

Briefing note on Alex Salmond final written submission to Harassment Committee

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Lack of evidence to support the submission

1. Assertion (1):

Documentary evidence exists to support all of the factual statements made in this submission. I have sought to provide that to the Committee where it is within my power to do so.

Line to take:

- Mr Salmond's submission contains many assertions and little evidence. Mr Salmond makes assertions based on "common knowledge" that is anything but, and claims knowledge of private conversations he was not party to.
- For example, Mr Salmond seems to claim detailed knowledge of private meetings between SG and its Counsel. Mr Salmond must be well aware that this information is covered by the Government's assertion of its legal privilege. The Government has not shared its privileged information with him. If what he says were correct, making it public would be a breach by him of that privilege.

2. Assertion (2):

Perhaps even more concerning is the direction from Crown Office that I face the prospect of criminal prosecution for even referring to the existence of such evidence or specifying (even in broad terms) what that evidence is.

Factual position:

Alex Salmond has been asked to give evidence under the same legal restrictions that apply to all witnesses.

Line to take:

- Scottish Government witnesses have given evidence under the same restrictions that Mr Salmond is criticising.
- The terms of the 2010 Act are clear and the purpose of the criminal offence for misuse of information was made clear to Parliament when the Bill was considered by it.

Conduct of the Judicial Review

3. Assertion (3):

In normal circumstances the extraordinary discovery by this Committee that both Senior and Junior Counsel to the Government threatened resignation because the case they were being asked to argue was unstateable would have been headline news

Factual position:

The Permanent Secretary and Lord Advocate have set out clearly the reasons why the Judicial Review was conceded on a single ground following the Commission hearings of 19 and 21 December 2018.

Counsel had indicated at the end of December 2018 that they require to withdraw from acting if the case were not conceded. It was conceded so they continued to act.

Evidence:

In December 2020, the Committee saw the submission from the former DG Organisational Development and Operations of 29 December 2018 that sets out the advice that informed the decision to concede the case, including legal, financial and public policy considerations. That advice records that Counsel said in late December that they would require to withdraw from acting if the case were not conceded.

Line to take:

- The Committee has not “discovered” that Senior and Junior Counsel threatened resignation – it has been stated as fact by a Committee member on several occasions with no evidence offered to support it. It is troubling that was then treated as an established fact.
- The Committee has seen the advice of 29 December 2018 to the Permanent Secretary setting out the factors that informed the decision to concede the case. That advice records that Counsel said in late December that they would require to withdraw from acting if the case were not conceded.
- The Permanent Secretary has confirmed in her letter to the Committee of 21 January 2021 that any suggestion that the case was conceded for any other reason is inaccurate and misleading.

4. Assertion (4):

It appears from what has emerged that by October 2018 external counsel advised the Government that, on the balance of probability, they were heading for likely defeat. And yet, despite that advice and the cost of hundreds of thousands of pounds of avoidable legal fees, the Scottish Government pressed on with a case they expected to lose. This submission explains why.

Factual position:

The advice of external Counsel and other legal advisers is subject to legal professional privilege.

[Not for stating (covered by LPP): advice from Counsel after 31 Oct was that SG arguments were more likely to fail than succeed, but stateable. SGLD/Lord Advocate

view at that time was that while understanding the risks, there were good arguments supporting the SG interpretation, on a natural reading of the procedure.]

The Lord Advocate, as the Scottish Government's principal legal adviser, has confirmed to the Committee that the SG was content that the case could properly be defended, up until the circumstances of the Commission hearings in late December 2018.

Evidence:

This is set out in the Sarah Davidson advice note, shared in confidence with the Committee and subject to a handling agreement.

The SG's legal position can be stated in public – Lord Advocate's evidence 17/11/2020 described SG legal position during the course of the JR:

“As it was first raised, the petition said nothing about the role of the investigating officer and contact with the complainers. That was not one of the grounds on which the petition was raised. At that stage, the Government was focused primarily on the issues that were identified in the petition, which is entirely normal in any judicial review. At the end of October, the Government identified the issue relating to contact between the investigating officer and the complainer, and the Government, having recognised that that was an issue that should be addressed, had to do two things. First, it had to consider the interpretation of procedure—I will come back to that in a moment—and, secondly, it had to investigate the factual position; that is to say, it had to investigate the nature of the contact and the extent to which it might be regarded as creating a difficulty.

“If one looks at the timeline, through November, both parties were adjusting their pleadings on that issue. I may say that Government made factual averments on 5 November about that contact, and voluntarily disclosed documents to the petitioner, because the Government recognised that it had an obligation and responsibility to be candid about the position. Then, in mid-November, the petitioner added that as a new ground of challenge in the judicial review. The process of adjustment of the pleadings continued, I think, into December.

“Then, when that process of adjustment of proceedings had been completed in early December, the Government reviewed its legal position. Again, I note that it is entirely normal in any litigation process to undertake a process of investigation and consideration and then to review where you stand, and the Government reviewed where it stood. At that stage, it was satisfied that it continued to be proper to defend the judicial review on the new ground that had been stated, and that the issue could and should be put before the court for determination. Obviously, that changed a few weeks later, as a result of the documents that were disclosed in the commission process.

“It is very important to appreciate that, when an issue is raised in the context of litigation, it is rarely a kind of binary point. Almost invariably, it is a matter that needs to be considered and investigated and, if there are facts that must be explored, they must be explored as far as they can be, before a conclusion is reached.”

