sup> DP indicated to Ms B that HPA would be conducting the investigation and would be in touch. HPA made arrangements to interview Ms B on 24 January. That day, Ms B indicated that she would like to make a complaint without disclosing her name.<sup>105</sup> She sent a written narrative by email to HPA.<sup>106</sup>

3.16 The ensuing weeks were occupied in investigating, including interviewing witnesses. By 18 February, there was a draft of the letter which would go to the former First Minister should the Investigating Officer's report be determined by the Permanent Secretary to demonstrate cause for concern.<sup>107</sup>

3.17 On 21 February, the Investigating Officer obtained permission from Ms A to share information about her complaint with Ms B, and vice versa, and notified both that the investigation report would be shared with the Permanent Secretary on 22 February ahead of a meeting with her on 26 February.<sup>108</sup> After this meeting, arrangements were to be made for the Permanent Secretary to speak to Ms A and Ms B to share her decision on the causes for concern.<sup>109</sup>

3.18 A decision was taken by the Permanent Secretary that there were causes for concern. A letter to this effect was sent to the former First Minister on 7 March, saying that two formal complaints about his behaviour while First Minister had been received and an internal investigation conducted. As the Permanent Secretary had decided that there were causes for concern, she was inviting him to

---

<sup>97</sup> [Phase2FN24/INV113](#)

<sup>98</sup> [Phase 2 \(Batch 2\) FN18/INV016](#) and [Phase2FN18/INV071](#)

<sup>99</sup> [Phase2FN18/INV071](#)

<sup>100</sup> [Phase2FN15/JR001](#)

<sup>101</sup> [Phase2FN20/INV641](#)

<sup>102</sup> [Phase2FN20/INV019](#)

<sup>103</sup> [Phase2FN21/INV103](#)

<sup>104</sup> [Phase2FN15/JR001](#)

<sup>105</sup> [Phase2FN24/INV113](#)

<sup>106</sup> [Phase2FN24/INV087](#)

<sup>107</sup> [Phase 2 \(Batch 2\) FN29/INV535](#)

<sup>108</sup> [Phase 2 \(Batch 2\) FN29/INV091](#) and [Phase 2 \(Batch 2\) F1N29/INV056](#)

<sup>109</sup> [Phase2FN28/INV533](#) and [Phase 2 \(Batch 2\) FN30/INV141](#)

provide a statement setting out his recollection of events and to supply details of witnesses if he wished as well.<sup>110</sup> The response was to be provided by 21 March.

3.19 This letter was responded to on behalf of the former First Minister by his solicitors, Levy and McRae, on 16 March, indicating that their client was keen to engage with the process. It was explained that he had been advised to consult counsel, and would respond when he was in a position to do so. Assurances were sought in relation to confidentiality.<sup>111</sup> On 20 March, the Permanent Secretary wrote extending the time for response to 4 April.<sup>112</sup>

3.20 On 30 March, Levy and McRae responded to the Permanent Secretary.<sup>113</sup> They observed that they did not have access to the witnesses and documents readily available to the Investigating Officer. The complaints were 'numerous, detailed and complex' and covered 'a wide period of time going back several years'. The allegations in paragraphs J and K were particularly problematic, each said to involve 'numerous occasions'. These were attributed to unidentified 'witnesses' and contained little or no specification of persons, times or places. They were seeking a further 8 weeks for their response.

3.21 On 4 April, by way of extension, the Permanent Secretary allowed until 25 April.<sup>114</sup> On 23 April, Levy and McRae wrote back saying that they did not consider it possible to apply the procedure in a manner consistent with the principles of procedural fairness.<sup>115</sup> The constraints imposed in the final paragraph of the Permanent Secretary's letter of 4 April on access to witnesses and documents were unacceptable. Levy and McRae were looking at the individual allegations to see what could be said in response within the constraints of the procedure – but no lawyer would put their client in the invidious position of offering an incomplete response to allegations of this kind without access to reliable supportive evidence which would otherwise be available. They reserved the right to offer some sort of response, as envisaged at paragraph 11 of the procedure. A number of specific legal arguments were raised, and it was asserted that allegation D had previously been dealt with under the procedure then in place.

3.22 At this point, Levy and McRae were also suggesting mediation involving four parties - the two complainants, the Scottish Government and the former First Minister. On 24 April, the Permanent Secretary responded, saying that mediation was not appropriate, since the process was still at the stage of fact finding.<sup>116</sup> She was satisfied the process was procedurally fair.

3.23 Levy and McRae responded on 26 April, reiterating points about fairness, and reserving the right to make these points in a Judicial Review. They repeated the offer of mediation. They also enclosed a list of witnesses.<sup>117</sup> Following this, both complainants indicated they did not wish to participate in mediation.<sup>118</sup> On 30 April, the Permanent Secretary wrote to Levy and McRae. The response of the former First Minister had been passed to the Investigating Officer. It was not agreed that allegation D had been dealt with. Mediation was declined.<sup>119</sup>

3.24 In May 2018, the Investigating Officer proceeded with arrangements to interview the former First Minister's witnesses. On 8 May, Levy and McRae wrote again, mentioning legal points they had raised already and also questioning the Permanent Secretary's jurisdiction over the former First Minister. The letter made the point that the Permanent Secretary asserted that the procedure was fair, amounting to an implicit acceptance that rules of procedural fairness (natural justice) did apply,

---

<sup>110</sup> [Phase2FN29/INV059](#)

<sup>111</sup> [Phase2FN30/INV089](#)

<sup>112</sup> [Phase2FN30/INV119](#)

<sup>113</sup> [Phase2FN30/INV125](#)

<sup>114</sup> [Phase2FN30/INV273](#)

<sup>115</sup> [Phase2FN32/INV146](#)

<sup>116</sup> [Phase2FN32/INV292](#)

<sup>117</sup> [Phase2FN31/INV272](#)

<sup>118</sup> [Phase 2 \(Batch 2\) FN35/INV128](#) and [Phase 2 \(Batch 2\) FN35/INV129](#)

<sup>119</sup> [Phase2FN32/INV117](#)

but did not refute the allegations they had made about unfairness.<sup>120</sup> Interviews with witnesses continued, with preparation of notes and opportunity for witnesses to revise these. The Investigating Officer also provided periodic updates to the complainants.

3.25 On 5 June, Levy and McRae wrote again, referring to previous correspondence and now wishing to consolidate their objections to the proceedings as a whole.<sup>121</sup> Points they had previously made were reiterated. They wrote again on 13 June on the topic of confidentiality, whilst also repeating their fundamental objections to the procedure. It was said that any communication or publication by the Scottish Government of (1) the existence of these proceedings (2) any purported determination by the Permanent Secretary (3) any report from the Investigating Officer or (4) any of the evidence the Investigating Officer had purportedly collected would be a breach of confidence and a violation of the former First Minister's right to privacy. In the event that the Permanent Secretary did communicate any of these matters to any person including the First Minister, she would be doing so in breach of confidence. If, notwithstanding that, she were to take that step they would separately insist that the Permanent Secretary impose strict conditions of confidentiality, and insist that she give proper notice to the persons receiving such communication that the matters were subject to a strict duty of confidence and of the former First Minister's position as set out. They reserved the right to found on the letter in any future proceedings.<sup>122</sup>

3.26 On 18 June, a Freedom of Information request was made to the Scottish Government.<sup>123</sup> A response was due by 16 July.

3.27 On 19 June, Levy and McRae contacted the Permanent Secretary, suggesting a lawyer to lawyer discussion in order for them to offer what they considered to be a mutually beneficial proposal. This was rejected on behalf of the Permanent Secretary on 20 June, at which point the offer was repeated and again rejected.<sup>124</sup>

3.28 On 21 June, a response was sent from the Scottish Government to the letters of 5 and 13 June from Levy and McRae.<sup>125</sup> The response stated that the Permanent Secretary remained satisfied that the Scottish Government's procedure was fair and legally competent. It was noted that the former First Minister reserved the right to challenge that view. In light of widespread concern about reports of harassment across public life, including at Holyrood and Westminster, the procedure was established by the Permanent Secretary to ensure that staff in the Scottish Government had confidence that any complaints of harassment by current or former Ministers would be taken seriously and investigated properly. The Permanent Secretary noted the view that the procedure should not be applied retrospectively. It was intended to fulfill the Scottish Government's obligation to protect its staff from harassment. The consent of former Ministers was not required. The Scottish Government was not asserting any jurisdiction, nor could it impose any sanction on the former First Minister. Specific responses to points concerning the individual allegations were also included.

3.29 On 26 June, Levy and McRae responded.<sup>126</sup> It was clear that there was a fundamental dispute on issues of competency and illegality; their proposal was that arbitration by an independent senior lawyer, for example a retired judge, be utilised to address this aspect. Levy and McRae rejected the suggestion that no jurisdiction was being asserted – the former First Minister was not free to choose whether this procedure was applied to allegations against him. The statement by the Permanent Secretary that the Scottish Government 'cannot impose any sanction' was misleading, as an outcome

---

<sup>120</sup> [Phase2FN34/INV253](#)

<sup>121</sup> [Phase2FN33/INV275](#)

<sup>122</sup> [Phase2FN33/INV196](#)

<sup>123</sup> See paragraph 3.30

<sup>124</sup> [Phase2FN33/INV277](#)

<sup>125</sup> [Phase2FN33/INV278](#)

<sup>126</sup> [Phase2FN33/INV279](#)

'recorded in the Scottish Government' would be destructive of the former First Minister's reputation. Previous points concerning specific unfairness were repeated.

3.30 This letter was answered by the Permanent Secretary on 4 July.<sup>127</sup> Arbitration was not considered appropriate. The letter also made the former First Minister aware that the Scottish Government had received an FOI request on 18 June, asking for 'any information relating to complaints about the conduct of Alex Salmond while he was First Minister'.

3.31 On 9 July, Levy and McRae wrote back.<sup>128</sup> In their response, they made particular points about how the FOI request should be handled. They also repeated the proposal of arbitration, which would ensure a confidential resolution of the dispute on competency.

3.32 On 11 July, Levy and McRae sent a further letter.<sup>129</sup> The position concerning arbitration was reiterated, with an emphasis on the willingness of their client to engage in the totality of the process should its legality be upheld in arbitration. They referred to the clear advice of Senior Counsel that engagement with an unlawful process could not be advised. Levy and McRae were also seeking production of further evidence, and making a subject access request under Data Protection legislation. Included in the material sought was information from the former First Minister's Private Office diary.

3.33 On 12 July, the Permanent Secretary responded.<sup>130</sup> The Scottish Government continued to reject arbitration; its view was that the procedure was fair and legally competent. Details of the complaints had been provided and time allowed for a response. The Ministerial diaries had been sent earlier that day. It was anticipated that the Permanent Secretary would receive the report from the Investigating Officer on Monday 16 July. The reference to the raising of proceedings was acknowledged: notice should be directed to the litigation directorate. A government lawyer now available to speak was identified.

3.34 On 13 July, Levy and McRae asked for further consideration of the idea of arbitration, with more explanation of their reasoning.<sup>131</sup>

3.35 On 18 July, the Permanent Secretary wrote to Levy and McRae.<sup>132</sup> This set out a résumé of the state of play, with a narrative of recent months and recapitulation of the points in issue between the parties. Reference was made to the need to bring the investigation to a close. The Permanent Secretary was willing to allow a further period for a substantive response from the former First Minister. Acceptance of this offer would have to be made by 1100 on 19 July, and the further response would have to be received by 1500 on 20 July.

3.36 At 0924 on 19 July, by email, Levy and McRae indicated that their client would take up this offer.<sup>133</sup> On the afternoon of 20 July, a final response was sent.<sup>134</sup> Arbitration concerning the legality of the process was addressed again. Separately, it was maintained that the process was unfair, and a list of the respects in which that was so was set out. An additional statement on allegations A to I was enclosed.

3.37 On Monday 23 July, these additional factual comments were put to Ms A and Ms B.<sup>135</sup> They sent replies.<sup>136</sup> At 1721 that day, the Investigating Officer emailed an updated report to the Permanent Secretary. An email of acknowledgement from Private Secretary 2 at 1801 recorded the

---

<sup>127</sup> [Phase2FN33/INV280](#)

<sup>128</sup> [Phase2FN33/INV218](#)

<sup>129</sup> [Phase2FN33/INV219](#)

<sup>130</sup> [Phase2FN33/INV284](#)

<sup>131</sup> [Phase2FN33/INV290](#)

<sup>132</sup> [Phase2FN39/INV123](#)

<sup>133</sup> [Phase2FN40/INV115](#)

<sup>134</sup> [Phase2FN40/INV523](#)

<sup>135</sup> [Phase2FN41/INV214](#) and [Phase 2 \(Batch 2\) FN45/INV211](#)

<sup>136</sup> [Phase2FN41/INV214](#) and [Phase 2 \(Batch 2\) FN45/INV211](#)

position: the Investigating Officer had updated the report (with tracked changes) to reflect the additional points from the former First Minister, corrected two incorrect dates and clarified the position regarding a table in the report.<sup>137</sup>

3.38 At the end of July and beginning of August, consideration was also given to the question of whether or not matters should be reported by Scottish Government to the police. Both Ms A and Ms B were asked about their attitude to referral to the police. It appears that both complainers were uneasy about this step, and sought information about what might be involved. At least one of the complainers communicated a position that she would not be ‘comfortable instructing the Scottish Government to make contact with the police on [her] behalf at this stage’.<sup>138</sup> During the week beginning 13 August, steps were taken in preparation for a report to be made to the police. Contact was made with the Crown Agent.<sup>139</sup> A formal letter of referral was sent by DP on 22 August.<sup>140</sup> That day, communication of the decision of the Permanent Secretary regarding the report prepared by the Investigating Officer was also made to the complainers and to the former First Minister.<sup>141</sup>

3.39 Further correspondence regarding confidentiality and communication ensued. A petition for Judicial Review was sent by Levy and McRae to the Scottish Government at 1723 on 23 August.<sup>142</sup> An examination of the judicial review challenge is contained in chapter 5 of this report.

---

<sup>137</sup> [Phase 2 \(Batch 2\) FN45/INV324](#)

<sup>138</sup> [Phase2FN43/INV179](#)

<sup>139</sup> [Phase2FN49/INV317](#)

<sup>140</sup> [Phase2FN45/INV325](#)

<sup>141</sup> [Phase2FN44/INV345](#), [Phase2FN44/INV048](#) and [Phase2FN46/INV255](#)

<sup>142</sup> [Phase2FN47/INV306](#)

### **Terminology and concepts**

4.1 This chapter aims to provide some orientation for the rest of the report. It looks at how the Scottish Government endeavours to maintain a workplace free of bullying, harassment and other forms of unacceptable behaviour, to deal with such behaviour when it occurs and to lay down a code of behaviour for Ministers. The chapter then looks at different ways of achieving accountability for harassment, particularly of a sexual or bullying nature, and remedies under the civil law for those experiencing such behaviour. The reach of the criminal law in relation to unwanted contact is summarised, and provisions governing the different types of investigation and inquiry across civil law, and what they require by way of fairness, are outlined.

4.2 At the heart of this review is fairness at work, both with and without capital letters. Fairness at Work is the name of a policy adopted by the Scottish Government in 2010, following a review of the previous policy, Dignity at Work. The work of review and replacement began in January 2008. I will return to Fairness at Work below.

4.3 Fairness at work, in the sense of ‘when working’ has many aspects. The relevant aspect here is in relation to how one is treated by colleagues. Within that, primarily relevant are bullying and harassment.

4.4 Lawyers sometimes spend time debating definitions, and analysing the inter-relationship between concepts. I do not consider that to be required here. A dictionary definition of ‘to harass’ will include synonyms such as to wear out, distress, annoy or pester. It can include an element of sexual content. ‘To bully’ means to oppress, threaten or intimidate. Bullying may be more likely to happen where there is an imbalance of power than is harassment. Both are longstanding problems. To quote the Lord President,

Harassment may be a novel term of art, but aggressive and bullying behaviour has been recognised in the employment context for generations.<sup>143</sup>

4.5 Tackling aggressive and bullying behaviour brings challenges. One area of difficulty which arises – not just in a work context – is the interplay between the mindset of the alleged aggressor, X, and the experience of the alleged victim, Y. Y can feel bullied or harassed without X ever intending to cause that feeling, or even recognising that that might be an outcome. Depending on the behaviour which occurs, that may be an explanation, an excuse or neither. Some types of work may be more stressful than others. Again, in some scenarios, stress may explain or excuse behaviour, in others it will not. Whether there is a single incident or a pattern may also be relevant.

4.6 In a workplace, there will also be a hierarchy, with those higher up holding management responsibilities. These will include the need to monitor and address performance, which is a sensitive task. There will be a need to identify mistakes and encourage improvement, without crossing a line into aggression or intimidation. Managers will also have duties in connection with complaints. If action is taken in relation to an allegation of bullying or harassment, the focus may be the restoration of calm in the workplace, the taking of action against an alleged aggressor or both.

4.7 Another area of difficulty concerns responsibility and accountability. A workplace where there is only one employer is more straightforward, because the responsibility to promote Y’s wellbeing at work (including dealing with their grievances) and the power to take action against X all reside in the same person or organisation. Where people work with others who answer to a different employer, or are office-holders, the position is more complicated.

---

<sup>143</sup> *Vaickuviene v Sainsbury's* 2014 SC 147 at paragraph [27]

4.8 Finally in this section on terminology and concepts, Fairness at Work is a policy, in the sense of being an aim of the organisation – in this case the Scottish Government – and also a written document. Different from ‘the policy’ is the process: how is the policy put into action? ‘Handling of Harassment Complaints Involving Current or Former Ministers’ (‘HHCM’) is described as a process, or procedure. That distinction needs to be borne in mind although, in relation to HHCM, to characterise it as a ‘procedure’ may not be totally accurate.<sup>144</sup>

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

4.9 The Fairness at Work policy dates from September 2010, and is revised from time to time. It was revised in January 2018, to reflect the existence of the HHCM Procedure. The comments which follow refer to the policy as it stood in the final months of 2017.

4.10 The policy begins with a statement of commitment to the provision of a workplace free from unfair discrimination and to ensuring the fair treatment of staff. The reach of this commitment extends to all employees of the Scottish Government, both permanent and fixed term. The first item in the list of specific behaviour covered is ‘bullying and harassment’.

4.11 Mediation is specifically referred to, and described as of ‘potential value’ to all parties.<sup>145</sup> Section 4 of the policy explains that it incorporates three steps of process: informal, formal and appeal. Section 5 explains the responsibilities of all those involved. It also includes a recognition of the limits on jurisdiction:

*5.3 You can only raise issues that the SG has the power to resolve.*

4.12 Of most importance is the section of Fairness at Work devoted to procedure. Particular provisions need to be set out:

#### **6. How do I raise a complaint?**

##### **6.1 Informal Resolution**

*6.1.1 All Fairness at Work issues should first be raised informally with your line manager. There may be exceptions to this depending on the nature of the complaint where you feel you cannot do this. ... In these circumstances, please contact [Human Resources Shared Service Centre] for advice.*

[There then follows a description of process, according to specified days by or on which a step will be taken.]

##### **6.2 Mediation**

*...can be put in place at any point...*

4.13 The formal resolution process is then described. It is said to apply where the employee ‘cannot resolve the situation informally’. (For those complaints of a serious nature, or where the employee feels they cannot utilise the informal process, advice will have been taken from Human Resources under 6.1.1, as outlined above).

4.14 Again, there are defined steps, to be taken on or by a certain day. The complaint must be in writing. It must explain why the complainer thinks the informal stage did not address their concerns, and how they would like to see matters resolved. The policy then addresses complaints which are more serious:

*6.3.4 Where serious allegations are made against a colleague, it may be more appropriate to follow disciplinary procedures. ... This may be apparent when the complaint is made or*

---

<sup>144</sup> See para 8.54

<sup>145</sup> para 1.3

*following investigation. In such cases, the formal Fairness at Work action will be suspended pending the outcome of the disciplinary procedure and HR will provide advice and guidance. If necessary, the Fairness at Work process will resume following the conclusion of the disciplinary process.*

If there is no resort to disciplinary procedures under 6.3.4, or once they have concluded and if an issue remains,

*6.3.5 The HRSSC will refer your case to an HR Professional Adviser (HRPA), who will acknowledge your complaint. ...HR will also appoint a Deciding Officer (DO) (selected from a pool of line managers from across the organisation) who will make a decision on your case where the facts are clear. The DO will be supported by an HR Professional Adviser (HRPA) throughout the process. ...*

*Exceptionally, where the matter is particularly sensitive or complex, two DOs may decide the case. ...*

4.15 The policy explains that, if it is necessary to inquire into the facts, an investigating officer will be appointed – such an appointment is anticipated to be normal in cases involving complaints about unacceptable behaviour, including bullying. Once the IO has prepared their report, the DO, accompanied by an HR professional adviser, will meet the complainer, who can explain their case and how they think it should be resolved.