...

“As long as the Government had properly and responsibly stateable arguments, there was a strong interest in putting the matter to adjudication by a court, and having the clarity and certainty that would come from its decision. I say that partly because of

the underlying interest of complainers whose complaints had apparently had determinations that were now under challenge, and partly because of the desirability of not conceding as long as there was a properly responsible argument to be made.

“One also has to remember that this was a case in which there was a plethora of grounds for challenge—from those on the lawfulness of the procedure itself, to its application to a former minister, all the way through to particular issues about the way in which the procedure had been applied. Assuming, of course, that the Government’s case could be responsibly defended, a determination by the court would have given clarity and certainty about precisely where any error lay, and on the position going forward—even if it had lost.”

Line to take:

- Advice of Counsel to the Scottish Government is covered by legal privilege and Mr Salmond offers no evidence to support his assertion.
- The Committee has received both written and oral evidence, including from the Lord Advocate, explaining clearly the legal position taken by the Scottish Government throughout the judicial review.
- The Lord Advocate also set out in his evidence the benefit of defending the case even where there was a significant risk of losing it, in order to get clarity and certainty about where any error lay.
- As the Lord Advocate said in his evidence - “Legal advice is not a single thing at a single point in time” – something Committee Members are aware of.
- Even once the issue of prior contact with the complainers was identified in late October, the Government was fully satisfied that it could continue to properly defend the case, taking account of the full range of legal advice available.

5. Assertion (5):

However, the Committee has yet to publish (or to my knowledge see) a single relevant minute, email, text message or ‘One Note’ from that entire period relating to those meetings despite being assured that such documents would be provided.

Also Assertion (43):

As the Committee has heard in evidence there were 17 meetings of the Committee formed to monitor and plan the Scottish Government defence of the Judicial Review between August 2018 and January 2019. Paul Cackette in his evidence said that there were daily meetings while Ms Mackinnon suggested three times a week. Despite this information being offered at the evidence session of 1 1st December no information has been received by the Committee of any of these meetings.

Factual position:

The Permanent Secretary confirmed the position in oral and written evidence to the Committee.

Meetings included brief update meetings about handling press inquiries / Fols / info sharing on latest position with JR – they were not decision making nor formal. SpAds sometimes attended.

Evidence:

Perm Sec letter of 20 November – *“Scottish Government responsibility for recording meetings is clear: to ensure all information of importance – of corporate value – is properly recorded. As I explained, there were different kinds of meetings taking place throughout the Judicial Review process. As well as consultations with counsel and meetings within the Legal Directorate, there were informal coordination meetings which were predominately for the purposes of information sharing. This type of conversation does not form part of the corporate record and as such, no formal minutes were recorded”*.

Line to take:

- In the normal course of Government business not all conversations and meetings are minuted.
- We have already provided the Committee with around 2000 pages of relevant material, responding directly to the questions asked by the Committee. Every request from the Committee for written material has been met so far as possible within legal requirements, the Law Officers’ Convention and legal privilege.

6. Assertion (6):

Of particular interest to the Committee would be the extent to which various parties were informed of the progress of the case and in particular whether the Lord Advocate’s expressed views on “sisting” (pausing) the Judicial Review pending the criminal case were discussed, how widely and with whom.

Also Assertion (44):

I believe there have to be such emails which show the Lord Advocate’s advice on the possibilities of sisting (pausing) the Judicial Review behind the criminal case. The advantage of doing so in a context where the Judicial Review was likely to be lost was clear. Any adverse comment or publicity about the illegality of the Scottish Government actions would be swept away in the publicity of my arrest and subsequent criminal proceedings.

Evidence:

Paul Cackette, Lord Advocate, Judith Mackinnon and Nicola Richards have commented on the consideration given to the possibility of sisting the JR.

Lord Advocate evidence, 17/11/2020:

“The Government considered—I think that this point was raised with Paul Cackette—whether it would be appropriate for the petition to be sisted or whether the public interest in relation to the on-going criminal investigation could be adequately protected by reporting restrictions. On that issue, the Government took the view that the public interest could be adequately protected by reporting restrictions and, ultimately, that was a matter of agreement. A number of issues were being addressed at that preliminary stage, one of which was the question of whether to contest permission.”

Whether the Lord Advocate gave legal advice on this point would be covered by the Law Officers’ Convention.

Line to take:

- The Committee has already received extensive evidence on the consideration and discussion of the possibility of sisting the JR. It was a possible option that came up as part of wider consideration of whether or not SG would oppose permission being granted for the JR to proceed.
- It seems the narrative has moved on from criticising the SG for not requesting a sisting, to criticising us for even considering the possibility.
- It should be unsurprising to know that during a litigation against the SG there are frequent meetings about all matters arising. Some meeting may be consultations which may be minuted, others may be for coordination across SG or in relation to particular issues. Meetings may be in person, by phone or by video conference. Witnesses have spoken about the sorts and types of meeting they were involved in. No one witness will have attended every meeting so any discrepancies in what has been said reflect the nature of the teamwork involved.

7. Assertion (28):

When the fact of it was discovered by the Government's external Counsel (and even after the duty of candour was explained to government lawyers by them on November 2nd and then by the court on November 6th, both 2018) the attempt was still made in pleadings to present it as "welfare" contact.