4.16 After this, and once the DO has reached their decision, it will be intimated to the complainer. Complaints of bullying, harassment or discrimination are regarded as more serious – automatic onwards referral for disciplinary procedures takes place under section 6.3.8.

4.17 Section 6.5 of the policy refers to ‘special cases’. Insofar as the cases are special because of who they are about, there are provisions about external third parties and Ministers, as follows:

#### ***Complaints about an external third party***

*6.5.4 As the SG will not necessarily have the ability to deal directly with an individual affiliated to or employed by another organisation, other arrangements apply to these situations. Please see Annex C for reporting incidents. Where you feel these special arrangements fail to protect you in going about your normal work, you can raise the matter under the formal stages of this policy.*

#### ***Complaints about Ministers***

*6.5.5 Where local, informal handling cannot resolve differences, the following procedure will apply.*

- *You should approach the Head of HR direct by phone or e-mail to arrange a meeting to discuss and outline the problem. ...*
- *The Head of HR will gather background information and will discuss with you whether an informal resolution is possible and what you see as a satisfactory outcome of your complaint.*

#### ***Informal resolution***

- *If you prefer to seek an informal resolution, the Head of HR will approach the Minister outlining the problem and suggesting a possible solution (the aim will be to achieve conciliation). Mediation can also be offered as a possible method of resolving the matter but we recognise that this may not always be appropriate and both parties would need to agree voluntarily to take this route.*

### ***Escalation***

- *If the situation needs to be escalated, the Permanent Secretary will be informed. You should put your complaint to the Head of HR in writing with details of incidents and witnesses and an indication of [how] you wish to resolve the situation. The complaint will be passed to the Permanent Secretary and Deputy First Minister (or other Minister if the complaint is about the DFM). They will as a first step also consider what scope there might be for alternative resolution such as conciliation or mediation. As a last resort, a Deciding Committee (DC) will be set up to review the situation. The DC would comprise a Cabinet Secretary, DG (different portfolio to the Minister involved) and Director of HRCS.<sup>146</sup> Where necessary an investigator will be appointed to provide a report for the DC.*
- *The DC will meet with you to enable you to state your case. ....The DC will also see the Minister concerned. It is the responsibility of the DC to ensure that it is satisfied it has sufficient information on which to make a fair and balanced judgement. The DC will complete a report stating why the complaint is or is not upheld with recommendations, if appropriate. It will also advise you and the Minister in writing, attaching a copy of the report. Recommendations might include conciliation, training or the Permanent Secretary and First Minister or Deputy First Minister considering what action should be taken.*

4.18 It can therefore be seen that, as at the end of October 2017, there was a procedure for dealing with complaints against Ministers under the Fairness at Work policy. It is, however, implicit in the wording of section 6.5.5 that serving Ministers are being referred to.

4.19 Since the end of January 2018, section 6.1.1 of the policy has read as follows:

*6.1.1 **Most** Fairness at Work issues should first be raised informally with your line manager. There may be exceptions to this depending on the nature of the complaint (such as serious instances, for example complaints relating to sexual harassment), and/or exceptional cases where you feel you cannot do this...In these circumstances, please contact the HR help for advice for general fairness at work issues and ...for complaints related to sexual harassment.*

and section 6.5 has been prefaced with the following:

*Note: A separate process applies in relation to harassment complaints against current and former Ministers*

4.20 Having reviewed the Scottish Government's policy for the promotion of fairness in its workplace and for the handling of complaints under the policy, I now turn to examine the Code of Conduct which regulates the behaviour of Ministers in the Scottish Government.

### **Scottish Ministerial Code**

4.21 The first Scottish Ministerial Code was introduced in 1999, at the time when devolution took effect. The Code applies to all Ministers, including the First Minister. Its provisions are revised from time to time, and it is customary for a new edition of the Code to be issued when a new administration takes power after an election. There have been a total of eight versions to date: 1999, 2002, 2003, 2008, 2011, 2015, 2016 and 2018. Certain provisions within the Code as published from time to time are particularly relevant to this review.

4.22 The Code opens with a general statement as to standards of behaviour. The wording of this changed between 2008 and 2011, to remove a reference to the context for which standards of

---

<sup>146</sup> Human Resources and Corporate Services; as at 2021, HR lies within the People Directorate.

behaviour were set and to substitute the word ‘propriety’ for the concept of ‘constitutional and personal conduct’. Thus, this provision from the version published in June 2008:

***1.1 In the performance of their duties, Scottish Ministers are expected to behave according to the highest standards of constitutional and personal conduct.***

became in 2011

***1.1. Scottish Ministers are expected to behave in a way that upholds the highest standards of propriety.***

In the most recent edition, in 2018, this is expressed as

***1.1. Scottish Ministers are expected to maintain high standards of behaviour and to behave in a way that upholds the highest standards of propriety.***

4.23 Next, the Code sets out the requirement of adherence, and the potential consequences of breach. The overarching requirement to comply with the law is expressed, in terms which have not changed. That it is for individual Ministers to judge for themselves how best to act in order to uphold the Code has also been stated throughout, as has the recognition that it is not for the Permanent Secretary to enforce the Code, although he or she can provide advice on matters which it covers.

4.24 Another provision which has remained the same is found in the chapter on Ministers and civil servants, which was chapter 5 until the 2008 edition, when it became chapter 6. The provision (now 6.2 (d)) reads:

*Ministers have a duty to ... observe the obligations of a good employer with regard to the terms and conditions of those who serve them.*

With effect from the 2018 edition, the chapter on civil servants has also had the following statement in its opening paragraph:

*Ministers should be professional in their working relationships with the Civil Service and treat all those with whom they come into contact with consideration and respect.*

4.25 A further addition in the 2018 Code was of this wording in chapter 1:

*1.2. Ministers should be professional in all their dealings and treat all those with whom they come into contact with consideration and respect. Working relationships, including with civil servants, Ministerial and Parliamentary colleagues and Parliamentary staff should be proper and appropriate. Harassing, bullying or other inappropriate or discriminating behaviour, wherever it takes place, is not consistent with the Ministerial Code and will not be tolerated.*

4.26 Lastly, and in relation to what should happen in the event of apparent or actual breach, the Code has always referred to the need for an individual to retain the confidence of the First Minister, saying that a Minister can only remain in office for so long as they retain that confidence. With effect from 2008, an expanded version of this section was included:

*1.4 It is for individual Ministers to judge how best to act in order to uphold the highest standards. Ministers are responsible for justifying their conduct to the Parliament. The First Minister, however, is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards. Although the First Minister will not expect to comment on every matter that could conceivably be brought to his attention, Ministers can only remain in office for so long as they retain his confidence.*

*Where he deems it appropriate, the First Minister may refer matters to the independent advisers on the Ministerial Code to provide him with advice on which to base his judgement about any action required in respect of Ministerial conduct. The findings of the independent advisers will be published.*

Up to and including the most recent version of the Code, from 2018, this wording has remained substantially the same.<sup>147</sup>

## **Legal remedies against harassment**

4.27 Since 1997, there has been legislation specifically protecting people against harassment. It is contained in the Protection from Harassment Act 1997. Section 8 applies to Scotland and, so far as relevant, reads as follows:

### **8. – Harassment**

(1) *Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and—*

- (a) *is intended to amount to harassment of that person; or*
- (b) *occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.*

...

(2) *An actual or apprehended breach of subsection (1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question; and any such claim shall be known as an action of harassment.*

(3) *For the purposes of this section—*

*“conduct” includes speech;*

*“harassment” of a person includes causing the person alarm or distress; and a course of conduct must involve conduct on at least two occasions.*

4.28 Certain defences are available to a person against whom a claim of harassment is made: that their behaviour was legally authorised, that it was to prevent crime or that it was reasonable in all the circumstances. Remedies include damages, interdict (an order to stop particular behaviour) and a specific ‘non-harassment order’. There is a time limit of three years for the bringing of an action of harassment, although there are also relaxations of this in certain scenarios, consistent with other actions in relation to personal injury. It will also be noted that harassment means a course of conduct, defined as at least two occasions.

4.29 This legislation has not generated a large volume of cases. Some which have been raised include *Marinello v City of Edinburgh Council*,<sup>148</sup> *Moulds v Reid*,<sup>149</sup> *Green v Chalmers*<sup>150</sup> and *McWilliams v Russell*.<sup>151</sup>

4.30 *Marinello* was a claim raised in the Court of Session by a community service assistant in relation to the behaviour of two of his superiors in the Council. He alleged that he had been subjected to verbal abuse and criticism, and that a minibus had been driven at him deliberately. The court held that this history could amount to a course of conduct – the incidents did not need to be of the same type. In *Moulds*, a female pursuer was sexually harassed by a male acquaintance; damages were sought under the Act. *McWilliams* was a decision of the Sheriff Appeal Court, concerning a long running dispute between a parent and a headteacher. The teacher obtained both interdicts and a non-harassment order against the parent. *Green* involved a course of conduct between neighbours, in which interdict was granted.

---

<sup>147</sup> Ministerial Codes for Wales and for the UK Government are discussed in chapter 6.

<sup>148</sup> 2011 SC 736

<sup>149</sup> [2011] CSOH 13

<sup>150</sup> [2017] SAC (Civ) 8; 2017 S.L.T. (Sh Ct) 69

<sup>151</sup> [2018] SAC (Civ) 9

4.31 The most serious Scottish case in which this legislation has been examined is *Vaickuviene v Sainsbury's*.<sup>152</sup> Racially motivated harassment culminated in the murder of an Eastern European supermarket worker. The case involves analysis of the extent to which employers can be liable for the actings of their employees in this area of law. Lord Carloway, then Lord Justice Clerk, analysed case-law in this area and concluded that there was insufficient connection between the work and the violence which occurred for Sainsbury's to be liable for the harassment, as distinct from any direct liability which might have been claimed.

4.32 The Equality Act 2010 also creates remedies against harassment. Harassment is defined as unwanted conduct, related to a relevant protected characteristic, which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.<sup>153</sup> Unwanted conduct of a sexual nature is specifically defined as harassment.<sup>154</sup> One of the protected characteristics is sex. Harassment is outlawed in many different scenarios, including the workplace. An employer may be liable for harassment perpetrated by an employee in the course of his employment.<sup>155</sup>

### Duty of care

4.33 As well as legislation conferring rights against those perpetrating harassment, there is also the common law which applies in the workplace. The term 'common law' contrasts with statute law, or legislation, such as the Protection from Harassment Act referred to above. 'Common law' means law which evolves in cases decided in court by a judge. It can result from an individual application of the provisions of legislation.

4.34 There is a large body of caselaw on the duties which employers have towards their employees. Employers owe a general duty to their employees to take reasonable care for their safety throughout the course of their employment. Traditionally, the duty of an employer towards an employee was subdivided into three parts: provision of competent staff, of adequate plant and machinery and of a safe system of work. These categories are not exhaustive. The duties of an employer insofar as psychological or emotional harm are concerned raise particular issues. And there is a large body of statutory material regulating how employers must treat their staff as well. All of this is designed to prevent injury or harm. Breach of the common law duty will normally lead to a finding of fault, or negligence.

### Criminal law

4.35 So far as the law of England and Wales is concerned, the Protection from Harassment Act 1997 creates a criminal offence of harassment, and a separate offence of stalking. The Act does not create offences under Scots law. In Scotland, stalking is an offence under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010. The definition in the Act sets out a range of behaviours which will constitute stalking. The list goes beyond what might be thought of as 'stalking' in ordinary parlance (following or attempting to contact another person). Section 38 of the 2010 Act creates an offence of behaving in a threatening or abusive manner. The offence will be committed if the threatening or abusive behaviour would be likely to cause a reasonable person to suffer fear or alarm, and A intends by the behaviour to cause fear or alarm or is reckless as to that result. Speaking and acting are both covered, and a single incident can suffice.

4.36 The Sexual Offences (Scotland) Act 2009 sets out a legal framework for sexual offences in Scotland. Among other measures, it sets out (in section 3) what will constitute the offence of sexual assault. This includes sexual touching.

---

<sup>152</sup> 2014 SC 147

<sup>153</sup> [Equality Act 2010, s 26\(1\)](#)

<sup>154</sup> [ibid s 26\(2\)](#)

<sup>155</sup> [ibid, s 109](#)

## **Disciplinary schemes**

4.37 Finally, under contracts of employment and also under the disciplinary schemes of professional bodies, allegations of misconduct may fall to be addressed. Such a process may involve the investigation of disputed matters of fact, and also an evaluation of whether what occurred was a breach of particular rules. Those entrusted with the responsibility of deciding whether allegations are established in the context of employment or professional discipline are also required to adhere to fair process, which will include the need to respect the principles of natural justice.

## **Inquiries**

4.38 Litigation in Scotland is adversarial, with both sides arguing a position and the judge adjudicating as to which of them should succeed. In some countries, and in some parts of the Scottish justice system, a more inquisitorial process takes place, with the judge or tribunal having an investigative role. That is particularly true of various types of inquiry. Features of the legal arrangements for some inquiries are also relevant to this review.

4.39 Most public inquiries in Scotland now take place under the Inquiries Act 2005, which was UK-wide legislation. The Act allows the Scottish Ministers to establish an inquiry if there is public concern that particular events may have occurred, or if particular events have caused, or could cause, public concern. There will be a chair, perhaps with other members, and/or assessors with particular expertise to assist, and a remit ('terms of reference'). The Act makes detailed provision for how the inquiry should go about its work, and confers powers it is likely to need. Particular provisions to mention are section 2 and section 9.

### ***2 No determination of liability***

- (1) *An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.*
- (2) *But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.*

### ***9 Requirement of impartiality***

- (1) *The Minister must not appoint a person as a member of the inquiry panel if it appears to the Minister that the person has–*
  - (a) *a direct interest in the matters to which the inquiry relates, or*
  - (b) *a close association with an interested party,**unless, despite the person's interest or association, his appointment could not reasonably be regarded as affecting the impartiality of the inquiry panel.*

4.40 Section 22 of the Act protects legally recognised privileges, which would include the privilege against self-incrimination. Similarly, as a further example of statutory protection, in relation to fatal accident inquiries in Scotland, section 20(6) of the Inquiries into Fatal Accidents etc Act 2016 provides that 'a person is not required at an inquiry to answer a question tending to show that the person is guilty of an offence'.

4.41 Public inquiries and fatal accident inquiries may be among the best known examples of inquisitorial processes in Scotland. But there are other types of inquiry, often under statute, where a fact-finding exercise is undertaken. From time to time, whether in relation to a public inquiry or other factual investigation, a challenge to some finding or aspect of procedure is taken in court. The necessary representation of those with an interest in the subject-matter can lead to differences of view about where the balance lies, between the objective of ascertaining what happened and the need to avoid reaching conclusions using unfair process.

4.42 More than a hundred years ago, in a passage still quoted, Lord Loreburn in the House of Lords made observations on the duties of fairness incumbent on those reaching decisions under statute, in that case a provision regarding the remuneration of teachers:

Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the board under section 7 (3) of this Act. The board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority.<sup>156</sup>

4.43 The interaction between an inquisitorial process and the rights of affected individuals is addressed in a decision of the Privy Council from 1983.<sup>157</sup>

The rules of natural justice that are germane to this appeal can ... be reduced to ... two. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.

---

<sup>156</sup> *Board of Education v Rice* [1911] AC 179 at 182

<sup>157</sup> *Mahon v Air New Zealand and others* [1984] 1 AC 808

## Chapter 5

## Judicial review

5.1 As noted in chapter 2, Mr Salmond commenced court action against the Scottish Government towards the end of August 2018. A petition for judicial review was sent to the Scottish Government by Levy and McRae on 23 August, the day on which it was also presented to the Court of Session. On 31 August 2018, the petition was served. The proceedings were raised against the Permanent Secretary and the Scottish Ministers, with the First Minister as an interested party.<sup>158</sup> In the discussion below, the Permanent Secretary and the Scottish Ministers are referred to as ‘the respondents’ and Mr Salmond as ‘the petitioner’.

### Some history of Judicial Review

5.2 Judicial review has a long history in Scots law. It can only be brought in the Court of Session. Sufficient interest to challenge the decision must be shown by the petitioner. Since 1985,<sup>159</sup> the Court has had a prescribed process for such review, albeit the core principles stretch back much further. An examination of the circumstances in which judicial review could, and could not, be used to challenge a decision took place in the First Division of the Court of Session in 1992, in the case of *West v Secretary of State for Scotland*.<sup>160</sup>

5.3 Lord President Hope said

1. The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument.
2. The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires.
3. The competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor is it correct in regard to issues about competency to describe judicial review under Rule of Court 260B as a public law remedy.<sup>161</sup>

5.4 The second point captures an important limitation: the Court is not taking to itself the right to make the decision concerned, rather it is policing how the decision is taken.

The principle is that where a particular matter has been entrusted to an inferior body or tribunal the Court of Session cannot substitute its own view for what that body or tribunal may decide; but it can nevertheless interfere in order to control any excess or abuse of power or failure to act within the limits of the jurisdiction which has been conferred. That supervisory jurisdiction may be appealed to in order to insist upon standards of rationality and fairness of

---

<sup>158</sup> An interested party is someone who, despite not being directly involved in the decisions being challenged, may have an interest – in the legal sense – in making representations and is therefore formally sent the petition to enable them to do so if they wish.

<sup>159</sup> Following the report of a Working Party chaired by Lord Dunpark, a new rule, 260B, was introduced into the [Court of Session Rules](#). The provisions concerning judicial review are now in Chapter 58 of those Rules.

<sup>160</sup> 1992 SC 385. Mr West was a prison officer. The petition concerned the refusal of the Secretary of State to pay his removal expenses when he was transferred to work in another prison. The Court decided that, notwithstanding the fact that Mr West held appointment through a government department, this was in the nature of a dispute between an employee and his employer about terms of service and, as such, not a matter which could be the subject of a judicial review.

<sup>161</sup> At 412 to 413

procedure in addition to what may have been expressly required by the statute or by the contract by which the limits of the inferior jurisdiction have been defined.<sup>162</sup>

5.5 At an earlier point, after examining a train of cases, the Court observed this:

The essential feature of all these cases is the conferring, whether by statute or private contract, of a decision-making power or duty on a third party to whom the taking of the decision is entrusted but whose manner of decision-making may be controlled by the court.<sup>163</sup>

5.6 Evolution of judicial review in Scotland has continued since *West*. There is a helpful publication by SPICe<sup>164</sup> which provides an overview of law and practice. It points out that, in a case in 2005, it was observed by Lord Reed (now President of the UK Supreme Court), that the ‘tripartite test’ formulated in *West* may not capture all the cases where judicial review is available.<sup>165</sup> The context of that case could hardly be more different from the present, but Lord Reed’s summary of the role of the court in a judicial review is general in its applicability:

Without attempting an exhaustive definition, it can be said in the most general terms that the essence of the supervisory jurisdiction is that it is the means by which, under the common law, the court ensures that bodies which possess legally circumscribed powers to take decisions or actions, affecting the rights or interests of other persons, exercise their powers in accordance with the limitations and requirements to which they are subject. Those limitations and requirements may be set by legislation, or by contract, or by some other instrument, or by the common law. They may concern such matters as the extent of the powers themselves, the purposes for which they can be exercised, the factors which the body in question requires to take into account, and the procedures which the body must follow. Since the court’s function is confined to ensuring that the powers are exercised in accordance with the limitations and requirements to which they are subject, it follows that its jurisdiction is of a restricted nature, which is aptly described as supervisory. It cannot interfere with an act or decision taken by the body in question within the limits of its powers, since to do so would be incompatible with the existence of those powers, but can only review the decision to ensure that it is *intra vires* [within powers].....the remedy which is most commonly (but not invariably) appropriate, in the exercise of the court’s supervisory jurisdiction, is that of reduction.<sup>166</sup>

5.7 It will therefore be seen that judicial review essentially represents scrutiny of the use of power. Sometimes a decision is alleged to be *ultra vires*: beyond the powers of the decision-maker. Or there may be steps in the process of reaching the decision which breach principles of fairness and natural justice. Two key principles of natural justice are that both sides of a dispute should have a chance to be heard, and that no one should be a judge in their own cause.<sup>167</sup> The first principle reflects ideas of equal opportunity to bring evidence and arguments before the decision-maker. The second principle means that personal or monetary connection with what is in dispute should disqualify someone from acting as judge.