Line to take:

- SG interaction with Counsel is covered by LPP and Mr Salmond provides no evidence for his assertions.
- The Lord Advocate has set out in evidence to the Committee the SG legal position during the process of the JR.
- Evidence relating to contact with the complainers has been shared with the Committee. It is clear from this evidence that the contact was in line with the HR professional role.

8. Assertion (29):

The documents which demonstrated this to be false had to be extracted from the Government by a Commission and Diligence procedure under the authority of the court as granted by Lord Pentland. The documents then produced under that procedure emerged despite the Government being willing to certify to the Court that these documents simply did not exist.

Evidence:

Lord Advocate evidence to Committee 17/11/2020 ([Official Report \(parliament.scot\)](#) page 15,17, 21):

"Although commission and diligence is pretty unusual in a judicial review, it is not a particularly unusual feature of litigation. In fact, it is a normal process in many litigations that the court approves a specification of documents and authorises a commission. That in itself often results in the disclosure of documents and no commission is held, but it is not unusual for a commission to be held."

...

“There was never any intention or desire to conceal anything; as I said earlier, the whole approach that the Government took in November in relation to putting facts into the pleadings and disclosing documents voluntarily reflected a desire to be candid and transparent. We know from the way matters turned out that, regrettably, the investigations that were undertaken then to investigate all relevant documents and to get a full picture of the facts was not as robust as it should have been, and lessons have to be learned from that.”

...
“It was highly unsatisfactory—let us put it that way—that the Government should be in a position where, after it had set out its stall in pleadings, disclosed documents and given assurances to the court that full disclosure had been made, it transpired during the course of the commission that there were additional documents, which had not previously been disclosed, that bore substantively on the issues in the case. Indeed, as the committee has heard, further documents were identified even after that point.

“That was not the way that I, as the Government’s senior law officer, would like to see a Government litigation conducted. It is clear that, corporately, there was a failure to get to the bottom of all the documentation at the time when that should have happened—in the course of November.

“I recognise the difficulties that can be involved in identifying all possible documents on different devices and in identifying documents that may have been deleted from some devices but not others, and so on. You would have to ask others about the details of recovery of documents, but I am alive to how challenging that can be in any large complex organisation. It is not unique to Government—that can be challenging for large corporations. However, that is not the way I would like to see Government litigation conducted.

“Corporately, the organisation will learn lessons from the process, both in appreciating what is expected of Government in drilling into the fine detail of facts where facts are an issue and regarding its document storage and retrieval and so on.”

Line to take:

- The Lord Advocate, in his evidence to the Committee on 17 November, described the process of providing documents during the JR in response to evolving specifications. He stated that it is not unusual for additional documents to come to light during the course of a case, but also acknowledged that the position was highly unsatisfactory and that the SG will learn lessons from the process.

9. Assertion (42):

From a very early stage in the Judicial Review the Government realised that they were at risk of losing. By October they were told by external counsel that on the balance of probability they would likely lose. This is the legal advice they have hidden from the Committee in defiance of two parliamentary votes.

Factual position:

As the Lord Advocate set out in his evidence to the Committee, when the judicial review was raised, the Scottish government was satisfied that it could answer all of the grounds raised by Mr Salmond. The Scottish Government on 5 November 2018 provided further detailed factual information on the development of the Procedure and contact between complainers and senior employees of the Scottish Government. The

full picture only became evident in December 2018 as a result of the work being undertaken to produce relevant documents in advance of the hearing. At this point the Scottish Government quickly conceded the case on the single ground of a possible perception of bias. On 4 January 2019, a Joint Minute was lodged in Court, setting out the agreement of the parties as to the basis on which the Petition was to be conceded.

Evidence:

Official Report - Parliamentary Business : Scottish Parliament – Lord Advocate evidence

Statement from Permanent Secretary at the Scottish Government Leslie Evans - gov.scot (www.gov.scot)

Perm Sec statement – 8 Jan 2019

Line to take:

- The appointment of the Investigating Officer was made in good faith and in line with SG's interpretation of the procedure
- When the judicial review was raised, we were satisfied we could answer all of the grounds raised by Mr Salmond
- As the Permanent Secretary said in her statement of 8 January 2019, the full picture only became evident in December 2018
- At this point the Scottish Government quickly conceded the case on the single ground of a possible perception of bias.
- We do not accept any suggestion that the Investigating Officer acted in a partial way, or that either the investigation or the decisions that were reached were partial. At all times those involved in the procedure acted in good faith.

10. Assertion (45):

It became common knowledge in government, special advisers and the SNP that the Judicial Review was in trouble for the Government and the hope was that police action would mean that it never came to court, that the JR would be overtaken by the criminal investigation.

Line to take:

- This is baseless speculation and assertion without evidence.
- As set out in evidence to the Committee, the full picture only became evident in December 2018. At this point the Scottish Government quickly conceded the case on the single ground of a possible perception of bias.
- The Lord Advocate has explained in evidence on 17/11/20 ([Official Report \(parliament.scot\)](#) , page 10-11) the reasons for considering the possibility of seeking to sist the case, and the conclusion reached: *“the Government took the view that the public interest could be adequately protected by reporting restrictions and, ultimately, that was a matter of agreement”*.

11. Assertion (52):

In a further breach of the duty of candour the Government owed to the Court, those documents were not made available at Judicial Review.

Line to take:

- We have given a detailed account of the process of providing docs relevant to the JR through Lord Advocate evidence and timeline submitted to the Committee
- The Lord Advocate's evidence to the Committee acknowledged that the provision of documents in the judicial review was regrettable.