---

<sup>162</sup> At 402

<sup>163</sup> At 400

<sup>164</sup> The Scottish Parliament Information Centre. The briefing, written by Sarah Harvie-Clark and dated July 2016, is available here: <https://www.parliament.scot/parliamentarybusiness/100350.aspx>

<sup>165</sup> *Crocket v Tantallon Golf Club* 2005 SLT 663

<sup>166</sup> *ibid* at paragraph [37]

<sup>167</sup> The Latin versions are *audi alteram partem* and *nemo iudex in sua causa*.

## **Progress of this Judicial Review**

5.8 The written stage of the case followed the usual route for judicial review.<sup>168</sup> After the petition had been served, a timetable was issued on 27 September dealing with particular aspects of the process, including setting a date for a procedural hearing (6 November) and also a date for a substantive hearing lasting four days, starting on 15 January 2019. Answers were lodged on 15 October on behalf of the respondents, reflecting the position of both the Permanent Secretary and the Scottish Ministers.

5.9 As in any case proceeding to a hearing, a Record was made up, showing each paragraph of the petition separately, with the corresponding answer to it immediately after. There were then changes in the written positions taken by both sides; again it is usual for the initiating party to add in written responses to the answers of their opponent and for each side then to spend time improving its own arguments and countering those of the other side. This is known as adjustment. It is usual for adjustment to take place turn about. Here, the court imposed a deadline for adjustment to be completed – 23 October 2018. Both parties made adjustments after that, sometimes with the formal permission of the court and sometimes simply with the tacit agreement of the other side. In order to highlight new material, each set of adjustments was made in a different colour or style of text. Many colours were required.

5.10 There were various other intermediate steps along the way. The procedural hearing took place on 6 November 2018. For the petitioner's legal team, the recovery of documents had been pursued from the outset of the case but, during November, it started to assume increased importance. According to the detailed chronology, documents were sent to the petitioner's solicitors on six occasions and lodged in court (in an inventory of productions) on three occasions between 15 October and 17 December (there may have been overlap between documents sent and documents lodged).<sup>169</sup> The recovery of documents and adjustment of written arguments proceeded in tandem over this period.

5.11 There is available a copy of the Record as at 14 December 2018.<sup>170</sup> It will be apparent from the outline above that it is not possible to say with certainty when, prior to that date, any one sentence had been added to the written position of either side. There is an exception to that, in that according to the limited key on the front page, adjustments made between 4 and 13 December are shown in red italics.

5.12 For present purposes, the Record fulfils the important function of summarising the legal challenges made by the petitioner in the Judicial Review. I will complete the narrative of the Judicial Review process then return to look at the arguments.

5.13 On 14 December 2018, the Court granted the petitioner's motion for a Commission to recover documents. A Commission is a procedure in which a QC with no previous involvement in the case or connection to the parties is appointed by the Court to preside over a hearing in which both sides are represented. The party who has been granted the Commission pursues the recovery of documents they consider they need to obtain in order to succeed in their case. In this case, the Commission took place over three different days: 19, 21 and 28 December. Whether at the Commission or in the days around it further documents were produced by the respondents between 18 and 27 December.

---

<sup>168</sup> Since 2015, it has been necessary to obtain the Court's permission to proceed with a judicial review. In the present case, the Scottish Government formally notified the Court on 20 September 2018 that this would not be contested and, on 27 September, permission was therefore granted without any argument.

<sup>169</sup> [Detailed chronology of Scottish Government participation in the Judicial Review 21 September 2020](#)

<sup>170</sup> [Open Record from Judicial Review proceedings](#)

## **Concession of the case by the Scottish Government**

5.14 At the request of the Permanent Secretary, Sarah Davidson, Director General Organisational Development and Operations, coordinated the provision of urgent advice in relation to the case. Ms Davidson provided a report dated 29th December 2018.<sup>171</sup> On 2 January, the Permanent Secretary concluded that the Judicial Review should be conceded. Further legal advice was taken, and lawyers for both sides discussed the basis on which the case would be concluded. By 4 January, agreement had been reached between them, and incorporated in a Joint Minute.

5.15 On 8 January, a hearing took place in court. The court pronounced an interlocutor (a court order) reflecting the terms of the parties' agreement. This included the following:

- finding the Permanent Secretary's decisions as recorded in her report and letter unlawful in respect that they were taken in circumstances which were procedurally unfair and in respect that they were tainted by apparent bias by reason of the Investigating Officer's involvement with aspects of the matters raised in the complaints prior to her appointment;
- reducing [quashing] the decision report and letter;
- reducing the three reports by the Investigating Officer;
- allowing the undertaking offered on behalf of the respondents to be recorded in the minute of proceedings; and
- finding the respondents liable to the petitioner for the expenses of the petition and proceedings on an agent and client, client paying scale.<sup>172</sup>

## **Arguments and responses**

5.16 The petitioner and his legal team made a number of different legal arguments in the petition. Because the case was conceded, there has been no judicial determination of any of these arguments. Rather, the case was ended by agreement, the terms of which were set out in a Joint Minute, as explained above. Had the arguments been tested in court, it is possible that there would have been a degree of mixed success. As the petitioner, Mr Salmond required only to succeed on one of his main arguments for the Permanent Secretary's decision to be overturned.

5.17 The arguments advanced by the petitioner are set out from page 45 of the Record onwards. The arguments were amplified in the Note of Argument for the petitioner, dated 5 November 2018, and comprised in the documents lodged by the petitioner's solicitors, from page 132.<sup>173</sup> What follows is a summary of those arguments and the responses to them.

5.18 **Ultra vires** – the Procedure had 'no statutory or other legal basis'. The Permanent Secretary had 'no legal right or authority to subject the petitioner to the procedure' or to purport to make findings against him. In answer, the Scottish Government referred to its duty of care, as employer, to civil servants in the Scottish administration. It had a responsibility to ensure the effective investigation of complaints of harassment and inappropriate conduct in the workplace; use of the procedure in discharging that responsibility was not dependent on the consent of the petitioner. An alternative framing of this argument was that the Permanent Secretary had **no jurisdiction** over the petitioner, nor to make findings in respect of the complaints against him, the response to which was that the petitioner could not, by refusing to participate, prevent the investigation of complaints.

5.19 Points were also taken in relation to alleged **retrospective effect** – the complaints were of alleged misconduct which occurred long before the Procedure was written or came into effect. Moreover, the Procedure differed from the process under the Fairness at Work policy for handling

---

<sup>171</sup> [Report prepared by the former DGODO](#)

<sup>172</sup> [Written submission on Judicial Review by Alex Salmond 27 January 2021](#)

<sup>173</sup> [Documents submitted by Levy & McRae](#)

complaints against Ministers, which would have applied had the complaints been made during the petitioner's holding of office. The differences were adverse to the petitioner. In response, it was said that, as a procedural mechanism, 'the Procedure would be expected to apply, and to be applied, for any complaints made after its coming into force, regardless of when the conduct complained of is said to have occurred'.

5.20 There were additional arguments relating to alleged **procedural unfairness**, which appear to relate to the way in which collection of facts, evaluation of those facts and a decision as to whether harassment had occurred had been carried out by, respectively, the investigating officer and the Permanent Secretary. Allegations were made about the inequality of access to witnesses and to documentary material. By way of comparison, reference was made to the ACAS Code of Practice on Disciplinary and Grievance Procedures, the relevance of which in this context was disputed by the respondents. Most of these arguments appear to depend on specific features of the investigation and of the Decision Report and cannot therefore be taken further here.

5.21 A lengthy section of the Record<sup>174</sup> deals with **the involvement of the investigating officer**, Ms Mackinnon, in the formulation of the procedure, and in liaising with Ms A and Ms B, prior to her appointment as Investigating Officer in relation to each complaint. It was alleged that her appointment was in contravention of paragraph 10 of the Procedure, which provided—

*In the event that a formal complaint of harassment is received against a former Minister the Director of People will designate a senior civil servant as the Investigating Officer to deal with the complaint. That person will have had no prior involvement with any aspect of the matter being raised. The role of the Investigating Officer will be to undertake an impartial collection of facts, from the members of staff and any witnesses and to prepare a report for the Permanent Secretary. The report will also be shared with the staff member.*

5.22 The petitioner argued that Ms Mackinnon was unsuitable for the appointment and was unable to perform her duties as Investigating Officer, given her duty to ensure the wellbeing of staff and her previous involvement with the complainants.

5.23 The legal rights on which the petitioner relied in making these arguments were set out. Primarily relied on were breaches of **Article 6 (the right to a fair hearing)** and **Article 8 (the right to respect for private life)** of the European Convention on Human Rights, as well as of his **right to reputation**.

5.24 Subsidiary arguments were made regarding specific allegations and the concluded resolution of a particular issue. Protective remedies against reporting or communication of the decision or of the report were also sought.

### **Relevance of these arguments to this review**

5.25 My remit is to review the Handling of Harassment Complaints Involving Current or Former Ministers Procedure. In particular, I am asked to

draw out the lessons from the first application of the procedure as followed through to decision. In particular, this will include the application of paragraph 10, and provide advice on any changes required to strengthen the content and future operation of the procedure.

I consider that, in addressing this remit, it is necessary to take some account of the criticisms made of the Procedure in the Judicial Review, beyond the specific point on which the petition was conceded. In chapter 8, where my conclusions and recommendations are set out, I will therefore aim to reflect some of the wider points, in order to mitigate the risk of challenge in future.

---

<sup>174</sup> [Open Record from Judicial Review proceedings](#) pages 64 to 78

## Chapter 6

## Comparisons outwith Scotland

### United Kingdom governments and Ministerial Codes

6.1 Questions of Procedure for Ministers, or QPM, was first issued to Ministers on a confidential basis by Clement Attlee in 1945.<sup>175</sup> It was first published in May 1992, under an Open Government initiative by then Prime Minister John Major. After becoming Prime Minister in 1997, Tony Blair renamed the document as the Ministerial Code. Separate Codes now exist in all four governments or administrations within the UK. Those for the UK government, for Wales and for Scotland are non-statutory.

6.2 The current Code for the UK government dates from August 2019.<sup>176</sup> So far as relevant, it contains the following:

#### ***Foreword***

*...There must be no bullying and no harassment...*

...

***1.1 Ministers of the Crown are expected to maintain high standards of behaviour and to behave in a way that upholds the highest standards of propriety.***

***1.2 Ministers should be professional in all their dealings and treat all those with whom they come into contact with consideration and respect. Working relationships, including with civil servants, ministerial and parliamentary colleagues and parliamentary staff should be proper and appropriate. Harassing, bullying or other inappropriate or discriminating behaviour wherever it takes place is not consistent with the Ministerial Code and will not be tolerated.***<sup>177</sup>

From Chapter 5:

***5.1 ...Ministers should be professional in their working relationships with the Civil Service and treat all those with whom they come into contact with consideration and respect.***

6.3 In this chapter, I will set out material received from administrations outwith Scotland in relation to processes for dealing with bullying and harassment, and for dealing with complaints about Ministers. We endeavoured to arrange a discussion with relevant officials in the Cabinet Office but, as we did not receive a response, the material included in the immediately following paragraphs is derived from publicly available sources.

### UK Government Ministers and Civil Servants

6.4 On 29 October 2017, allegations were published in the Mail on Sunday about the then Parliamentary Under Secretary of State for International Trade, Mark Garnier. The allegations were of sexual harassment of his secretary in 2010, at which time Mr Garnier had been a backbench MP. A Cabinet Office investigation was announced immediately.

6.5 Reporting in December 2017, the investigation concluded that there was no evidence that Mr Garnier had breached the expected standards of behaviour. The Cabinet Office investigation also noted that there was ‘no dispute about the facts of the incident’, but that there was ‘a significant

---

<sup>175</sup> This information is taken from House of Commons Research Paper 96/53, by Oonagh Gay.

<https://commonslibrary.parliament.uk/research-briefings/rp96-53/> Ms Gay comments that early versions of QPM were concerned more with procedure than conduct.

<sup>176</sup> <https://www.gov.uk/government/publications/ministerial-code>

<sup>177</sup> Wording on harassment was introduced in the version published in January 2018.

difference of interpretation between the parties', and distress to a member of staff.<sup>178</sup> The standards of behaviour which were said to have been applied were those in the Ministerial Code, although the events occurred before Mr Garnier had been appointed as a Minister. The scope of the investigation and the reasoning applied is difficult to follow.<sup>179</sup> Mr Garnier was removed from his position in a Cabinet reshuffle in January 2018.

6.6 On 17 November 2017, the Civil Service Employee Policy unit of the UK Government emailed a range of contacts in UK government departments and the devolved administrations, attaching guidance 'to support departments in handling any historic cases which you receive in the light of recent events outside the Civil Service'.<sup>180</sup> This guidance was revised and, on 12 December, a final version with FAQs was distributed.<sup>181</sup>

6.7 The guidance refers to the 'usual requirement in departmental HR grievance policies' that complaints should be brought within three months of the action complained about. In this area, however, the three-month deadline should not be used as a reason for not investigating. Departments or HR would consider what was just and equitable regarding out of time investigations. The guidance also pointed out that such a complaint could follow the grievance/harassment complaint route or proceed to a misconduct process immediately.<sup>182</sup>

6.8 In a section headed 'Hybrid cases', claims against non-civil servants, for example '...contractors, politicians, Ministers...' were addressed. The guidance indicated that it might be possible to carry out the investigation but 'not be within the department's authority to instigate a misconduct/disciplinary procedure or apply any penalty'. This meant that if the complaint was upheld, the complainant should be informed about it but also [have] explained the limitations of the department's power. Legal advice should be sought in certain situations, including if a criminal offence was suspected, and complaints against Ministers or special advisers required contact with departmental HR or casework teams.<sup>183</sup>

6.9 Next, the guidance addressed claims against former civil servants. It observed

*In some cases, it may not be possible to investigate a complaint fully. There may be different reasons for this e.g. significant amount of time has passed and the records have been destroyed or the subject of the complaint is no longer an employee of the department or deceased; or none of the witnesses are employees of the department or civil servants any more or cannot be traced. In such cases, the investigation should be attempted but if it turns out it is not practicable, the complainant(s) should be informed why and what was attempted, so they do not feel their complaint was dismissed without due consideration. The complainant should be informed that there is no effective sanction that the department can apply to former employees.*<sup>184</sup>

6.10 The guidance also highlighted the importance of providing support for the complainant and for the person who was the subject of the complaint.<sup>185</sup>

6.11 The FAQ document included a question about the option of following an informal resolution process, and observed

---

<sup>178</sup> <https://www.bbc.co.uk/news/uk-politics-42448314>

<sup>179</sup> <https://www.instituteforgovernment.org.uk/ministers-reflect/person/mark-garnier/>

<sup>180</sup> Phase1FN39/XX016

<sup>181</sup> Phase1FN39/XX054

<sup>182</sup> *ibid* paragraphs 6 to 8

<sup>183</sup> *ibid* paragraph 27

<sup>184</sup> *ibid* paragraph 28

<sup>185</sup> *ibid* paragraphs 32 and 33

*By their nature, historical allegations are likely to arise where the complainant felt unable to raise the issue at the time. For these cases, it is likely that a formal process, involving a full investigation by an independent party, will be required.<sup>186</sup>*

- 6.12 Material was also included about the treatment of current and former employees:

*Employers do not have any right or mechanism under employment law to apply any departmental policies or procedures to a former employee. Therefore, their involvement either as witnesses or subject of complaints is entirely voluntary.<sup>187</sup>*

- 6.13 The topic of complaints against third parties was also addressed:

*Where those procedures [for dealing with complaints against third parties] do not exist, departments should still seek to carry out some form of investigation of the complaint and seek the voluntary co-operation of those involved. Departments may not be able to apply any sanction if there is a finding of harassment and these limitations should be explained to the complainant at the outset.<sup>188</sup>*

- 6.14 Question 22 asked about processes to be used to deal with complaints against Ministers, ex-Ministers or Special Advisors. The answer was:

*In these cases, the department's HR Director should be contacted immediately and they will liaise with the Propriety and Ethics team in Cabinet Office, who normally investigate any complaints against Ministers or SpAds.<sup>189</sup>*

- 6.15 In relation to contact with the police, the guidance advised that the investigator must notify the departmental HR Director and Head of Security as soon as it became apparent from the evidence that harassment may constitute a criminal offence. If appropriate the police would be notified immediately.<sup>190</sup>

- 6.16 In March 2020, a Cabinet Office investigation was announced into allegations of bullying of civil servants by the Home Secretary. The investigation was conducted by Sir Alex Allan, who was asked by the Prime Minister to provide advice about whether the facts established by the Cabinet Office in relation to the conduct of the Home Secretary showed adherence to the Ministerial Code. According to the summary of the report prepared by Sir Alex,

My advice is that the Home Secretary has not consistently met the high standards required by the Ministerial Code of treating her civil servants with consideration and respect. Her approach on occasions has amounted to behaviour that can be described as bullying in terms of the impact felt by individuals. To that extent her behaviour has been in breach of the Ministerial Code, even if unintentionally. This conclusion needs to be seen in context. There is no evidence that she was aware of the impact of her behaviour, and no feedback was given to her at the time. The high pressure and demands of the role, in the Home Office, coupled with the need for more supportive leadership from top of the department has clearly been a contributory factor. In particular, I note the finding of different and more positive behaviour since these issues were raised with her.<sup>191</sup>

---

<sup>186</sup> [Phase1FN39/XX054](#) answer 3

<sup>187</sup> [ibid](#) answer 17

<sup>188</sup> [ibid](#) answer 19

<sup>189</sup> [ibid](#) answer 22

<sup>190</sup> [ibid](#) answer 24

<sup>191</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/937010/Findings\\_of\\_the\\_Independent\\_Adviser.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/937010/Findings_of_the_Independent_Adviser.pdf)

6.17 As ultimate judge of compliance with the Ministerial Code, the Prime Minister considered that the Ministerial Code was not breached. Sir Alex Allan resigned from his post as independent adviser on the Code.<sup>192</sup>

### **Wales – Ministerial Codes**

6.18 Like Scotland, Wales received significant devolution of power following the 1997 UK General Election. A Welsh Assembly was established by the Government of Wales Act 1998, which empowered the Assembly to pass secondary legislation. By the Government of Wales Act 2006, the power to legislate was expanded to allow the passage of primary legislation. ‘The first Welsh Ministerial Code was published in June 2007 following elections to the third Assembly (2007 – 2011), and the formal separation of the Assembly’s corporate body into legislative and executive branches as required by the [2006 Act]’.<sup>193</sup>

6.19 The Code has been revised on seven occasions since. Of particular interest are developments since 2016. The first part is entitled ‘Ministerial Code of Ethics’. The version introduced in May 2016 included the following:<sup>194</sup>

*1.3 Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Ministerial Code and for justifying their actions and conduct in the Assembly and to the public. It is not the role of the Permanent Secretary or other officials to enforce it.*

*1.4 Ministers only remain in office for so long as they retain the confidence of the First Minister. The First Minister is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards.*

6.20 At this point, the Code mainly covered issues relating to a traditional concept of Ministerial probity, such as relationships within Cabinet and avoiding conflict of interest. It makes no reference to bullying or harassment, nor does it refer specifically to what is expected by way of behaviour by Ministers towards those who work with or for them.

6.21 With effect from 23 November 2017, the Code was revised. It now included this:

*1.3 Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Ministerial Code and for justifying their actions and conduct in the Assembly and to the public. The First Minister is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards. Although the First Minister will not expect to comment on every matter which could conceivably be brought to his or her attention, Ministers can only remain in office for so long as they retain the confidence of the First Minister. It is not the role of the Permanent Secretary or other officials to enforce the Code.*

*1.4 Where he or she deems it appropriate, the First Minister may refer matters to an independent adviser on the Ministerial Code to provide him or her with advice on which to base his or her judgement about any action required in respect of Ministerial conduct. In particular, the First Minister may also refer matters concerning himself to an Independent Adviser. The findings of the independent adviser will be published.*

*1.5 This Ministerial Code applies to the First Minister, all Cabinet Secretaries and Ministers. It also applies to the Counsel General. Unless otherwise stated, the term “Minister” in this Code encompasses all of these.*

---

<sup>192</sup> <https://www.bbc.co.uk/news/uk-politics-55016076>

<sup>193</sup> [The Welsh Ministerial Code October 2012](#) Owain Roberts, Paper number 12/043, at page 5

<sup>194</sup> <https://gov.wales/sites/default/files/publications/2017-10/ministerial-code.pdf>

6.22 Then from January 2019, insofar as changed in respects which are of relevance to this review, it read:

*1.1 Ministers of the Welsh Government are expected to maintain high standards of behaviour and to behave in a way that upholds the highest standards of propriety.*

*1.2 Ministers should be professional in all their dealings and treat all those with whom they come into contact with consideration and respect. Working relationships with civil servants, other Ministers, Assembly colleagues and staff should be proper and appropriate. Harassing, bullying or other inappropriate or discriminating behaviour wherever it takes place is not consistent with the Ministerial Code and will not be tolerated.*

...

*1.4 The First Minister will refer complaints regarding Ministerial conduct to an Independent Adviser for consideration and advice, unless he is satisfied that the complaints can be responded to more immediately or routinely - for example where there is an undeniable breach, or where there is no plausible case to answer or complaints are deemed vexatious or trivial in nature. The First Minister will exercise judgement over any necessary action resulting from the advice. The findings of the Independent Adviser will be published. These arrangements shall also apply to the First Minister.*

...

*3.2 Ministers should be professional in their working relationships with the Civil Service and treat all those with whom they come into contact with consideration and respect.<sup>195</sup>*

6.23 The version which is current at present is that dated November 2019.<sup>196</sup> It includes a new section:

#### ***Ministers and their Wellbeing***

*1.8 The statutory powers of a First Minister to appoint and remove Ministers from office are derived from Section 48 of the Government of Wales Act 2006. These powers are wide and unfettered.*

*1.9 The First Minister recognises that at times the personal pressures upon Ministers can be considerable. Most of the time these pressures, which are not unique to Ministerial responsibilities, will be accommodated by Ministers as part of the resilience required to undertake the role. But the First Minister will have regard to the wellbeing of Ministers and will ensure that there are adequate arrangements in place to provide Ministers with support where necessary if they wish to avail themselves of it; and that these arrangements are drawn to the attention of Ministers on a regular basis.*

*1.10 In particular, the First Minister will ensure that the wellbeing of the Minister or Ministers involved is fully taken into account as part of planning and preparation for reshuffles or other circumstances in which Ministers may depart from Government. This will include ensuring that the Ministers at the time are aware of the support services which are available to them to access. This will be the case particularly where departure is taking place in circumstances which may attract significant media interest. The First Minister will endeavour to ensure that outgoing Ministers are provided with appropriate channels of support.*

*1.11 The First Minister will ensure that information surrounding any reshuffle is kept to as tight a cohort of individuals as the First Minister thinks possible*

---

<sup>195</sup> [https://gov.wales/sites/default/files/publications/2019-01/ministerial-code-january-2019\\_0.pdf](https://gov.wales/sites/default/files/publications/2019-01/ministerial-code-january-2019_0.pdf)

<sup>196</sup> <https://gov.wales/ministerial-code-html>

## **Wales – recent events and current position**

6.24 On 3 November 2017, the Welsh Government received the letter from Sir Jeremy Heywood concerning the Civil Service response to misconduct or misbehaviour.<sup>197</sup> The letter was circulated in an ‘all-staff notice’. Staff were reminded of the procedures in existence and were encouraged to approach the Human Resources Director if they had concerns. A network of individuals holding different grades in the organisation, who could be approached for advice, was also set up.

6.25 At this time in the Welsh Government, the Cabinet Secretary for Communities and Children was Carl Sargeant. On 3 November, following allegations about his behaviour, he was removed from his Cabinet position by the then First Minister of Wales, Carwyn Jones. He was also suspended from Welsh Labour, the allegations having been referred to the party by Carwyn Jones. Carl Sargeant was found dead on 7 November 2017. On 11 July 2019, the coroner recorded a verdict of suicide.

6.26 An independent investigation was announced by Carwyn Jones on 10 November 2017. This was to take place under sections 48 and 71 of the Government of Wales Act 2006. The independent investigator was Paul Bowen QC. As recorded in the Operational Protocol for the investigation, the rationale for its establishment (quoting a Press Statement of 10 November) was as follows:

Further to the First Minister’s comments yesterday about the need for independent scrutiny of his actions and decisions in relation to Carl Sargeant, he agrees that there should be an independent inquiry and it would be proper to ask a senior QC to lead that work. To ensure this happens separately from his office, the First Minister has asked the Permanent Secretary to begin preparatory work for this inquiry, and to make contact with the family to discuss terms of reference and the identity of the QC. It is our understanding that such an inquiry should not take place before the outcome of a Coroner’s Inquest – but we will take further advice on this matter.<sup>198</sup>

The Terms of Reference for the investigation were:

To conduct an investigation into the First Minister’s actions and decisions in relation to Carl Sargeant’s departure from his post as Cabinet Secretary for Communities and Children and thereafter.

6.27 There were other related inquiries into these events. These are summarised in the following extract from the decision of Lord Justice Haddon-Cave and Mr Justice Swift in a Judicial Review brought by Mr Sargeant’s widow:<sup>199</sup>

17. On 13th November 2017, a Coroner’s Inquest (“the Inquest”) was opened into Mr Sargeant’s death by Mr John Gittins, HM Senior Coroner for North Wales (East and Central) at County Hall Ruthin. In opening the Inquest, the Coroner found that the provisional cause of death was hanging, in an apparent act of self-harm, and indicated that in discharging his duty to consider what steps may be taken to prevent future deaths, he would be examining actions and decisions taken by “the Assembly”<sup>200</sup> in regard to Mr Sargeant prior to his death. The Coroner’s inquest subsequently heard evidence from 26th to 30th November 2018, but was then adjourned.

18. There were two other related investigations which should be mentioned by way of background. The first was commissioned by the Permanent Secretary on 4th November 2017 and concerned whether there had been a “leak” by the Welsh Government of information relating to the Ministerial reshuffle. The Chief Security Officer for the Welsh Government

---

<sup>197</sup> See para 2.11

<sup>198</sup> <https://gov.wales/sites/default/files/publications/2019-07/revised-operational-protocol-iqci.pdf>

<sup>199</sup> *R (on the application of Sargeant) v First Minister of Wales* [2019] 4 WLR 64

<sup>200</sup> punctuation as in original

reported on 25th January 2018 that he had found “no evidence of prior unauthorised sharing of information by the Welsh Government relating to the recent Ministerial reshuffle”.

19.The second was commissioned by the First Minister and was directed to whether he had breached the Ministerial Code by misleading the National Assembly for Wales (Cynulliad Cenedlaethol Cymru) in relation to answers which he had given on 14th November 2017 and earlier on 11th November 2014 regards allegations or reports of bullying by special advisers.<sup>201</sup> The Independent Adviser on the Ministerial Code, Mr James Hamilton, reported on 17th April 2014 [sic – should be 2018] that the First Minister’s answers on each occasion “were truthful, and not misleading, and did not breach the Ministerial Code”.

6.28 In April 2020, the QC-led inquiry was dropped by the Welsh Government, with the agreement of the Sargeant family.

6.29 This is a sensitive and distressing episode. Nothing would be gained from my discussing or analysing the points which it raises about allegations in relation to Ministerial conduct or how they are dealt with. But it needs to be borne in mind that much of the current position in Wales regarding these matters has been informed by this experience.

6.30 Insofar as concerns allegations against Welsh Ministers by civil servants, very few complaints have been received over the years. Each complaint has either been withdrawn or resolved informally. There is, of course, a difference between a single incident and a course of conduct. And incidents vary in their severity. If an allegation of a more serious nature were to be made, or a course of conduct was involved, and there appeared to be a case to answer, then it is likely that an external investigator would be appointed, though there might be at least an initial internal assessment of whether there was a case to answer. The decision as to whether this was warranted would be one for both the First Minister and the Permanent Secretary. If an investigation took place, the report would be presented to both. The decision regarding the outcome under the Ministerial Code would be for the First Minister.

6.31 The Welsh Government has not separately codified the process by which it would take forward complaints though it is considering doing so at the moment. The current Dignity at Work policy for staff does not extend to complaints against Ministers. Any changes which might be proposed would require to achieve consistency of investigative process between the Dignity at Work policy and the Ministerial Code. The Welsh Government already has a suite of support services available to staff, and more recently serving Ministers, which both could access while making or being subject to a complaint.

6.32 All allegations would be considered carefully, though it would be more difficult for them to be taken forward if the complainant was seeking to have their identity concealed from the person accused. But in these circumstances the Welsh Government would do all that it could to preserve confidentiality.

6.33 If a complaint were to be made about a former Minister, the Ministerial Code itself would not apply since it only binds serving Ministers. However, the Welsh Government would still be concerned and would seek to address the complaint if it could. There would need to be an assessment on a case-by-case basis to decide upon an appropriate response. Depending on the nature of the allegation, it might be possible to approach the former Minister and seek to establish an investigation on an agreed basis. If a former Minister were to be the subject of an allegation which was sufficiently serious, there would need to be consideration about referring the matter to the police, and senior members of the Welsh Government would do whatever was needed to support the member of staff in such an approach.

---

<sup>201</sup> In 2014, Mr Sargeant had raised concerns about possible bullying within the Welsh Government.

## Northern Ireland – Ministerial Codes

6.34 The context of the responsibility of Ministers in Northern Ireland is different. The 1998 Multi-Party Agreement, part of what is known as the Belfast or Good Friday Agreement, sets out the arrangements for the appointment of Ministers, who will discharge the responsibilities of government. As a condition of appointment, Ministers must affirm the terms of a Pledge of Office undertaking (in paragraph g) to comply with the Ministerial Code of Conduct. These arrangements were given legislative force in the Northern Ireland Act 1998, where the Pledge of Office and Ministerial Code of Conduct are set out in Schedule 4.

6.35 The Ministerial Code of Conduct, like the other such Codes in these islands around that time, focuses on more traditional notions of probity rather than personal behaviour. It is understandable that the situation in Northern Ireland revealed particular priorities. For instance, paragraphs b) and c) of the Pledge of Office pledge

- (b) commitment to non-violence and exclusively peaceful and democratic means;
- (c) to serve all the people of Northern Ireland equally, and to act in accordance with the general obligations on government to promote equality and prevent discrimination.

6.36 Changes were made in 2006, following the St Andrews Agreement, the goal of which was the restoration of political institutions after a gap. It was agreed that there would be a statutory Ministerial Code. This was achieved by statutory amendments contained in the Northern Ireland (St Andrews Agreement) Act 2006. The Code subsequently formulated (of which the Ministerial Code of Conduct is an integral part) does not address in terms the issue of personal behaviour towards others. It did, however, strengthen the accountability of Ministers to the Executive Committee as a collective decision-making body. Because of this line of accountability, Ministers cannot be dismissed by the First Minister (or deputy First Minister). Sanctions are a matter for the Assembly, voted on following the tabling of a motion, all as set out in the Northern Ireland Act 1998.

6.37 In January 2017, in the aftermath of events related to a Renewable Heat Incentive Scheme, devolved government in Northern Ireland collapsed. An independent inquiry into the scheme commenced its work on 1 February 2017.<sup>202</sup> The details of the Inquiry and the specific recommendations it made are largely beyond the scope of this review. But the Inquiry did consider the issue of codes of conduct and made the following recommendation (number 43 of 44):

In addition, the Northern Ireland Executive and Assembly ought, in the Inquiry's view, to give due consideration to an independent mechanism to assess compliance with codes of conduct in public life as they apply to Ministers and Special Advisers. Whatever route is chosen, there must in future also be a focus on keeping standards of conduct clear, consistent, up-to-date and reflective of good practice. How this is done will be a matter for debate, but the principles of independence, transparency and periodic reporting to the people of Northern Ireland must be at the core.<sup>203</sup>

Earlier, the Inquiry had acknowledged that, where 'a recommendation relates to political structures or arrangements ... the degree of weight which it may attract is a matter for the devolved administration'.<sup>204</sup>

6.38 In January 2020, a deal ('New Decade New Approach' – 'NDNA') to restore devolved government in Northern Ireland was formulated after discussions between the two governments and

---

<sup>202</sup> The Inquiry panel was chaired by the Right Honourable Sir Patrick Coghlin, a retired Northern Ireland Court of Appeal Judge. He was assisted by a panel member, Dame Una O'Brien and a technical assessor, Dr Keith MacLean.

<sup>203</sup> <https://wayback.archive-it.org/11112/20200911100057/https://www.rhiinquiry.org/sites/rhi/files/media-files/RHI-Inquiry-Report-Volume3-Chapter56-Summary-and-Recommendations.pdf> at page 16

<sup>204</sup> [ibid](#) at paragraph 56.9

the five main Northern Ireland parties.<sup>205</sup> The two governments invited the parties to endorse the terms of the deal.

6.39 The NDNA document includes a section entitled ‘Priorities of the Restored Executive’. It also includes a section which ‘represents the deal that the Parties would agree to restore the Belfast (Good Friday) Agreement Institutions’. That includes this:

*6. The parties also agree to establish a robust, independent enforcement mechanism to deal with breaches of the Ministerial Code and related documents.*

6.40 Full details are then in Annex A, headed ‘Transparency, accountability and the functioning of the Executive’. In turn, it provides that the Executive will, as a matter of urgency, produce strengthened drafts of the relevant codes to be implemented immediately.

6.41 Included in the list of what these strengthened codes will achieve is that they will:

*1.1.13 - Make clear that within the civil service there is zero tolerance of harassment, bullying or inappropriate or discriminatory behaviour and that action should be taken to ensure there is a culture where people can speak up about unacceptable behaviour.*

...

*1.3 Anyone may make a complaint regarding alleged breaches of ministerial standards or the Ministerial Code. Complaints will only be considered if the complainant provides their name, contact details and sufficient details of the alleged breach to be able to give it full consideration.*

*1.4. Complaints that a Minister has breached the Ministerial Code of Conduct, Guidance to Ministers on the Exercise of their Functions or Conduct of Executive Business will be referred to the Commissioners for Ministerial Standards.*

*1.5. The Commissioners will decide whether a complaint has sufficient merit to be considered, and will decline to investigate a complaint that is frivolous, vexatious, or made in bad faith.*

*1.6. The Commissioners will number three in addition to the Assembly Commissioner for Standards, and will be appointed by the First Minister and deputy First Minister.*

*1.7. The Commissioners may ask for the facts from the Secretary to the Executive to inform their decision as to whether to investigate a complaint.*

*1.8. The Commissioners’ decision to investigate or not to investigate, and the grounds for their decision, will be published. There will be strict, published, timeframes to adhere to for each stage of the process.*

*1.9. When the Commissioners investigate a complaint, they will publish the findings of their investigation. Their findings will include whether or not the Minister has been found to have breached the terms of the Code or Guidance, and the relative seriousness of the breach. The findings will not include any recommendation regarding sanctions. This will ultimately be a matter for the relevant Party/Assembly process.*

*1.10. The published report of the Commissioners may provide the grounds upon which others may initiate their own sanctions, including those under s.30 of the NI Act 1998 by which the Assembly can suspend a Minister on the passing of a motion of no confidence supported by 30 MLAs or moved by the First Minister and deputy First Minister acting jointly. The published report may also be taken into consideration by the nominating officer of the Minister’s party.*

---

<sup>205</sup> Available at <https://www.gov.uk/government/news/deal-to-see-restored-government-in-northern-ireland-tomorrow>

*1.11. All Ministers and civil servants, including special advisers, will cooperate fully with any investigation by the Commissioners for Ministerial Standards.*

6.42 In January 2021, the Northern Ireland Assembly approved legislation to extend the role of the Assembly Commissioner on Standards to the investigation of complaints against Ministers in respect of the Ministerial Code of Conduct. The arrangements as proposed by NDNA as set out above are now under review. Insofar as concerns the more general point about producing a strengthened draft to be implemented immediately, the process for approval of a Ministerial Code for Northern Ireland is set out in the Northern Ireland Act 1998 and, if that process needs to be amended, Westminster legislation is required. I understand that such amending legislation is anticipated during 2021.<sup>206</sup>

### **Northern Ireland – current position**

6.43 The Northern Ireland Civil Service operates a Dignity at Work policy. It addresses bullying and harassment, and offers definitions and examples. There are Harassment Contact Officers, who are trained to offer support and information to any member of staff who considers that s/he has experienced unwanted, unreasonable and offensive behaviour.

6.44 Section 6 of the policy deals with complaints against those who are not fellow civil servants. This covers complaints against staff in another NICS Department or Agency, members of the public, contractors or staff on secondment, with guidance provided for each scenario.

6.45 Separately, there is a grievance procedure. Staff can raise issues in relation to their treatment at work, but neither the grievance procedure nor the Dignity at Work policy was intended to be used to address Ministerial conduct.

### **New Zealand – investigations into Ministerial conduct**

6.46 In 2000, allegations in relation to sexual misconduct surfaced against the Minister for Maori Affairs, Dover Samuels. The allegations concerned events 14 years previously. A police investigation was commenced, and the Minister took leave from Ministerial office. The Minister was dismissed on 28 June 2000, after the Prime Minister learned of further allegations.<sup>207</sup> He was ultimately cleared of all allegations and returned to office, becoming a Parliamentary Under-Secretary in 2002.<sup>208</sup>

6.47 In May 2005, there came to light allegations against the then Associate Minister for Education, David Benson-Pope.<sup>209</sup> The allegations surfaced a few days after the Minister had launched an anti-bullying campaign. They related to Mr Benson-Pope's teaching career: it was asserted that in the early 1980s he had engaged in conduct including stuffing a tennis ball into the mouth of a 14 year-old boy, throwing balls at pupils, causing a pupil's nose to bleed by hitting it with the back of his hand and caning a student hard enough to draw blood. On 16 May the Minister, who denied the allegations, stepped down from Parliament temporarily, pending an investigation. It was suggested that there could be a Ministerial Inquiry by an independent person, but the claims were referred to the police. On 8 June, Mr Benson-Pope resumed other Ministerial responsibilities which he had held, but not the

---

<sup>206</sup> Much fuller explanation and discussion of the arrangements in place and how they might change is contained in, inter alia, *Back to Stormont: The New Decade, New Approach Agreement and What it Means for Northern Ireland*, (2020) Dr Sean Haughey, The Political Quarterly, 91 (1); 134 - 140 and written evidence from many individuals and organisations to the Northern Ireland Affairs Committee of the UK Parliament, available at <https://committees.parliament.uk/work/113/new-decade-new-approach-agreement/publications/written-evidence/>

<sup>207</sup> <https://www.beehive.govt.nz/release/dover-samuels>

<sup>208</sup> <https://www.beehive.govt.nz/node/14687>

<sup>209</sup> <https://www.nzherald.co.nz/nz/benson-pope-steps-downnbspas-bully-inquiry-looms/H7IRXFY7MH5NHZ5T6VH75VHXVI/>

role in relation to education.<sup>210</sup> The police investigation determined that there was conflicting evidence and that it was not in the public interest to lay charges.<sup>211</sup>

6.48 In June 2009, a woman (who was never publicly identified) complained to police about the Honourable Dr Richard Worth, the Associate Minister for Justice. Other allegations regarding sexual behaviour had been intimated to the Prime Minister previously. These had been made by an active member of another political party. Richard Worth declared that he was innocent of any crime.<sup>212</sup> On 3 June 2009, Dr Worth resigned as a Minister; the Press Release issued by the then Prime Minister said

Dr Worth tendered his resignation to me last night, and I have accepted it.