12. Assertion (57):

The Government was aware at a very early stage that they were at significant risk of defeat in the Judicial Review, and by October 2018 were advised that, on the balance of probabilities, they were likely to lose. Nevertheless they kept the clock running and the public ended up paying over £600,000 as a result. This information on likely defeat in the JR was communicated to key decision makers – the Permanent Secretary, First Minister, the Lord Advocate, the Chief of Staff- in meetings with external Counsel through October and November 2018.

Line to take:

- This is baseless speculation and assertion without evidence.
- As set out in evidence to the Committee, the full picture only became evident in December 2018. At this point the Scottish Government quickly conceded the case on the single ground of a possible perception of bias.
- Salmond seems to claim detailed knowledge of private meetings between SG and its Counsel. Mr Salmond must be well aware that this information is covered by the Government's assertion of its legal privilege. The Government has not shared its privileged information with him. If what he says were correct, making it public would be a breach by him of that privilege.
- The Committee has received both written and oral evidence, including from the Lord Advocate, explaining clearly the legal position taken by the Scottish Government throughout the judicial review. As the Lord Advocate set out in his evidence, when the judicial review was first raised the Scottish Government was satisfied that it could answer all of the grounds raised by Mr Salmond.
- The Lord Advocate also set out in his evidence the benefit of defending the case even where there was a significant risk of losing it, to get clarity and certainty about where any error lay.

Allegations of attempt to damage reputation

13. Assertion (8):

The Parliamentary Committee has already heard evidence of activities by civil servants, special advisers, Ministers and SNP officials which taken individually could be put down to incompetence, albeit on an epic scale. However taken together, and over such a prolonged period, it becomes impossible to explain such conduct as inadvertent co-incidence. The inescapable conclusion is of a malicious and concerted attempt to damage my reputation and remove me from public life in Scotland.

Factual position:

Civil servants are providing evidence on behalf of the Scottish Government, and are responding in line with the written statements and evidence submitted by the Scottish Government. Civil servants are required to act in line with their obligations under the Civil Service Code.

Committee witnesses have, under oath, given their own recollections of complex events that took place some time ago. Where further information or clarification has been required, officials have followed up quickly in writing, including to correct inaccurate assertions that documents had not been provided when they had in fact already been submitted.

This process is normal practice during Parliamentary Inquiries.

In creating the Procedure, SG focus was on developing an employment policy and a procedure which could resolve complaints with the cooperation of all parties. We were not in a position to learn from others because we were in many ways in uncharted territory but sought to ensure that principles of good employment practice were built in, recognising the uniqueness of the relationship between civil servants and ministers. We acted in good faith at all times.

An employer would have to address any complaints raised, even if they did not have a written procedure in place. We opted to be transparent and set that out.

Line to take:

- The SG had a duty to investigate the serious and specific complaints raised against Alex Salmond and was right to do so.
- Civil servants have acted professionally and in good faith throughout – bound by the requirements of the Civil Service Code to act with integrity, honesty, impartiality and objectivity.
- Accusations of a conspiracy against Alex Salmond by the Scottish Government are unfounded and untrue.
- Scottish Government witnesses are providing evidence to the best of their knowledge on behalf of Ministers.
- It was appropriate to develop a separate procedure for the Handling of Harassment Complaints Involving Current or Former Ministers to recognise the historical nature of the issues being raised through the #metoo movement and that former ministers may have different statuses depending on whether they are MSPs or party members, so there is a route to raise concerns either

to FM or to the relevant party leader. Anything to suggest this was aimed at one person is not evidenced and ignores the wider international context of late 2017.

14. Assertion (16):

In reality I had spent 30 years in public life in Scotland and for most of that time was certainly the most investigated person in the country by the press. It is inherently unlikely that misconduct had remained unreported and undiscovered over such a period.

Factual position: It is not inherently unlikely that allegations of harassment against anyone would remain unreported or undiscovered, even after many years. This has been the reality in a number of high profile cases involving individuals holding positions of power.

Mr Salmond has said in public that he has not been an angel. He stated in the judicial review that a complaint had been made about him and dealt with under Fairness at Work. His lawyer in the criminal trial suggested that his behaviour had been inappropriate (but not criminal) (*"I'm not here to suggest he always behaved well or couldn't have been a better man on occasions. That would be a waste of my time."*) His assertion now contradicts these statements.

Evidence: Organisations like Rape Crisis Scotland and others have challenged strongly myths about why someone might not feel able to report an incident until months or years afterwards. Only half the survivors who engage with Rape Crisis Scotland go on to report to the police.

Line to take:

- One of the key lessons from the #MeToo movement is that far too many women have experiences of harassment at work and elsewhere, often dating back many years, that were previously unreported or undiscovered.
- Behaviour may not meet the test of criminality but that does not prevent it being unacceptable in a workplace.

15. Assertion (46):

In evidence Ms Allison on 15th September 2020 specifically denied that the Scottish Government had any role in contacting potential witnesses or former civil servants after the police investigation had started on August 23rd 2018. This is not true. I enclose at appendix 2 a copy of an unsolicited email sent by Ms Allison herself to an ex Scottish Government employee on August 27th who then received a further unsolicited email from Ms Ruddick of the SNP the following day (appendix 3) The individual concerned, who provided a defence statement, had never even been a member of the SNP. I believe her contact details were given to Ms Allison by a Government Special Adviser

Factual position:

[Redacted]

Evidence:

[Redacted]

Line to take:

- The email is clearly an offer of support to a former employee in light of the media interest and no more than that.
- It now seems likely that Ms Baillie had this specific email in mind when questioning Ms Allison but did not provide it to her. Making use of information that witnesses are unsighted on in this way is contrary to the Committee's statement on handling of evidence and is one of many examples of unfair treatment of SG witnesses by the Committee.