He advised me of some private matters in respect of which he felt it appropriate that he should resign as a Minister. I accepted his resignation and have advised the Governor-General accordingly.<sup>213</sup>

Later in June 2009, Dr Worth resigned from Parliament. In November 2009, the police concluded there was no basis for proceeding with criminal charges.<sup>214</sup>

6.49 In August 2014, a leaked email claimed that a government Minister, Judith Collins, had been ‘gunning’ for the Chief Executive of the Serious Fraud Office in 2009, while responsibility for the Office rested within her portfolio.<sup>215</sup> Judith Collins denied the allegations, but resigned pending an investigation.<sup>216</sup> On 2 September 2014, the Prime Minister announced the establishment of a Government Inquiry into the allegations. This Government Inquiry had full powers of inquiry under the Inquiries Act 2013, and was conducted by former High Court Judge the Honourable Lester Chisholm.<sup>217</sup> Reporting in November 2014, the Inquiry found no evidence that Ms Collins had acted inappropriately.<sup>218</sup> She was reinstated in December 2015.<sup>219</sup>

6.50 In August 2018, a member of staff in the Ministerial office of Hon Meka Whaitiri, then Minister of Customs, Associate Minister of Agriculture, Crown/Maori Relations, Forestry and Local Government alleged that the Minister had grabbed her arm, pulled her from the room and shouted at her. The Minister and the Prime Minister agreed that she would stand aside while there was an investigation into the matter.<sup>220</sup> Staff in Ministerial offices are employed by the Department of Internal Affairs (Ministerial Services and Secretariat Support). The Department engaged a barrister to conduct an independent external investigation and provide a report, which would be passed on to the Prime Minister. The investigator found two of the three allegations concerned to be established.<sup>221</sup> On 20 September 2018, after receiving the report, the Prime Minister removed Ms Whaitiri as a Minister. In

---

<sup>210</sup> <https://www.beehive.govt.nz/node/23297>

<sup>211</sup> <https://www.nzherald.co.nz/nz/benson-popenbspescapes-assault-prosecution/3YGEHNQHM3ZN34ZYVATVJZJDHA/>

<sup>212</sup> <https://www.stuff.co.nz/national/politics/2489703/Woman-at-centre-of-Worth-allegations-revealed>

<sup>213</sup> <https://www.beehive.govt.nz/release/statement-richard-worth's-resignation>

<sup>214</sup> <https://www.nzherald.co.nz/nz/no-charges-after-police-end-mp-sex-claim-inquiry/UH33PYTIIPSPOTHJTAFJDAPDE/>

<sup>215</sup> <https://www.nzherald.co.nz/nz/the-email-that-brought-down-judith-collins/37Q5RTAGMARYMJE3WOY7CMLLZE/>

<sup>216</sup> <https://www.nzherald.co.nz/nz/im-the-victim-of-a-smear-campaign-judith-collins-resigns/QMB2QKLCDUUHVAP2NLBYYRFLUA/>

<sup>217</sup> <http://www.dia.govt.nz/Government-Inquiry-Collins-Inquiry>

<sup>218</sup> <https://www.beehive.govt.nz/release/government-inquiry-report-released>

<sup>219</sup> <https://www.rnz.co.nz/news/on-the-inside/429700/restocking-the-cabinet-ardern-spring-clean-packs-surprise-or-two>

<sup>220</sup> <https://www.beehive.govt.nz/release/prime-minister-stands-minister-aside>

<sup>221</sup> [https://www.dia.govt.nz/diawebsite.nsf/Files/Patten-Proactive-Release-Oct-2018/\\$file/Final-Report-5-Oct-18\\_Redacted.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Patten-Proactive-Release-Oct-2018/$file/Final-Report-5-Oct-18_Redacted.pdf)

her statement, the Prime Minister acknowledged that the facts continued to be in dispute, albeit elements were agreed. She continued:

Based on the context and conclusions of the report, I no longer have confidence in Meka Whaitiri as a Minister at this time, and that is why I have taken the action I have.<sup>222</sup>

Ms Whaitiri was reappointed as a Minister in October 2020.<sup>223</sup>

### New Zealand – Ministers and Civil Servants

6.51 New Zealand government departments and agencies each have their own internal conduct policies and procedures. The Public Service Commission has the task of setting standards of integrity and conduct that apply to most State Services agencies and provides model standards that include minimum expectations for state servants.<sup>224</sup>

6.52 The Department of Internal Affairs maintains a ‘Managing Unacceptable Behaviour’ policy, which covers public servants employed by the Department, but not Ministers. Those so employed include staff in Ministerial offices, and many other staff (more than 2000 other employees in total). The policy deals with unacceptable behaviour in the workplace, occurring elsewhere when the employee is performing work-related actions, or happening in work-related social situations. The behaviours targeted include bullying and harassment. The policy covers all those working at the Department of Internal Affairs and aims, among other objectives, to repair the working relationship and promote positive workplace behaviours.

6.53 Under the policy, tackling unacceptable behaviour may involve self-help, informal intervention or the making of a formal complaint. The procedures which are available are also set out in the Problem Resolution Procedure: suggestions as to how to approach someone in the self-help method are offered, informal intervention involving a manager is described and the process of formal complaint is also explained. That will be appropriate where one of the lesser methods has not worked, or the complainant wishes a formal process. The complaint is made to a manager, an investigator (who may be from a different department, from HR or external) is nominated and a process of interviewing commences. The investigation will follow certain listed principles, described as ‘principles of natural justice’, and a written report will be prepared. Disciplinary action may follow.

---

<sup>222</sup> <https://www.beehive.govt.nz/release/meka-whaitiri-removed-minister>

<sup>223</sup> <https://www.rnz.co.nz/news/on-the-inside/429700/restocking-the-cabinet-ardern-spring-clean-packs-surprise-or-two>

<sup>224</sup> <https://www.publicservice.govt.nz/our-work/integrityandconduct/>

## **Chapter 7**

## **Comparisons within Scotland**

### **Introduction**

7.1 In this chapter, I set out material I have obtained from looking at other bodies in Scotland which face the same issues concerning bullying and harassment at work. In particular, they feature workplaces where people work with others who answer to a different employer, or are office-holders or self-employed. As I have already observed, that makes the position more complicated.

### **Church of Scotland**

7.2 The Church of Scotland is an institution where people with different employers, or who are technically self-employed, often work together. To investigate how policies on unacceptable behaviour operate in this context, I spoke to Elaine McCloghry, head of Human Resources for the Church of Scotland. Mrs McCloghry has a master's degree in human resources, and worked in the HR department at the National Library of Scotland for 14 years. She began work at the Church in 2016 and became head of HR in 2017. She is based in Church Headquarters in Edinburgh. Those who work there work for the central church. This includes departments such as the law department, the finance department (the General Treasurer), the department which looks after heritable property (the General Trustees), the Guild and those who work for the Church's forums on ministry and mission or on societal issues at home and abroad.

7.3 In the Church of Scotland, ministers are accountable for their behaviour to the Presbytery to which they belong.<sup>225</sup> That accountability includes a disciplinary process, applicable to ministers and others holding particular status within the Church. This process was codified most recently in the Discipline Act 2019.<sup>226</sup> Bullying and harassment, as defined in the Act, are forms of behaviour which may justify the bringing of proceedings.

7.4 The Church's disciplinary process has features in common with those of other organisations, with aspects which are particular to the Church. Of potential relevance to this review are the following points:

- The legislation contains a prohibition on demitting status as a minister<sup>227</sup> pending investigation of a disciplinary complaint.
- If, following preliminary screening by the Presbytery Clerk, the complaint appears one which should be considered under the Act, an assessor is appointed and is responsible for initiating further steps, though with the assistance of an adviser, who the assessor must consult before taking any decision under the legislation. The assessor is likely to be legally qualified and the adviser will be a minister.
- It is mandatory for pastoral support to be provided for the person complained about and for the complainer.
- Individuals with prescribed roles, such as assessor and adviser, cannot be members of the Presbytery (or a congregation situated in the Presbytery) involved in the disciplinary proceedings. Should matters proceed to a discipline tribunal, the same prohibition of overlap applies to the members of the tribunal.

---

<sup>225</sup> Presbyteries cover the entire territory of Scotland. There is a Presbytery for England and like arrangements for those Church of Scotland ministers working elsewhere in the world.

<sup>226</sup> Act 1 of 2019, available at [https://www.churchofscotland.org.uk/\\_data/assets/pdf\\_file/0015/72033/2019-Act-01-I-revised-to-October-2020.pdf](https://www.churchofscotland.org.uk/_data/assets/pdf_file/0015/72033/2019-Act-01-I-revised-to-October-2020.pdf)

<sup>227</sup> Resigning from the clergy. A minister subject to proceedings under disciplinary legislation is, however, permitted to resign from a particular congregation or other appointment. In the latter situation, the minister remains under the jurisdiction of the Presbytery until proceedings are finally disposed of.

- After being appointed, the assessor determines whether the matter should be dealt with under the complaints procedure applicable to presbyteries, or by mediation or conciliation or other form of alternative dispute resolution.
- If not screened out under the previous provisions, then investigatory proceedings are initiated by the assessor; these may lead to proceedings before the Discipline Tribunal.
- There is provision for an offer of censure with consent to be made to the person complained about.

7.5 Separate from the disciplinary process, and much as for those who work in other organisations, those members of staff based in the central church offices have a set of employment policies which govern their relationships with each other. Bullying and harassment are dealt with by the Dignity at Work Policy, which dates from 2012 but was revised in April 2020.

7.6 The policy aims to foster a culture opposed to bullying and harassment, clarify what actions are covered, raise awareness of the support on offer and set out procedures for dealing with harassment should it occur. Sexual harassment is specifically included. In relation to harassment by third parties, the policy contains the following:

#### ***Third party harassment***

*It is unlawful and inappropriate for an employee to be persistently harassed by someone who does not work for the [central employing agency], such as a Forum or Committee member, visitors to the Church Offices or any other place of work, contractors, agency workers or any other person. If an employee feels that they have been subjected to harassment by any third party they should immediately speak to their line manager, who will be responsible for taking action on every reported complaint. If an incident of harassment recurs and an employee feels that their departmental managers have not taken adequate steps to deal with the problem the employee should contact the HR department to let them know what has happened and discuss how the problem might be addressed.*

and

*Complaints of harassment are treated seriously. It is the responsibility of the Church to protect employees against harassment, whether from within the same employing agency, from someone within another part of the Church of Scotland or from the general public, where this occurs in the workplace or in the course of employment.*

7.7 The policy offers both an informal and a formal stage, with an emphasis on raising any complaint as soon as possible. It is not necessary to have attempted informal resolution before making a formal complaint. A formal complaint proceeds under the grievance procedure, and must be made in writing. The person designated under the grievance procedure will investigate, and determine the action to be taken, which may involve a fuller investigation. Eventual outcomes are that the complaint is not upheld, that mediation, counselling or other process should be provided to the person complained about or that the complaint is upheld and evidence justifies proceeding to the disciplinary process. There is provision for support to both parties if the complaint is not upheld, ‘to help repair working relationships’. Across all stages and outcomes, the Employee Counselling Service is available to both the individual making the complaint and the alleged harasser.

7.8 In Mrs McCloghy's view, third party harassment is complicated. If the difficulty concerns a member of staff who is working alongside the person about whom they are complaining, the solution may be redeployment. Notwithstanding the passage in the policy about the requirement to take action on every reported complaint, if the alleged harasser is a minister, the matter has to be passed to the relevant presbytery for action to be taken. The role of HR is protection of the employee and the role of the Presbytery is investigating the conduct of a minister. In securing effective outcomes, the relationship between HR in the central office and the relevant individuals in the Presbytery is key.

7.9 Mrs McCloghry has experience of contacting a minister and asking that he or she responds to complaints directed to HR. If the minister refuses to respond at all, the matter is 'stuck'. If the person complained about starts to gather support for their position, the situation may worsen. Although she has never done this, Mrs McCloghry would be prepared to complain to a Presbytery on behalf of staff if she felt this to be necessary in order to make progress.

7.10 In relation to any possible cut-off by the passage of time since an incident, Mrs McCloghry felt that the main question would be why a complaint was being raised after a significant period of time. Given that there can be reasons why individuals do not complain at the time, she would not dismiss a delayed complaint on this basis out of hand: she commented that to say 'too much time has passed and your chance has gone' feels wrong.

7.11 Mrs McCloghry has dealt with a complaint concerning how a member of staff felt they had been treated by a minister at a meeting months earlier. On that occasion, a complaint was made by the minister about the member of staff, and it was therefore possible to utilise the Dignity at Work policy to investigate what had occurred. Ultimately, a disciplinary process was initiated against the minister. For the member of staff, this was a difficult experience, due to factors such as the duration of the process, the presence of legal representation for the minister and the element of confrontation.

7.12 Mrs McCloghry accepted that there can be difficulties if those who complain wish to do so anonymously. It is likely that any investigation of their allegations will only be able to proceed to a limited extent. She hopes that, in such a situation, the support offered to a complainer will encourage them to allow disclosure of their identity. It is not possible for a complaint to proceed against an individual on the basis of anonymous accusation.

7.13 Investigation of a complaint under the Dignity at Work policy will be undertaken by a member of the HR department, where around six people have had training to equip them for this task. Alternatively, one of the in-house solicitors, or other trained staff member, may be the investigator. Care is taken not to appoint anyone who has had involvement (including having had a conversation about the matter) or who has a connection such as proximity of workplace, with anyone concerned in the narrative.

7.14 In general, the processes rely on treating those involved well throughout, and on their understanding of what to expect. But she agreed that outcomes can be less than satisfactory, with perceptions of vindication or of not having had justice.

7.15 Such effects are not confined to the adjudication of workplace complaints.

### **Faculty of Advocates**

7.16 The Faculty of Advocates is Scotland's independent referral Bar. In the summer of 2016, the number of members of the Equality and Diversity Committee of the Faculty was increased in order to address some specific tasks. One of those tasks was to consider the introduction of an anti-harassment policy. In January 2017, a sub-group produced a draft policy on harassment and bullying. This was discussed and adjusted over the ensuing months. It required to be approved by the Dean and Office-Bearers of the Faculty and by the Faculty Council, and a view had to be taken as to whether or not approval by the Lord President was required. Finally, the policy was launched at an event in December 2017.<sup>228</sup>

7.17 As well as definitions of bullying and harassment, the policy sets out an informal and a formal procedure. For the legal profession in general, any formal steps need to fit into the regulatory landscape: the legal profession is regulated under the Legal Profession and Legal Aid (Scotland) Act 2007, which contains provisions concerning complaints about the conduct of lawyers or the services

---

<sup>228</sup> <http://www.advocates.org.uk/news-and-responses/news/2018/jan/celebrated-former-dean-welcomes-bullying-policy>

they provide (and see also the Legal Services (Scotland) Act 2010). The gatekeeper for complaints against members of Faculty is the Scottish Legal Complaints Commission.

7.18 Because much of the work of an advocate concerns litigation, the formulation of a policy needed to address the perpetration of bullying and harassment by members of the judiciary, as well as by solicitors and clients. Ultimately, the policy as finalised (and as applicable today) contains this clause:

4.5 *If the incident concerns someone who is not a Member of Faculty (such as a member of the judiciary, a solicitor, a client or other third party), you may wish to ask an Office Bearer to intervene for you on an informal basis. In such a situation, the Faculty will seek to provide such further assistance and support as may be considered appropriate in the circumstances.*

7.19 In 2018 and 2019, further work in this area was undertaken in both the solicitors' branch of the profession and the Faculty.<sup>229</sup> Issues are also under examination internationally, under the aegis of the International Bar Association.<sup>230</sup>

7.20 I spoke to Kirsty Hood QC, Clerk of Faculty from October 2014 to April 2019 and current convener of the Equality and Diversity committee within the Faculty. She had also served on a cross-profession group called 'Legal Wellbeing Scotland': this group was led by the Law Society of Scotland and LawCare, and aimed to promote improved mental health and wellbeing in the Scottish legal profession.

7.21 The Clerk of Faculty is often the first office bearer approached by a junior member wishing to raise a concern.<sup>231</sup> Around the time the policy was being developed, issues were also being taken to the then Vice Dean. Issues about bullying are seldom raised – in terms of frequency, they would rank a long way behind litigation-related ethical dilemmas. Dr Hood could not recall any episode of bullying or harassment between those of approximately equal status. Incidents involving the behaviour of a more senior member towards a more junior advocate are more common than those between opponents in litigation. Certain contact which Dr Hood could recall concerned more general working relationships, as distinct from anything related to a particular court case. It is part of the function of the Clerk to offer support, and to help to explore the next steps that could be taken, with a hope that matters could be resolved informally. If someone wants their name to be withheld, it is unlikely that anything can be done although, if particularly egregious conduct was involved, Dr Hood confirmed that this would not be disregarded.

7.22 The Faculty's policy does not have a time limit within which concerns must be raised for action to be taken. Given that the background may involve an imbalance of power, there can be many reasons why people do not come forward at the time of an incident occurring – or why they do come forward when the relationship has changed and the power no longer exists. The longer they wait, however, the more difficult it is to resolve. If there was a gap of time, especially if only a single incident rather than a course of conduct was involved, there would be a desire to explore why the person was coming forward now.

7.23 If the person complained about is an advocate, there is a limitation in terms of time within which a formal complaint can be made. As noted above, any formal complaint about the conduct of an advocate would require to be remitted to the Scottish Legal Complaints Commission. Broadly, complaints require to be made within three years of the conduct complained of, although if there are

---

<sup>229</sup> <https://www.scottishlegal.com/article/time-s-up-for-bullies-in-the-legal-profession>

<https://www.insider.co.uk/news/minister-urges-law-profession-end-16497130>

<sup>230</sup> <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>

<sup>231</sup> Section 4.3 of the policy recommends an approach to the clerk for those unsure whether they have experienced bullying or harassment

reasons or circumstances which are exceptional, or the circumstances dictate, the Commission can accept a complaint beyond its deadline.<sup>232</sup>

7.24 If the person complained about is someone not subject to the jurisdiction of the Faculty, such as a member of the judiciary, Dr Hood observed that ‘it is not in the gift of the Faculty to superintend the process of complaining about judges’. The likely course of action would be to remind the complainer about the process for complaining about judges. It may be that the Dean or another office bearer would attempt to resolve the matter informally.

7.25 Dr Hood could not recall any issue in relation to sexual harassment ever being raised with her. In principle, the same routes for raising a concern would be available, although the formal process of complaining about the conduct of a member of the judiciary is administered by the Judicial Office for Scotland. It is likely that a person raising a concern about such matters would prioritise making it stop; invoking assistance is likely to be because the person does not feel they can solve it informally themselves. Informal resolution of any issue with a judge, if that can be achieved, is preferable because of the chance to solve a problem without making it worse. The advantage of a formal process is that it is structured, and offers equality of arms and independent adjudication. But there is a risk that it will detrimentally affect working relationships, perhaps also with other senior figures who become aware of the complaint from the person complained about.

7.26 Finally, early in 2020, the Faculty created a list of members who are willing to be contacted informally about any issue in relation to bullying or harassment. These individuals, who number around 30, are a first point of contact, intended to ease the reporting of such instances. Concerns will be treated with the utmost confidence and not reported further without the consent of the member in question.

### **Judicial Office for Scotland**

7.27 The Judicial Office occasionally receives complaints in relation to bullying and harassment.

7.28 The Scottish Courts and Tribunals Service (SCTS) has a ‘Dignity at Work’ policy. It is aimed at creating ‘a work environment free of unacceptable behaviour’.<sup>233</sup> Like the Faculty’s policy, it begins with a Statement of Commitment. This highlights core values of respect, service and excellence.<sup>234</sup> The policy also sets out an approach to identifying unacceptable behaviour.<sup>235</sup> This recognises that, given the nature of work in courts and tribunals, SCTS staff ‘can, on occasion, work in challenging situations dealing with difficult cases’. Nevertheless, ‘SCTS requires that all our employees are treated with courtesy and consideration by all people using our services’.<sup>236</sup> Reference is made to the possibility that, after investigation of behaviour found to be unacceptable, the employee may be advised that they will not be required to deal with the perpetrator again.

7.29 Both informal resolution and the possibility of formal complaint are available. Informal resolution is to be attempted first where possible.<sup>237</sup> Informal resolution of a complaint concerning a judge could involve escalation to a senior person in the line of management above the complainer, and that senior person then communicating with someone in the judiciary.

7.30 Advice is provided in the policy about how to take informal action in relation to a complaint against a colleague (although, if the issue is too serious for informal resolution, a formal complaint may be pursued as a first step). Mediation is specified as a possible means of resolving issues. The

---

<sup>232</sup> Rule 7 of the SLCC rules. <https://www.scottishlegalcomplaints.org.uk/about-us/rules-policies-and-publications/our-rules/>

<sup>233</sup> Introduction

<sup>234</sup> para 1.4

<sup>235</sup> In section 3

<sup>236</sup> para 3.3

<sup>237</sup> para 6.4

formal complaints procedure, for use if informal methods have not succeeded or for a more serious issue, is outlined in the policy.<sup>238</sup> It is expressly stated that a member of staff with a formal complaint about a member of the judiciary is entitled to use the judicial conduct procedure.

7.31 Formal complaints under the SCTS procedure are to be made, in writing, within three months of an incident or behaviour or, if a course of conduct is involved, the last incident. Complaints which are more than three months old may be incapable of fair and effective investigation. Anything more than six months old will not normally be considered unless there is reasonable cause to do so.

7.32 On receipt, a determining officer will appoint an investigator, normally a manager from outwith the complainant's own team. A report will be prepared by the investigating officer, and submitted to the Determining Officer, who will consider that written report, decide whether the case is well-founded and whether there is an allegation to answer under the Conduct and Discipline Policy. An anticipated timetable is set out. There are rights of appeal, available to both the complainant and the person accused. Importantly, however, the formal procedure to be followed if the complaint concerns judicial conduct is the judicial conduct procedure.<sup>239</sup>

### **Judicial Complaints**

7.33 Complaints against serving judges fall to be considered under the Complaints about the Judiciary (Scotland) Rules 2017.<sup>240</sup> The application of these rules is overseen by an appointed senior judge, known as the disciplinary judge. Complaints have to be in writing and there are provisions allowing for dismissal by the Judicial Office or, subsequently, the disciplinary judge in certain circumstances. A complaint will not be accepted if the person complaining refuses to allow their complaint or an accompanying document to be shown to the person complained about.

7.34 If the complaint relates to actions which may be criminal, there are provisions allowing for the processing of the complaint to be suspended until criminal proceedings are ruled out or completed. There is a time limit of three months from the incident complained about, although this can be departed from in exceptional circumstances.

7.35 Where the allegation, if substantiated, would raise a possible question of fitness for office, the Lord President, as the country's most senior judge, must be told and will determine if a tribunal to assess fitness is to be constituted.

7.36 Where there is not going to be a tribunal and the complaint fails to be investigated, it will be referred to another judge for that purpose. That nominated judge can pursue resolution without further investigation, if appropriate. If an investigation is proceeding, the investigating judge has necessary powers to enable the obtaining of evidence. The investigating judge will reach conclusions on factual matters, determine if the allegation is substantiated and, if it is, make recommendations concerning the sanctions available to the Lord President under legislation. Should the judicial office holder cease to hold office, or die, consideration of the allegation is also to cease.

### **Scottish Parliament**

7.37 At its meeting on 9 November 2017, the Standards, Procedures and Public Appointments Committee ('SPPA') of the Scottish Parliament began to consider inquiring into sexual harassment and inappropriate conduct at the Scottish Parliament. In December 2017, the committee launched an inquiry with the following remit:

---

<sup>238</sup> paras 6.12 onwards

<sup>239</sup> paras 3.3 and 6.12

<sup>240</sup> Available at <https://www.judiciary.scot/home/publications/judicial-complaints>

- To conduct an examination of the rules, procedures and guidance governing the reporting, investigation and sanctioning of MSPs' conduct with regard to sexual harassment at the Scottish Parliament.
- To consider the Code of Conduct for MSPs, and the context in which it operates, in order to deliver a reporting regime which inspires confidence in those affected by MSPs' conduct that they will be taken seriously and treated fairly and that appropriate action will be taken if sexual harassment is found to have occurred, including sanctions.
- To examine political parliamentary parties' approaches to the reporting and investigation of MSPs' conduct with regard to sexual harassment at the Scottish Parliament with a view to making recommendations.
- To understand workplace cultural and societal factors that may be relevant to MSPs' conduct with regard to sexual harassment and determine whether and what changes could be made to the Code of Conduct to address them.<sup>241</sup>

7.38 In the course of its inquiry, the committee reviewed the current situation, took evidence and made recommendations. It published a report in June 2018.<sup>242</sup> Recommendations included: a central policy on sexual harassment to apply to everyone on the Parliamentary campus, promoting the reporting of incidents and monitoring the number of complaints, and addressing the possibility of independent investigation and the question of sanctions. Other legislatures appeared to be endeavouring to tackle the same issues and 'an ideal model [did] not appear to exist'.<sup>243</sup> In paragraph 7, the committee also observed as follows:

It should be a matter of principle that MSPs are not, and are not seen to be, protected from investigation or sanction in matters such as sexual harassment, compared with people employed at the Parliament in other capacities.

7.39 The committee noted that the regulatory landscape included several different sets of provisions. An important figure in this landscape is the Commissioner for Ethical Standards in Public Life in Scotland. This person is the current holder of the responsibilities originally placed on the Scottish Parliamentary Standards Commissioner, established under the Scottish Parliamentary Standards Commissioner Act 2002. These responsibilities include the investigation of alleged breaches of the Code of Conduct for MSPs. The Commissioner has the power to call for witnesses and documents, is protected from actions for defamation, and has a duty to report annually to the Parliament.

7.40 As at the time of publication of the committee's report, the Code of Conduct governed how MSPs behaved towards parliamentary staff and the staff of other MSPs. For their own staff, the relationship was one of employer and employee and MSPs would require to adhere to obligations flowing from that. How parliamentary staff related to each other would be governed by the Scottish Parliamentary Corporate Body (SPCB) Dignity at Work policy, which did not (and still does not) apply to MSPs.<sup>244</sup>

7.41 Given the variety of provisions which applied, the committee recognised that it could not deliver a complete set of reforms itself. It was, however, committed to taking work forward, in which exercise its aims would be:

- reducing the incidence of unacceptable behaviour;

---

<sup>241</sup> <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/106811.aspx>

<sup>242</sup> [Standards, Procedures and Public Appointments Committee report on Sexual Harassment and Inappropriate Conduct, 5 June 2018](#)

<sup>243</sup> [Ibid](#) Introduction, para 5

<sup>244</sup> [Ibid](#) para 10

- encouraging reporting where unacceptable behaviour occurs;
- providing greater clarity about the procedures which apply to such cases including greater clarity for both complainers and accused individuals; and
- providing some consistency with regard to sanctions where possible.<sup>245</sup>

7.42 In furtherance of its responsibility to recommend to the Parliament possible changes to the Code of Conduct for MSPs, the committee identified a number of provisions which might need to be revised.<sup>246</sup> It also noted that there were understandable concerns in relation to both confidentiality and anonymity on the part of people who might wish to report incidents. In relation to the latter, the committee observed:

A complaint cannot be investigated properly without sufficient detail of its facts and circumstances. In many cases, it will be evident to the accused, when presented with the accusation, who their accuser is... There is a need to balance confidentiality and anonymity with a fair process for the accused.<sup>247</sup>

7.43 Other factors which might be involved in individual cases were fears about a negative impact on career, and damage to working relationships should behaviour be reported. There could also be loyalty to individuals or political parties, which would have an inhibiting effect on the level of reporting.<sup>248</sup>

7.44 In relation to questions of investigation and possible sanctions, the committee noted that an independent investigator could be an option although, if a bespoke approach were to be taken to sexual harassment, as distinct from other bullying and harassment, there could be issues of categorisation.<sup>249</sup> Moreover, the Commissioner for Ethical Standards in Public Life already performed an investigatory role in relation to some complaints and good reason would be required to confer an investigatory function on someone else.<sup>250</sup>

7.45 On the matter of sanctions, MSPs are, as a matter of principle, answerable to the electorate and, as a matter of parliamentary procedure, sanctions can be applied by other MSPs, but not by any external body. It appeared likely that any proposal to change this would divide opinion, being

seen by some as a significant innovation, but by others merely as the extension of a role currently exercised only by the courts.<sup>251</sup>

7.46 At the time the committee began its work in this area, the SPCB also launched a helpline for staff affected by sexual harassment<sup>252</sup> and, at the end of 2017, issued a survey to all staff and Members. In February 2018, a Joint Working Group with officials, representatives of the parties and an external expert was established, to work alongside the committee in tackling these issues. It reported in December 2018.<sup>253</sup>

<sup>245</sup> [Standards, Procedures and Public Appointments Committee report on Sexual Harassment and Inappropriate Conduct, 5 June 2018](#) para 14

<sup>246</sup> [ibid](#) para 29

<sup>247</sup> [ibid](#) paras 43 and 44

<sup>248</sup> [ibid](#) paras 53 and 58

<sup>249</sup> [ibid](#) para 75

<sup>250</sup> [ibid](#)

<sup>251</sup> [ibid](#) para 77

<sup>252</sup> The helpline came into operation on 6 November 2017.

<https://www.scotsman.com/news/politics/holyrood-sexual-harassment-helpline-has-received-four-calls-in-three-days-1436971>

<sup>253</sup> [Report of the Joint Working Group on Sexual Harassment December 2018](#)

7.47 In its report, the Joint Working Group proposed that there should be a centralised service providing a single complaint route and providing advice, support and advocacy.<sup>254</sup> It should be independent of the Parliament and the political parties, and run by an external body. There should be methods of informal resolution, and formal process,<sup>255</sup> involving investigation into members by the Commissioner and into other persons by an external independent body.<sup>256</sup> Questions of sanction were unresolved. There should no longer be time limits for the making of complaints.<sup>257</sup>

7.48 In relation to anonymity, the report stated this:

36.... [I]f someone decides to take forward a complaint, this cannot be done anonymously. In the interests of natural justice, any respondent has to know the nature of the allegations against them and in cases such as these, that includes knowing who has made the allegations.

7.49 In paragraphs 118 to 126, the report addresses the topic of complaints made against former MSPs or former members of parliamentary staff. Proceeding against former MSPs was not a new proposal given that, by section 20 of the 2002 Act, 'member of the parliament' includes a former member, and has done since 31 July 2002, when the Act first came into force. But the effect of removing the one-year time limit would, in practice, widen the scope for the making and investigation of complaints.

7.50 In December 2019, the SPPA committee published a report proposing revisions to the Code of Conduct for MSPs, in order to implement the recommendations contained in the Joint Working Group's Report on Sexual Harassment. Over the summer, there had been a three-month consultation with MSPs in relation to the changes now sought. The changes were agreed by the Parliament on 10 December 2019, and came into effect on 7 January 2020.<sup>258</sup>

7.51 Meanwhile, at its meeting on 7 November 2019, the committee had agreed to instruct a committee Bill to amend the Scottish Parliamentary Standards Commissioner Act 2002 in order to allow allegations of historic misconduct to be addressed.<sup>259</sup> Further consultation and preparation work followed, and the Scottish Parliamentary Standards (Sexual Harassment and Complaints Process) Bill was introduced in the Scottish Parliament on 13 November 2020.<sup>260</sup>

7.52 The Policy Memorandum for this Bill explains the reasoning of the Committee as follows:

*4 ... The Committee is clear that such conduct brings the Parliament into disrepute and should be capable of investigation by the Commissioner, regardless of when that conduct occurred. An independent investigation mechanism is vital to the proper investigation of complaints and the Parliament's processes for holding members to account for their conduct.*

*5. In deciding to make provision on past cases, regard has also been had to the fact that incidents of alleged sexual harassment by a person's employer are not always reported at the time they occur. This, as revealed during the Committee's inquiry, can happen for a number of reasons, including an imbalance of power and concern about impact on career prospects.*

*6. The Bill places MSPs' staff on the same footing as other staff working at the Parliament by bringing complaints about historic sexual harassment by their employing MSPs under the investigatory remit of the Commissioner. ...*

---

<sup>254</sup> [Report of the Joint Working Group on Sexual Harassment December 2018](#) para 28

<sup>255</sup> [Ibid](#) para 32

<sup>256</sup> [Ibid](#) para 53

<sup>257</sup> This is set out in [para 76](#); how far back the allegations go, whether it was a one-off incident or recurrent behaviour will be taken into account in determining if there is a case to answer.

<sup>258</sup> <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111615.aspx>

<sup>259</sup> <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/113541.aspx>

<sup>260</sup> <https://beta.parliament.scot/bills-and-laws/bills/scottish-parliamentary-standards-sexual-harassment-and-complaints-process-bill#target1>

7.53 In short, this Bill creates backdating of the Code of Conduct for MSPs, in specific and limited respects. The specific provisions backdated are paragraphs 5 and 6 of section 7 of the Code. They state:

*5. Members must treat the following individuals with courtesy and respect:*

- *other MSPs;*
- *parliamentary staff (including contractors providing services to the Parliament);*
- *their own staff and the staff of other MSPs.*

*6. Members must not behave in a manner towards these individuals that involves bullying, harassment (including sexual harassment) or any other inappropriate behaviour.*

7.54 The backdating occurs in two respects. Firstly, these paragraphs are backdated to 24 February 2000 so far as concerning sexual harassment by an MSP of their own staff. Secondly, the backdating is for the purpose of allowing the Commissioner for Ethical Standards in Public Life in Scotland to investigate an allegation of sexual harassment occurring since that date, made against an MSP by a member of their staff, past or present.

7.55 The other amendment included in the Bill will remove the one-year time limit for the making of all types of complaints against MSPs. The remaining requirements for admissibility in the 2002 Act will continue to apply. In essence, these relate to the form and content of allegations. A complaint warrants further investigation if, after initial investigation, it appears that the evidence is sufficient to suggest that the conduct complained about may have taken place.

7.56 Stage 2 of the passage of the new Bill through Parliament ended on 27 January 2021. The Bill is now at Stage 3, the final Parliamentary stage.

7.57 In summary, the effect of this work since 2017 is

- that from 7 January 2020, MSPs have been formally required to treat their staff with courtesy and respect and not harass (including sexually) or bully them;

and, on the assumption that the Bill will be passed

- that there will be no time limit on bringing complaints against MSPs;
- that historic complaints (relating to events since 24 February 2000) of sexual harassment of their staff against anyone who was an MSP at the time, even if they no longer hold this office, can be investigated.

7.58 Since 26 January 2021, there has been a central policy on sexual harassment, covering all who work in the Parliament, both to set standards of behaviour to be expected and the availability of support and of ways to take action, should sexual harassment occur.<sup>261</sup> A separate document sets out the procedures available.<sup>262</sup>

---

<sup>261</sup>[https://www.parliament.scot/images/Human%20Resources/Sexual\\_Harassment\\_Policy\\_20200126.pdf](https://www.parliament.scot/images/Human%20Resources/Sexual_Harassment_Policy_20200126.pdf)

<sup>262</sup>[https://www.parliament.scot/images/Human%20Resources/Reporting\\_Procedures\\_and\\_Support.pdf](https://www.parliament.scot/images/Human%20Resources/Reporting_Procedures_and_Support.pdf)

## **Chapter 8**

## **Conclusions and Recommendations**

### **Introduction**

8.1 In this chapter, I will set out my conclusions in response to the remit given to me. In doing so, I will draw on the material in the previous chapters. Certain themes emerge from the factual narrative, some of which represent a perspective gained by looking back. There is also value in looking around. Here, that has consisted of examination of what occurs in administrations elsewhere and of contact with other organisations and bodies in Scotland. I consider it legitimate from a constitutional point of view to compare what happens in the Scottish Parliament and the Judiciary. From wider society, the Faculty of Advocates and the Church of Scotland are two of the country's oldest institutions.

8.2 Some of this chapter bears on policy, which is not for me to determine. I will, however, draw attention to policy issues, both at a general level and when I consider the detail of provisions. Insofar as questions of practice are concerned, I have endeavoured to identify lessons from the first application of the procedure and steps that would assist in improving how processes work. My primary focus is on complaints against serving Ministers, in relation to their conduct whilst holding office. I will also examine the issue of how to address complaints about how Ministers allegedly behaved which come to light after they have left office.

### **Policy**

8.3 Other than the Law Officers, every Minister in the Scottish Government is an MSP. In its report of June 2018, the Standards, Procedures and Public Appointments Committee of the Scottish Parliament made a clear statement, which I also quoted in the previous chapter:

It should be a matter of principle that MSPs are not, and are not seen to be, protected from investigation or sanction in matters such as sexual harassment, compared with people employed at the Parliament in other capacities.

8.4 In the United Kingdom, the Ministerial Codes of Scotland, Wales and the UK government all now proscribe bullying and harassment. All require that Ministers work with colleagues in the civil service in a professional manner, treating them with consideration and respect.<sup>263</sup> In Northern Ireland, steps are being taken to incorporate provisions to like effect.<sup>264</sup>

8.5 It therefore seems reasonable to proceed on the basis that, as a matter of principle, Ministers, like MSPs, should not be protected from investigation or sanction in matters such as sexual harassment, compared with people employed elsewhere in the Scottish Government.<sup>265</sup> Indeed, the incorporation of a specific process for complaints against Ministers in the 2010 Fairness at Work policy affords that equality of treatment, and ensures that civil servants and others who work with individuals in government are protected on a basis similar to that which will apply to people who work for the same individuals when they are carrying out their duties as MSPs.<sup>266</sup>

8.6 Recent events have, however, raised questions about the practical steps which exist for raising complaints against Ministers. The remit given to me focuses on the Procedure called 'Handling of Harassment Complaints involving Current or Former Ministers'. I am to advise on strengthening its content and future operation. This is the procedure which was challenged in the Judicial Review. I refer to it as 'HHC'. How HHC relates to the Ministerial Code and to the Fairness at Work policy is also relevant: the system requires to be coherent overall. Moreover, whatever process is used for addressing complaints against Ministers or former Ministers requires not only to be clear and

---

<sup>263</sup> See chapter 6

<sup>264</sup> Paras 6.41 and 6.42

<sup>265</sup> If a process is maintained for complaints after Ministers leave office, there is some inconsistency with the lack of any such process for complaints against former senior civil servants, as referred to in para 2.37.

<sup>266</sup> The developing arrangements to protect those who work in the Parliament are outlined in chapter 7.

effective, but also to be fair to the person accused. This would be true for anyone accused of misconduct but additional considerations arise for those who hold office in prominent positions, as the circumstances discussed in paragraphs 6.25 to 6.29 illustrate.

8.7 Before I examine the practical details, two general issues arise in relation to complaints against serving and former Ministers: time limits and police involvement. I will examine these issues below.

### **Time limits**

8.8 Of the comparative material which I have discussed in the two previous chapters, the procedure for Judicial Complaints has a time limit (three months from the incident complained about, unless in exceptional circumstances) as does the procedure for making complaints against MSPs, where there is currently a time limit of one year from the conduct complained of (or awareness of it). The latter time limit is in the course of being removed, for all complaints against MSPs, by means of reform contained in the Scottish Parliamentary Standards (Sexual Harassment and Complaints Procedure) Bill. In effect, the lack of a time limit has itself been backdated to allow historic complaints of sexual harassment to be investigated if the behaviour occurred on or after 24 February 2000.

8.9 Among people I spoke to in the course of this review, there was no support for a time limit on claims against Ministers or other senior figures in relation to bullying, harassment or other inappropriate behaviour. Mrs McCloghry, in the Church of Scotland, demonstrated a commonly held view when she said that a time-related cut-off felt wrong. Those who attended our meeting with the Trade Unions were also opposed to a time limit. Although no one referred to this expressly, it is relevant to point out that, in relation to claims brought by those seeking damages for abuse suffered when they were children, the normal limit of three years has been disapplied, no doubt in accurate reflection of societal attitudes as to what is right.<sup>267</sup>

8.10 It would be consistent with what is taking place in relation to MSPs and, separately, would accord with values shared by many for there to be no time limit in relation to the investigation of complaints of sexual harassment against former Ministers.