16. Assertion (47):

It was clear that defeat in the Judicial Review would have severe consequences. Cabinet Ministers thought it should lead to the resignation of the Permanent Secretary. The Special Adviser most associated with the policy believed that her job was in jeopardy and accordingly sought to change press releases in light of that. The First Minister's team felt threatened by the process as did the civil service. The documentary evidence shows that special advisers were using civil servants and working with SNP officials in a fishing expedition to recruit potential complainants. This activity was taking place from late August 2018 to January 2019, after the police investigation had started.

Line to take:

- This is baseless speculation about events Mr Salmond had no involvement in and he offers no evidence to support his statements.

Fairness at Work policy

17. Assertion (9):

In the event there were no formal complaints made against any Minister under the policy [FaW] and thus it was never invoked. Specifically and to my knowledge the present First Minister was never informed about any complaints against me because there were none. Similarly I was never informed about any complaints against her or any other Minister under the terms of this policy because there were none.

Factual position:

Fairness at Work provides a process for handling concerns or complaints, including a number of stages. Where appropriate we seek to resolve concerns on an informal, early intervention basis. The number of formal complaints under Fairness at Work is low. We do not hold records of informal concerns raised and have no record of the reference in the 'Initial Version of Judicial Review Petition' to a previous complaint that was dealt with and resolved

The Scottish Government was not aware of any formal complaints against Mr Salmond under Fairness at Work. During the Judicial Review his lawyers argued that one of the 2018 complaints made against Mr Salmond had previously been dealt with under the informal stage of FaW.

Evidence:

We've responded to a number of FOIs on complaints under FaW. For 2019-20, under each category we had fewer than 5 formal complaints. Related FOI replies attached:

<https://www.gov.scot/publications/foi-202000018100/>

<https://www.gov.scot/publications/foi-202000083344/>

<https://www.gov.scot/publications/foi-202000019799/>

Evidence submitted to Committee by Levy & McRae – "[Initial Version of Judicial Review Petition](#)"

"27. Allegation D – Breach of Legitimate Expectation, Irrationality and Oppression. This allegation concerns an incident which was the subject matter of a previous complaint against the petitioner in [redacted]. That complaint was dealt with and resolved using the Procedure in place in [redacted], Fairness at Work. The petitioner had a legitimate expectation that the matter was concluded and that this complaint would not be resurrected years later under a different procedure which was not in force (not even in contemplation) when the incident giving rise to the complaint occurred..."

There have been three formal complaints against ministers, all of which post-date Mr Salmond's time as First Minister.

- 2 complaints were made in 2018 under the harassment procedure about FFM
- there have been other complaints under FaW, which are, unfortunately, in the public domain. One was resolved informally in 2017 and did not proceed further to the formal stage [so is not covered in the 'formal complaints' figures]; the other is in progress and I will not be commenting further.

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

Line to take:

- The FFM’s statement that no complaints were made against any Minister under Fairness at Work is in conflict with his prior position that one of the complaints against him was previously dealt with under Fairness at Work.
- Mr Salmond’s assertion that he was never complained about during his time as First Minister does not appear to entirely match his public statements or legal pleadings
- The #MeToo movement was about this very issue – just because there were no formal complaints at a point in time, doesn’t mean there were no issues to be address and it was this very movement that enabled people to come forward about their experiences in the past.

18. Assertion (10):

Fairness at Work, of which the Permanent Secretary admitted in her evidence (in response to Ms Mitchell on 18th August 2020) to “not being an expert”, is in reality a carefully considered policy which is still in operation for the civil service and for serving Ministers with regard to bullying complaints. The Permanent Secretary’s extraordinary claim in the same evidence session that it does not cover harassment can only be a result of her admitted lack of familiarity with the policy.

Factual position:

The focus of all our grievance procedures is to enable our staff to raise issues which have arisen during their employment with us.

The Fairness at Work procedure does provide a process for considering complaints about ministers, however given the #metoo context, in common with other organisations, we needed to be sure that our approach to sexual harassment complaints was sufficiently robust. The way in which sexual harassment complaints about civil servants was clarified at the same time.

Fairness at Work is a wide-ranging employee policy that is now 11 years old. Like any employee policy it needs to be refreshed over time and the commitment to review it had already been agreed with the trade unions. This included reviewing the ministerial aspect of Fairness of Work and work on that had begun in discussion with the trade unions earlier in 2017.

The wider review remains the plan and was part of the process that began in late 2017 but that has been delayed by the events of the judicial review, trial and now these inquiries. Once that is all complete the recommendations will be reviewed and taken forward in discussion with the trade unions.

Fairness at Work is clearly communicated for all staff to draw on. The 2017 Procedure aimed to rectify a gap identified in the context of the #MeToo movement and the commission from Scottish Ministers and the head of the UK civil service.