8.11 Nevertheless, the issue of time limits should at least be considered in relation to other types of complaint, for the following reasons:

- Investigation of disputed facts becomes more difficult as time passes. Memory fades. Potential witnesses may become uncontactable. Documents or electronic communications are destroyed or deleted; indeed retention of written information for long periods is now discouraged. A time limit serves to encourage prompt action.
- Perhaps as the obverse of the last point, reasons for raising a complaint after a considerable period of time can, in some cases, be difficult to discern.
- Even if the inclusion of any such provision is ultimately rejected, it is worth consideration and my reference to it may achieve that. Its use or otherwise should also be looked at not in isolation but as part of the design of the overall system.

8.12 In ordinary civil claims for personal injury, there is a period of three years from the date of the accident or injury within which a case must be brought. The court has a power to override that, if it seems equitable to do so. In the present context, were a time limit to be introduced, a power to disregard would need to accompany this to allow for situations where, owing to an imbalance of power or a continuing work relationship, a complaint was not pursued earlier. It would also be necessary to provide a power to override where it is in the public interest for a complaint to proceed. In the absence of circumstances of this nature when a complaint is raised some years after an incident,

---

<sup>267</sup> [Limitation \(Childhood Abuse\)\(Scotland\) Act 2017](#)

it may be more difficult to justify subjecting the person accused to the requirement to answer allegations, particularly if they are of a less serious nature.

**Recommendation 1: There should be no time limit in any process for investigating complaints of sexual harassment against serving or former Ministers, although consideration should be given to including a time limit, probably of less than three years but with an override provision, in relation to complaints of other types.**

### **Referral to the police**

8.13 Paragraph 18 of HHCM states that at all times a staff member may make a complaint directly to the police. Paragraph 19 states that, if at any point it becomes apparent to the Scottish Government that criminal behaviour might have occurred, the matter may be brought to the attention of the police. This may also occur if it appears that the matter raised is part of a wider pattern of behaviour. If the police are informed, the staff member will be advised and supported throughout.

8.14 There are clear benefits to having any allegation of criminal conduct investigated by the police, and for that to happen at the earliest possible moment and in advance of investigation by anyone else. The police have skills, experience and powers. There may, however, be no supportive other evidence or a decision may be taken not to commence proceedings, all for reasons connected to what is required to prove a criminal charge, therefore referral to the police may not lead to resolution of the complaint.

8.15 All the organisations with whom I discussed these matters recognised that the issue of whether, and if so in what circumstances, to report an incident to the police was a difficult one. Some were clear that any suggestion of conduct which appeared criminal would require a report to be made. Others were less sure. This is a matter which may be re-examined in any work which continues to develop the process for complaining about a Minister.

8.16 Because of the variety of scenarios which could be reported, the potential for continuing risk to others and the need to avoid what can be a temptation to cover up misconduct (or the appearance of that) it is unlikely that a commitment never to involve the police could be given. But the issue of police involvement without the consent of the complainant is particularly challenging. It may be that wording could be found to offer reassurance that a person's wish not to involve the police will be respected if at all possible. This could occur where the behaviour complained about, notwithstanding the possibility that it could amount to a criminal offence, is below a level of seriousness and appears not to pose a real risk to anyone else.

8.17 Whatever the position ultimately taken, it needs to be spelled out clearly in the procedure what a person complaining should expect, particularly if it is thought that reporting to the police may occur without their consent. The wording currently included in paragraphs 18 and 19 appears to me to reflect a reasonable position, although there is no indication that a person's wish not to involve the police may in some situations be respected. As with the time limits issue, the ultimate position is not for me to frame, but I suggest that consideration be given to including additional wording on this aspect.

**Recommendation 2: There should be consideration of whether to include in any policy about complaints against Ministers a provision allowing a complainant's wish to avoid police involvement to be respected.**

### **HHCM and Fairness at Work**

8.18 I turn now to look at the detail of current processes, and possible changes to them. It is my understanding that the aim is to integrate HHCM into Fairness at Work and to utilise it for complaints by civil servants against serving or former Ministers, whether of harassment or not. This appears to me to be sensible, since it avoids a categorisation step at the outset. The process adopted should not

be dependent on identifying whether behaviour, which has not yet been fully investigated, is properly described as ‘harassment’. Moreover, it avoids a potential difficulty in deciding how to deal with alleged bullying. A better initial classification would be whether the complaint is about the behaviour of a Minister, which is generally straightforward to answer. Consistency with the handling of complaints about Ministers from other sources should also be an aim, although in what follows I concentrate on complaints in relation to their treatment of civil servants.

**Recommendation 3: Whether within Fairness at Work, or in a separate document referred to within Fairness at Work, there should be one process governing the raising of a complaint against a Minister by a civil servant.**

### **Informal stage**

8.19 HCHM does not, in terms, make provision for an informal stage. Section 6.5.5 of Fairness at Work refers to both ‘local informal handling’ and ‘Informal resolution’. Particular revisions which had been proposed to the Fairness at Work policy earlier in 2017 also included an informal stage. I consider that specific provision for an informal stage is a proportionate step to take. What it should comprise is not the subject of this review, but dialogue between the complainant and the Minister, with the involvement of at least one other person at a senior level, is consistent with policies of other organisations on this topic. The paragraph in Fairness at Work headed ‘Informal Resolution’ (quoted in chapter 4) appears apt. This paragraph mentions mediation.

8.20 In the course of this review, reservations were expressed about mediation where sexual harassment is concerned, including at the meeting which took place with the Trade Unions, although it was also commented that mediation had been seen to work really well where an issue was surfaced early and both parties were willing to resolve it.

8.21 I understand the reservations, which sometimes relate to ideas about compelling someone to be in a room with the person they are complaining about. Nevertheless, it is my view that mediation should be referred to as an option in any process for dealing with complaints against Ministers, both because it has potential in relation to some complaints of harassment and also because there are steps which mediators can take to mitigate the concerns that those who see themselves as the weaker party may feel. I accept that, in the end, mediation could not be compulsory.

8.22 Prior to the formal stage of HCHM, there is also reference to the possibility of intimating a concern and asking that there be no action, in which case it would be held on file within People Directorate. In light of the issues concerning fairness to the individual who is the subject of the concern, I would suggest that consideration be given to what will be done with this information and for how long it will be retained.

### **Formal complaint**

8.23 A formal stage will be utilised where the informal stage has not worked, or where the complaint is sufficiently serious that it is necessary to begin with formal process. There are factors relevant to any process of formal complaint, beyond the interests of the complainant and the Minister. Those are the role of the First Minister, who is the decision-maker in relation to the holding of Ministerial office, and the fact that the Permanent Secretary carries legal responsibility to a civil servant making a complaint, because employer/employee duties of care and statutory obligations are owed.

8.24 The Fairness at Work process requires that a formal complaint is in writing, a position I would endorse. It also makes reference to sources of support for the complainant and it is important that such support is offered. This needs to be provided independently of anyone involved in assessment,

investigation or decision-making regarding a complaint. When the complaint is intimated to the Minister, support should be offered to them as well.<sup>268</sup>

**Recommendation 4: There should be inserted into any Code or policy governing an investigation into the conduct of a Minister an obligation to arrange specific support for the Minister during the investigation process.**

### **Initial assessment in principle**

8.25 With a Fairness at Work policy to which Ministers are subject and also a Ministerial Code, each of which covers personal behaviour, there is overlap between them and questions as to how to handle a formal complaint will exist from the outset. Someone raising a formal complaint about bullying behaviour they regularly encounter in their work is likely to be hoping for a reasonably swift and effective resolution, which a rigid approach to every possible breach of the Ministerial Code is unlikely to offer.<sup>269</sup>

8.26 Two questions will arise once a complaint has been made:

- a) Would this allegation, if substantiated, raise a question of fitness for office; and
- b) What is the process for reaching a decision as to a)?

8.27 Since the question of whether someone should continue as a Minister is for the First Minister, it would be logical for the decision maker on a) to be the First Minister and for her to consider all allegations. Reporting of every possible contravention of the provisions now in the Ministerial Code could, however, represent a large volume of material.<sup>270</sup> A screening decision (that set out at a) above) could conceivably be taken by another senior figure in government, either the Permanent Secretary or one of the Director Generals, or perhaps one of the Scottish Government's non-Executive Directors. If the answer to the screening question is yes, then all future procedure on it may require to follow whatever process is adopted for investigation and evaluation of Ministerial Code complaints.

**Recommendation 5: A screening process ('initial assessment') should be adopted, to decide whether a complaint by a civil servant against a Minister requires to be handled under the Ministerial Code or follow the process of Fairness at Work.**

If this recommendation as to initial assessment were to be adopted, a single process could be followed up to the conclusion of the initial assessment stage, but not beyond.

### **Initial assessment in practice**

8.28 Initial assessment ('IA') should include analysis of what is in the complaint with perhaps a provisional categorisation of whether it is bullying/harassment or has a sexual element. There are other matters which could usefully be explored at the initial stage. An immediate issue is whether the Minister should be told that there is a formal complaint. Where complaints against the judiciary are concerned, that happens at an early stage. In the present context, initial intimation could be problematic, especially if people work together. As with police involvement, the procedure should be clear about what the complainer should expect. It would be reasonable to make provision for intimation to the Minister unless the complainer asks that this not take place.

---

<sup>268</sup> The careful provisions for support in the Welsh Code are set out in paragraph 6.23 above.

<sup>269</sup> This was clearly articulated in my meeting with the Trade Unions. Additional points were made about the non-compliance in practice with the timescales for dealing with complaints under Fairness at Work, in part due to a shortage of Investigating Officers and Deciding Officers under the policy.

<sup>270</sup> Complaints of many types may be made. An example from one of our conversations is of a complaint being made against a Minister (not in the Scottish Government) about use of a mobile phone on a plane in apparent disobedience of cabin crew.

8.29 I consider that the process currently set out in paragraph 6 of HHCM would, with adaptation, be suitable for the IA. The senior figure who will take the screening decision would be the initial assessor. They would designate a senior civil servant as investigator to interview the complainer and the Minister (on the assumption that intimation has taken place) and prepare a summary report, on which decisions as to handling can be based. The report should contain a brief account of facts alleged by each person without any views as to credibility or reliability and note evidence (witnesses and/or documents) potentially available. It should record whether there is any agreement as to facts and what the complainer is hoping for by way of resolution. If the complainer has asked for their identity to be withheld, it is unlikely that a complaint can go further, but that would be a decision for the IA.

**Recommendation 6: The screening process should be along the lines of that which is set out in paragraph 6 of HHCM, confined to an initial report of a complaint against a Minister and including a brief account of facts alleged by each person without any views as to credibility or reliability. The report should note evidence (witnesses and/or documents) potentially available and record whether there is any agreement as to facts and what the complainer is hoping for by way of resolution.**

8.30 Provision should be made for the IA to have access to legal advice. It may be that in certain types of complaint, the obtaining of legal advice should be mandatory. Anyone serving as an investigator will require to have had training. It would be advisable to have a pool of investigators, some of whom are legally qualified and others who may have a background in HR.<sup>271</sup> In some cases, the investigator role could be performed by one of each, working together.

**Recommendation 7: The person conducting the screening process should have access to legal advice.**

8.31 Whoever is selected to carry out the steps required of the investigator, as well as whoever carries out the duties of the IA, will need to be free from association with the complainer and the Minister. In HHCM, provision is made for the neutrality of the person chosen to investigate formal complaints. Paragraphs 6 and 10 stipulate that the person ‘will have had no prior involvement with any aspect of the matter being raised’. Their role is ‘to undertake an impartial collection of facts ... and prepare a report...’.

8.32 At this point, it is appropriate to deviate from the sequence of steps in the handling of a formal complaint to deal with the issue of impartiality.<sup>272</sup>

### **Impartiality**

8.33 The basis on which the judicial review at the instance of the former First Minister was conceded was that the Decision Report and written decision

were taken in circumstances which were procedurally unfair and ... were tainted by apparent bias by reason of the extent and effects of the Investigating Officer’s involvement with aspects of the matters raised in the formal complaints against the petitioner prior to her appointment as Investigating Officer in respect of each of those complaints.

8.34 As explained in chapter 5, the case was settled on the basis of an agreement reached between the parties, without the arguments being tested before the judge. In the Record, the argument was that the duty of the investigating officer to ensure the wellbeing of the complainers as employees and her previous involvement with them made her unsuited for the role – there was bias, conscious or unconscious. From the agreement recorded in the Court Order, as above, it is clear that the investigating officer’s involvement with the complainers’ side of the process was considered to have been too close to be considered fair.

---

<sup>271</sup> Although see 8.40 regarding the investigation of complaints by those from an HR background.

<sup>272</sup> The discussion in this section concerns complaints against serving Ministers.

8.35 The agreement was therefore confined to what had happened in this case. The argument advanced by the petitioner had, however, rested on what might be termed ‘systemic’ bias. By that, I mean that a member of the HR team has professional responsibility for the wellbeing of an employee of the organisation, which raises an issue about their impartiality in reaching conclusions when that employee is in conflict with a third party. This is not normally an issue with workplace investigations where the HR professional, the complainer and the person complained about are all employed by the same entity.

8.36 Even if there is no systemic problem, however, there could be a problem in an individual case where an investigator appears to be too close to one party. There are a number of ways in which this appearance could develop, including an understandable professional instinct to offer support to someone during an investigation of difficult or distressing events.

8.37 It is important to emphasise that what happened in this instance was not simply about paragraph 10 of the Procedure. Paragraph 10 had to be fulfilled, but such compliance, although necessary, was not sufficient to preclude an issue of apparent bias. Ideas of bias are connected to the principles of natural justice, which were discussed in chapter 4. Put shortly, natural justice requires a level playing field and a neutral adjudicator. An adjudicator might have had no prior involvement in any aspect of a matter being raised but if, for example, they are related to one of the parties, they will not appear impartial.

8.38 How should one guard against such a situation?

8.39 In chapter 4, I referred to the Inquiries Act 2005, which makes this provision about impartiality of any person who is on an inquiry panel: the person cannot have ‘a close association with an interested party’.<sup>273</sup> I consider that what is needed here is similar wording, to reflect the need to avoid the appearance of partisanship. My suggestion would be a requirement that anyone involved in factual investigation and/or preparation of a report should have had no prior involvement with any aspect of the matter being raised, and should have no close association with either party before or during the investigation.

**Recommendation 8: Anyone involved in factual investigation to any extent of a complaint against a Minister should be free of prior involvement with any aspect of the matter being raised and should have no close association with either party before or during the investigation.**

8.40 If a factual investigator may be someone holding a position within HR, then the tension between the normal role of an HR professional in providing support to employees needs to be reconciled with the obligation of impartiality in investigation. It may be that an entitlement for the Minister to seek the appointment of a legally qualified investigator, either alone or with an HR investigator, would be sufficient, particularly given that professional HR support to the complainer must come from a different person.

### **Censure with consent**

8.41 Within the Disciplinary Scheme for ministers of the Church of Scotland, there is a process for ‘censure with consent’. I have been advised that, although it can be challenging in practice to achieve, censure with consent is undoubtedly a helpful mechanism for resolving proceedings. It may be that in some situations a similar mechanism would be appropriate at this early stage for those in government. It would not be suitable for all types of complaint. Whether there is potential for its use would also depend on there being some acceptance on the part of the Minister that there has been conduct which should not have happened.

8.42 An expression of regret if any upset has been felt would not be sufficient. Further, there would need to be a means of recording, in brief terms, the accepted basis of the censure. The attitude of

---

<sup>273</sup> Para 4.39

the complainer to resolution by this means should be ascertained, and should be a consideration in whether or not this is finalised, but it should not be a veto. If any such procedure is added in relation to complaints against Ministers (or any other senior figures), I would endorse another suggestion made by the Trade Unions that post-outcome review be incorporated, so that the way in which a new procedure has actually operated can be monitored and any necessary changes made.

**Recommendation 9: Consideration should be given to the introduction of a process of censure with consent, to denote an acceptance that there has been unacceptable conduct on the part of a Minister towards a civil servant. If such an innovation does occur, there should be a post-outcome review of any early application.**

### **Further steps**

8.43 With or without a report by an investigator as suggested above, it will be necessary for the IA to determine what should happen next. Resort to any censure with consent process will be a matter for the IA. If that does not take place, the IA should decide whether the complaint should proceed as a Ministerial Code or Fairness at Work investigation. The conduct of a Ministerial Code investigation is not within my remit.

8.44 For those complaints which are proceeding under the Fairness at Work process, the steps which are set out in the last part of section 6.5.5 appear to me to be broadly appropriate. If, as appears likely, the initial assessment has revealed a dispute of fact, an investigator will require to prepare a report. It would be efficient, and should not raise any issues of fairness, for this to be the same person who prepared the summary report for the initial assessment, although there could be a provision allowing either party, on cause shown, to seek the appointment of a different investigator. The investigator will be responsible for the making of findings of fact.

8.45 Under the Fairness at Work policy, the decision-making function is vested in a Deciding Committee. Again, this appears to me to be appropriate both as a mechanism and in its composition. In relation to bullying and harassment, it will be necessary to adjudicate as to whether the facts found constitute bullying or harassment, and the policy could clarify this and that it is to be the responsibility of the Deciding Committee to reach that judgement.

8.46 It is possible that the Minister may not have cooperated in the investigation. I would simply say that I consider that paragraph 8 of HHCM makes reasonable provision for this situation.

8.47 In making recommendations concerning the handling of complaints against Ministers, I have endeavoured to include measures which I consider would improve the process. With an effective process, the chances of complaints emerging only after a Minister has left office should diminish. It is however possible that that will occur. It is to that scenario that I now turn.

### **Former Ministers; historic complaints**

8.48 If, after someone has ceased to hold office as a Minister, a concern comes to light about their treatment of a civil servant when they held office, the employer will wish to address that concern. At minimum, this will require assessment of how to prevent similar incidents in future. It may be that this is sufficient to deal with the concern. For formal complaints against former Ministers, in principle an initial assessment process along the same lines as that described in paragraphs 8.28 to 8.42 could be available. For some types of complaint, this could include a censure with consent.

8.49 If, however, it is thought necessary for there to be a process for adjudication of a formal complaint against a former Minister, there are certain issues to consider. Some of these issues arose in the application of the current procedure to complaints against the former First Minister.

8.50 The Judicial Review proceedings in 2018 included an argument concerning jurisdiction. It was contended for the petitioner that the Permanent Secretary had 'no legal right or authority to subject [him] to the procedure'. The Procedure was 'not binding on the petitioner'. There was also an

argument concerning retrospectivity: the Procedure, not having been in place earlier, could not now be applied to the petitioner.

8.51 As I have already observed, whether these were arguments which rendered the application of the procedure to the petitioner invalid was not tested in court, and the concession of the case on an agreed basis leaves the question unanswered. But if the aim is to maintain a process for dealing with complaints against former Ministers, it would be prudent to strengthen that process against these criticisms.

8.52 I do not consider that there is a substantive issue concerning retrospectivity. Since its inception, the Scottish Ministerial Code has had a duty on Ministers, in terms which have remained the same, concerning how they should treat civil servants. In the first Code, in 1999, it was in paragraph 5.1:

Ministers have a duty to ... observe the obligations of a good employer with regard to the terms and conditions of those who serve them.<sup>274</sup>

8.53 Bullying and harassment are below this standard.<sup>275</sup>

8.54 The more difficult aspect is the procedural step of pursuing inquiry into such allegations after a person is no longer in office. The difficulty is not confined to complaints by civil servants, since allegations in relation to former Ministers could come from people employed by others. Although HHCM was characterised as a procedure, which in many respects it is, it also makes possible the scrutinising of a person's behaviour in office once they have left office.

8.55 In the Church, it is not possible to demit status as a minister with a disciplinary complaint outstanding. This is true of other professional bodies, for example the Faculty of Advocates Rules expressly apply to practising advocates and to someone who has 'ceased to be a member of Faculty since the time of the events giving rise to a conduct complaint against the advocate'.<sup>276</sup> These provisions seek to prevent the evasion, by resigning, of an investigation in relation to behaviour. The Faculty of Advocates provision, in particular, would apply to someone in relation to whom a complaint had not come to light at the time of resignation.