The key updates to reflect this are stated in FaW policy:

- a new route map setting out a number of routes through which a member of staff may raise a concern or complaint about sexual harassment
- a new process for complaints against ministers or former ministers in relation to any concerns or complaints about harassment
- making the Scottish Government required standards of behaviour more prominent to all staff and ensuring that there is a clear link between these and the core values set out in the Civil Service Code

Strictly speaking, definitions of harassment tend to refer to protected characteristics under the Equality Act so arguably it would not cover instances of bullying by current ministers unrelated to protected characteristics. Staff would therefore continue to look to the 2010 Fairness at Work policy as a means for raising issues involving current ministers.

In early 2018, revisions were also made to the Scottish Ministerial Code. These changes included specific references to harassing, bullying or other inappropriate or discriminating behaviour.

Evidence:

Extract of Perm Sec evidence quoted by FFM (18/08/2020) [<UNSPECIFIED>](#)
[\(parliament.scot\)](#) page 8-9:

- **Margaret Mitchell (Central Scotland) (Con):**
You mentioned the fairness at work policy. If we look at the development of policy, it would be helpful to put it in context. Could you give a brief outline of how the policy developed from dignity at work, from when fairness at work came in right up to the point in 2017 when the internal procedure was brought in?
- **Leslie Evans:**
*I am not an expert on the fairness at work policy. It was originally introduced in 2010. It was and is still intended to predominantly cover everything except harassment. You will appreciate that, when we looked at fairness at work, which was negotiated and agreed with our trade unions at the time, we wanted to ensure that it had been used, applied, and tested. It is a process for handling, including a number of stages, so it has an informal as well as a more formal element.
Finally, as you would imagine, the policy interacts with and bumps up against the ministerial code. When we looked at what the gaps were through the review that we were commissioned to undertake, that included looking at how the fairness at work policy operated and what it covered and did not cover. For example, it had some very basic elements, such as there being no time bar, which we agreed we would want to include in the new procedure, but it also had a lack of clarity about where it docked into the ministerial code. Where the policy had been used, there had been experience of how well it had operated and how clear it was on where responsibility for what took place was with the fairness at work policy and where that translated and transferred into the ministerial code.*

I am sure that you will call witnesses who are more expert in HR than I am and who perhaps may have been involved in creating the policy, but it had existed and had been used since 2010.

...

On the fairness at work policy in particular, a whole part of it has traditionally been focused on bullying rather than harassment, and that is now even more the case. To deal with issues of bullying, we turn to the fairness at work policy rather than to the new policy that we have for harassment. The fairness at work policy outlines a whole stage that is about informal resolution and the kinds of techniques, processes and support that can enable that.

...

Bullying, which would be the counterpart, is covered by the fairness at work policy. What we have to understand here—as I say, I was not involved in the detail of this—is that this was an opportunity for the clarification and improvement of the fairness at work policy, particularly in relation to issues, which were referred to earlier, where trade unions and others said that it was not working perfectly. This was the opportunity for us to clarify what policy does what. For harassment purposes, the 2017 policy is the go-to place. For civil servant to civil servant issues and bullying by ministers, it is the fairness at work policy. That is the rough divide that we use for reference when deciding which policy is applied.

Line to take:

- The Perm Sec’s reference to being “not an expert” on the Fairness at Work was in response to a question specifically about its development in 2010, which as she explained was before she took up post as Permanent Secretary.
- The Perm Sec did not claim that the Fairness at Work policy does not cover harassment – she explained that since a specific Procedure now exists for harassment complaints against current or former Ministers, that Procedure would be used for such a complaint, whereas complaints about bullying would be managed under Fairness at Work.

19. Assertion (11):

FaW is legal, not illegal. It is procedurally fair, not unfair. It was carefully considered, not rushed. It achieved the central longstanding workforce ambition of having Ministers on the same footing as civil service managers. No doubt it can be updated and improved but the current position of limbo is ridiculous. ... Fairness At Work should be reinstated at the earliest opportunity pending the Dunlop review.

Factual position:

Fairness at Work is currently in use and has been so throughout the process. Work was underway earlier in 2017 to review our Fairness at Work policy and procedures, discussion with the Unions had continued during 2017. While staff could always raise concerns under F@W, the gap analysis undertaken identified that there was no process to handle complaints involving former ministers and that the role of ministers under the Ministerial Code and the ability for ministers to be sanctioned was not clear under the 2010 policy. We engaged with Trade Unions throughout who acknowledged the fact that the 2010 procedure was in place, but it warranted further review.

Further work, including wider engagement with senior managers, in January/February 2018 was paused in recognition of the judicial review and subsequent Committee inquiry and externally led SG review. Given this wider context, and the intersection with non-harassment complaints against current ministers, we have not yet finalised our review of Fairness at Work. Given the level of scrutiny at present we wish to take on board any lessons emerging from all these processes once they have completed.

The Harassment Procedure has not been found by a court to be unfair, unlawful or illegal.

Line to take:

- The FFM's assertion that Fairness at Work is in limbo is inaccurate and his demand that it be reinstated is unnecessary. It is in use now and has been throughout.
- Fairness at Work is a wide-ranging employee policy of which the ministerial aspect is only a small part so would clearly take longer to develop and agree.
- The Harassment Procedure has not been found by a court to be unfair, unlawful or illegal.
- As set out in phase 1 of this inquiry, work was underway earlier in 2017 to review our Fairness at Work policy and procedures, discussion with the Unions had continued during 2017. Further work, including wider engagement with senior managers, in January/February 2019 was paused in March 2019 in recognition of the commitment to this Committee's Inquiry and the internal review, now being carried out by Laura Dunlop QC. Given this wider context, and the intersection with non-harassment complaints against current ministers, we have not yet finalised our review of Fairness at Work. Given the level of scrutiny at present we wish to take on board any lessons emerging from all these processes once they have completed.
- The Scottish Government will carefully consider any relevant recommendations from Laura Dunlop or from the Committee in relation to Fairness at Work.