8.56 It is also instructive to examine what has happened in the Scottish Parliament on this point. As I have explained in Chapter 7, steady work since 2017 has led to a position now in place whereby, since 7 January 2020, MSPs have been required to treat their own staff with courtesy and respect, and not to bully or harass them. This change was required because, previously, it was considered that employment law regulated how MSPs behaved towards their staff and this should therefore not be within the Code of Conduct and its enforcement provisions. An imminent change is in relation to investigation of historic complaints of sexual harassment against MSPs by their staff: any such complaint involving behaviour since 24 February 2000 will be capable of investigation by the Commissioner for Ethical Standards in Public Life in Scotland (if the Bill currently proceeding becomes law).

8.57 It is noteworthy that the definition of an MSP includes a former MSP. This is so because, since the Scottish Parliamentary Standards Commissioner Act 2002 became law in July 2002, it has provided that the definition of an MSP includes a former MSP.<sup>277</sup> The Explanatory Notes for that legislative provision published with the Bill<sup>278</sup> do not set out detailed thinking behind this provision, but simply say:

---

<sup>274</sup> In the most recent Code, this is in paragraph 6.2 d). See para 4.24 above.

<sup>275</sup> They are also now referred to expressly.

<sup>276</sup> <http://www.advocates.org.uk/media/1916/disciplinaryrules2015.pdf>

<sup>277</sup> [By s 20 of the 2002 Act](#)

<sup>278</sup> Prepared on behalf of the then convener of the Committee and available at

[https://www.parliament.scot/S1\\_Bills/Scottish%20Parliamentary%20Standards%20Commissioner%20Bill/b48s1en.pdf](https://www.parliament.scot/S1_Bills/Scottish%20Parliamentary%20Standards%20Commissioner%20Bill/b48s1en.pdf)

*The definition makes clear that the Commissioner can investigate complaints about former members of Parliament in relation to conduct that took place when they were members.*<sup>279</sup>

8.58 From commencement of the legislation until the changes currently being made, the effect of such an inclusive definition was restricted by the time limit of one year for the making of complaints against members. Nevertheless, some provision for looking back at the behaviour of a member for a year after they have left office has been in place since these early days of the Scottish Parliament. In relation to sexual misconduct, there is about to be a longer period where complaints of sexual harassment of staff may be made against a former MSP and investigated. The Code does not apply to members who are Ministers when they are acting as such,<sup>280</sup> and alignment of the position under the Ministerial Code with the position under the Code for MSPs appears desirable.

### **Independent process**

8.59 It is however extremely difficult to fit such episodes, and their investigation, into any structure connected to the government in power when the allegations come to light. The government of the day will either be of the same political complexion as the former Minister complained about, or not. This is a political context. The risks of perception of bias, either in favour of or against the person complained about, are obvious. Moreover, there is a specific issue of accountability inherent in any process which involves civil servants in investigating such complaints. Paragraph 2 of the Civil Service Code provides

*...As a civil servant, you are accountable to Scottish Ministers, who in turn are accountable to the Scottish Parliament.*<sup>281</sup>

8.60 If a civil servant is investigating a complaint against a former Minister, they have no duty to the former Minister, and the Ministers to whom they are accountable will either be of the same political persuasion as the person complained about, or not. This is self-evidently problematic.

**Recommendation 10: Formal complaints against a former Minister should be investigated and adjudicated (by which I mean reaching conclusions as to facts and as to whether a relevant provision has been breached) independently.**

8.61 It appears to me that the options for such investigation and adjudication are either by the Commissioner for Ethical Standards in Public Life in Scotland, or under the auspices of the Independent Advisers on the Ministerial Code. The facts can be investigated by officers of the relevant body or by an outside person contracted for this purpose (which might be necessary with the independent advisers, given that they are individuals and do not have the infrastructure of an organisation). The conduct found to have occurred would be measured against the standards of the Ministerial Code in force at the time the conduct occurred. Allocating responsibility for investigating complaints against former Ministers to the Commissioner for Ethical Standards in Public Life would require legislation. This would be accompanied by debate, including on what types of complaint should be covered, and would result in a clear process, implemented by an independent office holder. Allocating responsibility to the Independent Advisers on the Ministerial Code would likewise confer jurisdiction upon an independent person, who could pursue their own investigation.

8.62 It is right to acknowledge that making a complaint of this nature to an external body is likely to be an onerous step for any person who was at the weaker end of an imbalance of power. But the investigation can be private<sup>282</sup> and an employer of someone who is pursuing a complaint will be able to arrange for the provision of support should the person wish it.

---

<sup>279</sup> Para 30

<sup>280</sup> Code of Conduct for MSPs para 3

<sup>281</sup> <https://www.gov.scot/publications/civil-service-code/>

<sup>282</sup> Section 5(2) of the 2002 Act provides that an investigation by the Ethical Standards Commissioner shall be in private.

8.63 The further strengthening to which I referred above would also require to include amendment of the Ministerial Code, either to define a Minister to include a former Minister for certain purposes, or to provide that particular types of complaint alleging breaches of the Code may need to be investigated after a Minister has left office.

8.64 There is also the opposite situation – where complaints are made against someone currently serving as a Minister in relation to behaviour that occurred before they held office. Instances of this would include Mark Garnier and David Benson-Pope.<sup>283</sup> It is most unlikely that the complaint would come from a civil servant. This is not therefore within my remit, although it might be thought right that there should be overall consistency in the handling of complaints against Ministers. An investigation is likely to be required and the Ministerial Code is a reasonable barometer of the standards of behaviour expected.<sup>284</sup>

### **Sanctions**

8.65 It remains to note the question of sanction. This too is not within my remit, and I mention it only for completeness. It raises profound issues about democracy and accountability, and would require careful consideration.<sup>285</sup> In relation to MSPs, these issues are well summarised in recommendation 77 of the 2018 Report of the Standards, Procedures and Public Appointments Committee of the Parliament:

There are practical, legal and constitutional issues to take into account before considering whether it would be appropriate for an independent figure to have the authority to sanction or dismiss MSPs. This would be seen by some as a significant innovation, but by others merely as the extension of a role currently exercised only by the courts.

8.66 Where someone is a serving Minister, there is likely to be a de facto sanction in that a finding in relation to a complaint of harassment which breaches the Ministerial Code may affect the confidence which the First Minister retains in that person, with consequences for their continued holding of office. For former Ministers, who are now private citizens, the question of sanction raises difficulties analogous to those raised in relation to former MSPs. The topic is addressed in paragraphs 119 to 125 of the Report of the Scottish Parliament Joint Working Group on Sexual Harassment, to which I have referred in some detail in chapter 7.<sup>286</sup> Some of the options being considered in relation to complaints against former MSPs in paragraphs 123 to 125 of that Report could be applied in relation to former Ministers as well.

8.67 There is much to consider in pursuing improvements to the process for handling formal complaints against former Ministers, and there are difficult challenges in balancing competing considerations within that process. To avoid the pursuit, however, may be anomalous when compared with the position arrived at for MSPs. It may also be at odds with expectations regarding scrutiny of how those at the highest levels behave towards those who serve them in the Executive arm of government.

---

<sup>283</sup> Paras 6.4 and 6.5; 6.47

<sup>284</sup> Para 6.5

<sup>285</sup> I note that there is now an independent expert panel in the House of Commons, which has jurisdiction over sanctions in cases where complaints have been brought against MPs of bullying, harassment or sexual misconduct <https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliaments-behaviour-code/independent-expert-panel-appointed/> In Scotland, this function is exercised by the SPPA committee.

<sup>286</sup> Para 7.49

## **Appendix 1: Remit**

The remit for the review was announced by the Deputy First Minister on 3 August 2020 in response to a written Parliamentary Question.

**S5W-31055**

**Clare Adamson MSP:**

To ask the Scottish Government for an update on progress with the review of its procedure for the handling of harassment complaints involving current or former Ministers.

**John Swinney MSP:**

In my response to S5W-21344 on 31 January 2019, I advised Parliament that we would not be progressing the review of the application of the Scottish Government's procedure for handling complaints about Ministers or former Ministers at that time to avoid any risk of prejudice to live criminal proceedings. Since the conclusion of those proceedings, the attention of the Government has been focussed on leading Scotland's response to the global health emergency.

I am now however able to advise that Laura Dunlop QC has agreed to lead this review, which will commence this month.

The remit of the review is to:

1. Draw out the lessons from the first application of the procedure as followed through to decision. In particular, this will include the application of paragraph 10, and provide advice on any changes required to strengthen the content and future operation of the procedure.
2. Identify how best to support complainants in future without undermining the integrity of the process.
3. Consider what further steps could be taken to improve the procedure to meet its intention, including maintaining the confidence of Scottish Government staff in the approach which will be taken to handling such issues in future.

The findings and recommendations will be published by the Scottish Government in due course.

## **Appendix 2: Handling of Harassment Complaints Involving Current or Former Ministers**

### **Initial contact**

1. An individual may choose to raise an issue involving a current or former Minister through a number of mechanisms. These may include a senior manager of your choosing, direct to HR or a Trade Union representative. If the approach is made through these routes it should be escalated to the Director of People for consideration and so that sources of support can be offered to the individual.
2. At this early point it will be important to support the individual to consider how best to resolve the issue. At this point options available to the staff member include:

2.1 Asking that their concern is acknowledged but without further action being taken, in order to recognise their experience and to assist our organisational commitment to help prevent the circumstances arising again (although, as set out at note (ii) below, the SG may require to take follow up action where deemed necessary in light of the concern being raised). The details of the concern, along with the staff member's decision not to proceed with a formal complaint, will be held on file within People Directorate; or

2.2 Indicating that they wish to make a formal complaint.

**NOTE:** At all times the staff member is free to make a complaint directly to the police – see Para 18 onwards for further information.

### **Formal complaints against current Scottish Government Ministers**

3. The Scottish Ministerial Code<sup>287</sup> sets out the general principle that Scottish Ministers are expected to behave in a way that upholds the highest standards of propriety, including in their interactions with Civil Servants. Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Code and for justifying their actions to Parliament and the public. The First Minister, however, has ultimate responsibility to judge the standards of behaviour expected of a Minister, including in their interactions with civil servants, and of the appropriate consequences of a breach of those standards. Ministers can only remain in office for so long as they retain the First Minister's confidence.

### **Role of Permanent Secretary**

4. Alongside Ministerial responsibilities under the Code, the Scottish Government as an employer has a duty of care to staff. The Permanent Secretary exercises day to day responsibility for civil servants working for the Scottish Administration. Where a formal complaint of harassment is raised about the conduct of a current Minister, the Permanent Secretary will inform the First Minister. In line with her responsibilities under the Ministerial Code, the First Minister has instructed the Permanent Secretary that complaints of this nature should be investigated using the process set out at paragraphs 6-8, and to provide a report of the facts as provided by those concerned, or to establish if it is possible to seek a mutually agreed resolution between the parties involved.

5. In situations relating to complaints against a current Minister, the Permanent Secretary will also take appropriate steps to (1) ensure that the staff member making such a complaint receives the necessary support throughout the process (including support after conclusion), and (2) put

---

<sup>287</sup> <https://beta.gov.scot/publications/scottish-ministerial-code-2018-edition/>

in train any further action that might be required within the civil service as a result of the issues raised by any complaint.

6. In the event that a formal complaint of harassment is received against a current Minister, the Director of People will designate a senior civil servant as the Investigating Officer to deal with the issue. That person will have had no prior involvement with any aspect of the matter being raised. The role of the senior officer will be to undertake an impartial collection of facts from the parties involved, including the Minister, the member of staff and any witnesses, and prepare a report for the Permanent Secretary. The report will also be shared with the staff member and the Minister.

7. The Permanent Secretary will inform the First Minister of the outcome. It will be for the First Minister to decide the appropriate response to any complaint about a Minister in light of the report produced following the investigation. The Permanent Secretary will also consider the report and take any actions required within the civil service to protect staff, including staff wellbeing, and ensure a positive working environment.

8. Current Ministers will be expected to cooperate fully with such an investigation. If the Minister declines to co-operate with the process the matter will be investigated as far as possible without their involvement. They will be advised of the complaint against them and the outcome of the investigation undertaken. This will be recorded within the SG. The First Minister will be advised where a current Minister has declined to cooperate and will be responsible for any further action.

9. Where a formal complaint of harassment is raised against the First Minister, the Permanent Secretary will instigate an investigation as set out above in line with the employer's duty of care to its staff and to assist the First Minister in discharging their responsibilities under the Code. The Permanent Secretary may draw upon the Independent Advisers on the Ministerial Code (the Rt. Hon. Dame Elish Angiolini QC DBE or James Hamilton) to reach a view on whether the First Minister has been in breach of the Code. The Permanent Secretary will take any action necessary to protect staff.

### **Formal complaints against former Scottish Government Ministers**

10. In the event that a formal complaint of harassment is received against a former Minister, the Director of People will designate a senior civil servant as the Investigating Officer to deal with the complaint. That person will have had no prior involvement with any aspect of the matter being raised. The role of the Investigating Officer will be to undertake an impartial collection of facts, from, the member of staff and any witnesses, and to prepare a report for the Permanent Secretary. The report will also be shared with the staff member.

11. If the Permanent Secretary considers that the report gives cause for concern over the former Minister's behaviour towards current or former civil servants the former Minister should be provided with details of the complaint and given an opportunity to respond. The former Minister will be invited to provide a statement setting out their recollection of events to add to the record. They may also request that statements are taken from other witnesses. If additional statements are collected the senior officer will revise their report to include this information and submit this to the Permanent Secretary and share with the staff member. The Permanent Secretary will consider the revised report and decide whether the complaint is well-founded. The outcome of the investigation will be recorded within the SG. The Permanent Secretary will also determine whether any further action is required; including action to ensure lessons are learnt for the future.

12. For complaints involving a former Minister who is a member of the Party of the current Administration, the Permanent Secretary will inform the First Minister both in this capacity and in their capacity as Party Leader, of the outcome when the investigation is complete. In their capacity as First Minister, they will wish to take steps to review practice to ensure the highest standards of behaviour within their current Administration.

13. Where the former Minister was a member of an Administration formed by a different Party, the Permanent Secretary will inform the relevant Scottish Party leader of the outcome of the investigation and any action taken.

14. The final report will be provided to the staff member and the former Minister.

15. If the former Minister **declines to co-operate** with the process the matter will be investigated as far as possible without their involvement. They will be advised of the complaint against them and the outcome of any investigation undertaken. This will be recorded within the SG.

16. The First Minister will be advised where a current or former Minister who is a member of the Party of the current Administration has declined to cooperate and will be responsible for any further action.

17. Where the former Minister was a member of an Administration formed by a different Party, the Permanent Secretary will inform the relevant Scottish Party Leader of the outcome of the investigation and that the former Minister has declined to cooperate. It will be the responsibility of the Party to consider any further action.

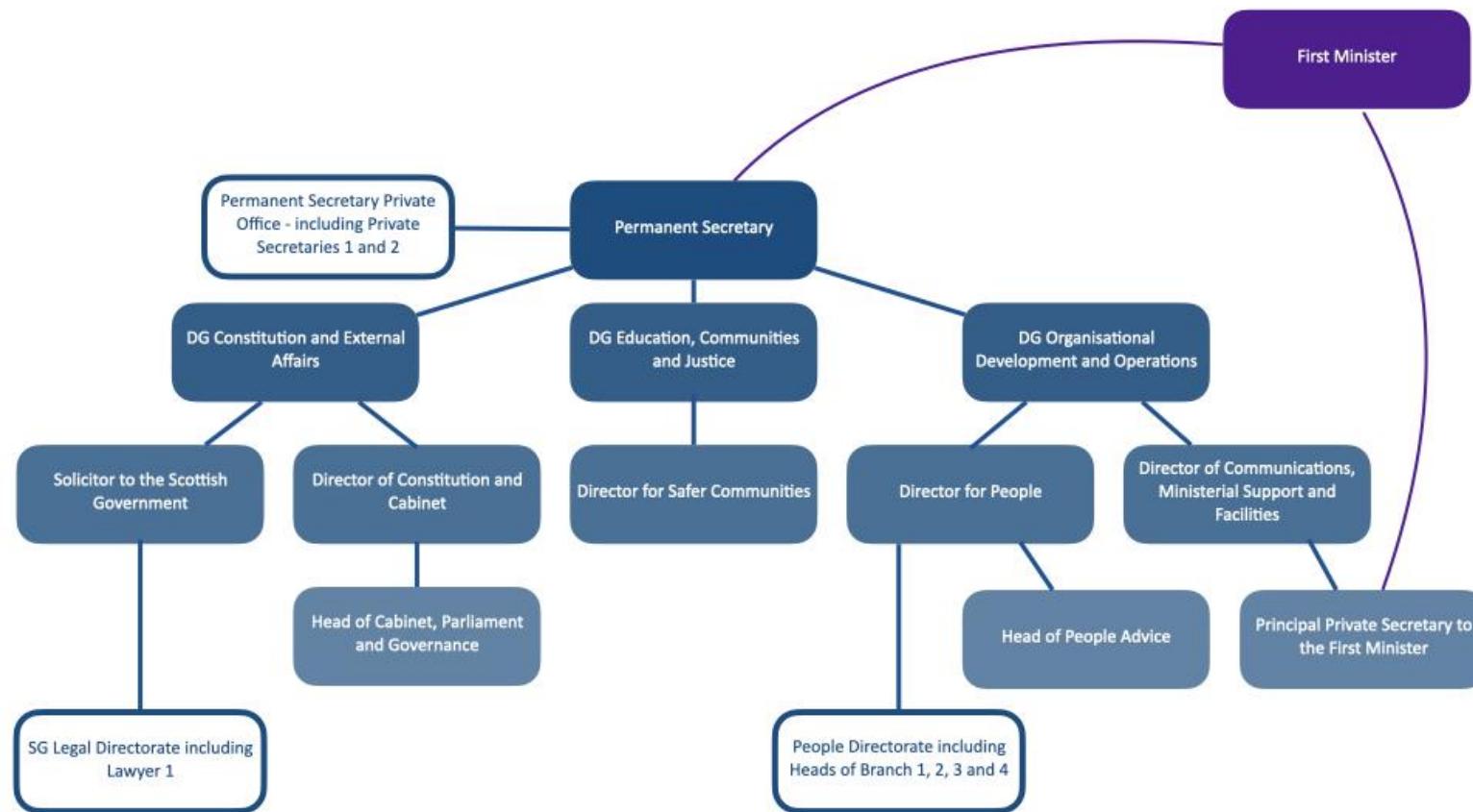
## **COMPLAINTS AND ENGAGEMENT WITH POLICE**

18. At all times the staff member is free to make a complaint directly to the Police. SG will co-operate fully with any Police investigation or criminal proceedings and may continue to investigate the complaint without awaiting the outcome of criminal proceedings. We will continue to offer support throughout to the staff member.

19. Throughout the process, all available steps will be taken to support the staff member and ensure they are protected from any harmful behaviour. However, if at any point it becomes apparent to the SG that criminal behaviour might have occurred the SG may bring the matter directly to the attention of the Police. Also, if it becomes apparent that the matter being raised is part of a wider pattern of behaviour it may be necessary for the SG to consider involving the Police in light of the information provided. Should either of these steps be necessary the staff member will be advised and supported throughout.

## Appendix 3: Scottish Government

Figure 3: Partial organogram showing reporting relationships between selected people in Scottish Government as these stood from autumn 2017 to early 2018



## **Scottish Government Trade Unions**

The Scottish Government recognises five trade unions for collective bargaining and employee relations:

- The Public and Commercial Services Union (PCS), which generally represents administrative and management staff below senior civil service level.
- Prospect, which represents any staff, including staff on short or fixed-term contracts.
- The FDA, which generally represents a range of staff in leadership roles at different levels, including senior civil servants and special advisers, and some specialists including statisticians, economists and solicitors.
- Nautilus, which generally represents marine, deck and engine officers.
- Unite the Union, which also generally represents marine, deck and engine officers.

The five unions working together on common issues are collectively known as the Council of Scottish Government Unions (CSGU). The CSGU meets bi-monthly to discuss issues of shared concern.