Development and general application of the Procedure

20. Assertion (12):

The concept of a civil service investigation into people over which they have no legitimate jurisdiction is nonsensical and the idea of passing the results to the relevant political party for action is self-evidently ludicrous.

Factual position:

The Procedure was an employment policy with the primary purpose of fulfilling our duty of care to employees. That duty of care does not disappear because the alleged perpetrator has left the organisation. The use of an internal investigating officer is a feature of Fairness at Work, which covers complaints against current ministers.

From an HR Professional perspective, it would be unusual for an employer to defer an internal employment matter to an external party at least without seeking to resolve through an internal procedure first.

Generally, on employment matters, independence is delivered by ACAS and the Employment Tribunal to provide independent remedy to individual or collective employment disputes. However that only applies after internal procedures have been followed and exhausted. It would have been very difficult to provide potential complainers on matters as sensitive as these with appropriate levels of comfort, trust and confidence in coming forward to share their experience had we suggested that the only option open to them was to engage in a process led by an external investigator. That does not feel entirely consistent with our duty of care to those colleagues.

Line to take:

- As the ACAS guidance, and processes put in place by the Scottish Parliament and many other organisations make clear, it is legitimate and good practice to have a policy that covers historical complaints
- ACAS guidance recommends that an employer should take a complaint of sexual harassment seriously, even if it is made some time after the incident took place
- The duty is to ensure employees have a mechanism to raise legitimate grievances – where these are about a ‘third party’ it is clear that there is no direct sanction or means to compel the individual to engage with the process. This is acknowledged by the procedure. However, this does not mean that an organisation can ignore complaints raised, it means that there are limitations to the actions that can be taken if the complaint is upheld.

21. Assertion (13):

The Committee has already clearly established that there was no discussion or information presented to either Parliament or Cabinet on the 31st October 2017 of extending work place policies to former Ministers. Nor was there any suggestion that this should be done in the Head of the Civil Service’s letter of 3rd November 2017. And of course it was not carried forward in any other administration in the U.K. and was opposed by of the UK Cabinet Office when they were briefly consulted on the proposal later in November 2017. As she wryly asked the Scottish Government at

that time, was there also to be such a retrospective policy for former civil servants? Nor was the new policy signalled in any of the internal communications with staff until February 2018.

Factual position:

Although not explicitly stated under FaW, we encourage staff to come forward if they have experienced bullying and harassment in the workplace and our policies and procedures support the appropriate investigation of complaints. In the event a concern was raised under Fairness at work relating to the conduct of a former civil servant, consideration would be given to the appropriate handling depending on the issues raised. We will support the staff member even if not possible to fully investigate or find a route to raise the issues with the subject of complaint.

The Scottish Government's defence of the retrospectivity point was set out in the pleadings. These were previously released to the Committee. Contrary to recent accusations that it was the First Minister who insisted on the Procedure applying retrospectively, evidence to the Committee has confirmed that officials were already looking at the policy applying to former Ministers from the very earliest draft..

The proposal was not opposed by the UK Cabinet Office. An email response indicated that it *"feels uncomfortable to be highlighting a process for complaints about Ministers and former Ministers"*.

Evidence:

Documents and a detailed timeline were released in June 2020 to the Committee about the development of the Harassment Procedure, including confirming contact with the UK Cabinet Office and also that draft letters were prepared to send as a courtesy to former First Ministers and party leaders about the procedure, although, in the end, these were not issued.

YY092 contains the response from the UK Cabinet Office.

Line to take:

- As the ACAS guidance, Scottish Parliament and many other organisational processes make clear, it is legitimate and good practice to have a policy that covers historical complaints
- ACAS guidance recommends that an employer should take a complaint of sexual harassment seriously, even if it is made some time after the incident took place
- As this was an employment policy with the primary purpose of fulfilling our duty of care to employees, letters to former First Ministers were considered as a courtesy and not to seek permission from them or Ministers in their administrations, and it was concluded that it was unnecessary for them to issue

22. Assertion (14):

The claim of the Government is that it came about independently from James Hynd who was tasked with drafting the policy and delivered the first draft applying ONLY [Redacted] [Redacted] 5 to Former Ministers on November 8th 2017. However the previous day Ms McKinnon had circulated a "routemap" of a policy which also suggested applying to former Ministers. Mr Hynd reacted to that on 8th November

saying that “neither of the pathways involving Ministers look right”. It is stretching credibility to believe that this radical departure from all previous policy in the Scottish (or any other) administration was simultaneously and independently dreamed up by two separate civil servants.

Factual position:

Scottish Government witnesses have confirmed that following the commission from Cabinet on 31 October 2017, officials from HR and those responsible for the Ministerial Code worked in parallel to review existing policies and procedures

Evidence:

The [written statement](#) and [timeline](#) provided by the Scottish Government to the Committee on the Development of the Procedure sets out clearly, with documentary references, the process for developing the Procedure, including its application to former Ministers. This was covered in by oral evidence by James Hynd and Judith Mackinnon. The first version of a new procedure that could be applied in respect of former Ministers was created by staff on 7 November 2017. This was then expanded to cover both current and former Ministers in a single procedure. A draft version was sent to the First Minister on 24 November.

The Permanent Secretary wrote to the First Minister on 20 December and the First Minister approved the Procedure that day.

The response from James Hynd is contained in [YY073](#). The document simply queries the route map rather than any issue with including former first ministers.

Line to take:

- In the context of the #MeToo movement there was growing recognition of the need to be able to deal appropriately with complaints of sexual harassment, including historical complaints.
- Following the Commission from Cabinet on 31 October 2017, officials identified a gap in the existing arrangements for dealing with complaints about former Ministers.
- Multiple Scottish Government witnesses have confirmed – under oath – that the development of the procedure was not targeted at any individual.

23. Assertion (15):

It is stretching credibility to believe that this radical departure from all previous policy in the Scottish (or any other) administration was simultaneously and independently dreamed up by two separate civil servants.

Line to take:

- Scottish Government witnesses have set out to the Committee under oath and in detail how a gap was identified around former Ministers as part of a review of processes and procedures commissioned by the First Minister at Cabinet.
- In the context of the #MeToo movement it is unsurprising that this included considering historical complaints.

24. Assertion (17):

Regardless, the chronology revealed by the evidence tells us that the Permanent Secretary briefed the First Minister on 6th November 2017 on the proposed story involving Edinburgh Airport. Further, the Permanent Secretary was contacted by Barbara Allison about a separate concern from a former civil servant on November 8th 2017. Having briefed the First Minister on the first of these it might be considered unlikely that she did not brief her on the second. In that context, the notion that a policy instructed immediately afterwards which specifically, and uniquely, extended to cover allegations against former ministers is co-incidental and unrelated is hardly sustainable.

Factual position: The Permanent Secretary has confirmed that she did not inform the First Minister of any investigation against Mr Salmond.

Evidence: In her oral evidence to the Committee on 12 January 2021 ([Official Report \(parliament.scot\)](#) page 7) the Permanent Secretary said: *“I did not inform the First Minister that an investigation was under way, but I understand that Mr Salmond informed her. The First Minister did not make any attempt to influence the investigation at any point, nor did she receive a copy of the investigation or decision reports.”*

Line to take:

- In her evidence on 12 January 2021 the Permanent Secretary told the Committee – under oath – that she did not inform me that an investigation was underway and that I did not make any attempt to influence the investigation at any point.

25. Assertion (18):

The Chief of Staff to the First Minister drafted a specific amendment on 17 November 2017 which amended the commissioning letter instructing the policy proposing the wording “but also former Ministers, including from previous administrations regardless of Party”. This was in an email to Leslie Evans’ Private Secretary. It is impossible to accept that such a radical expansion of the jurisdiction of the Scottish Government to cover not just former ministers of the current administration but also those of previous administrations (many of whom are no longer even in elected office never mind in Government) was not specifically inserted to allow the complaint against me to be prosecuted.

Factual position:

An email from Liz Lloyd does suggest the inclusion of that wording in a note from FM to Perm Sec. However, if you read the entire text (submitted to the Committee), the addition of those words does not change the effect of the note. The note restates the commission for Perm Sec to review SG policies and processes, and makes clear that historic incidents including former ministers are within scope of this review. That was clearly already the case, as the Procedure covered former Ministers from the first draft.

The Chief of Staff was responding to an earlier email from the Permanent Secretary's PS which contained a draft of the paragraph to be sent from FM to Perm Sec. The wording of "former Ministers" was already within the paragraph, and the Chief of Staff suggested expanding it to make it clear that this would be regardless of the party of the previous administration.

The review process in 2017 identified that while options were available to guide the investigation of potential sexual harassment complaints about serving Ministers, this was not clearly set out in respect of former Ministers. Those involved in the review process identified that there was a gap in the coverage in terms of having a procedure that could be deployed should any historical complaints arise in Scotland. It was recognised that a number of the allegations that had emerged at Westminster related to the actions of former Ministers during their time in office and a Minister had recently resigned from the Scottish Government.

Following the identification of that gap in the overall framework, work was put in hand to determine the most effective way to fill it, consistent with the principles as outlined at paragraph 12. As a result, Scottish Government officials began work on the development of a new procedure that could be followed in respect of former Ministers. The first version of the procedure was created on 7 November, which was the beginning of an iterative and collaborative drafting process.

The consideration of the approach to be taken for former Ministers had already been flagged by People Directorate on 7 November as requiring consideration, including suggestion of checking with James Hynd about the obligations on a former minister in the Ministerial Code.

Evidence:

Footnotes 12, 19, 20, 21 and 23 of the SG's [written statement](#) on the development of the Procedure.

Permanent Secretary oral evidence to the Committee, 08/09/2020: *"The decision to include former ministers came from an analysis that was already under way and work that had already been undertaken on the fairness at work procedure. From the very beginning, it was agreed that the tidying-up—to use a colloquialism—or the making consistent of the fairness at work procedure would always address the issue of former ministers."*

FN23 of the Development of the Procedure evidence: [XX013](#) & [XX015](#) – Email trail between [Private Secretary 1] and Liz Lloyd in [XX013](#) – Private Secretary 1 shares with Liz Lloyd on 17/11/2017 at 11:28 a paragraph he has drafted for FM to send to PermSec which includes the wording "I wanted to make clear that the arrangements you are putting in place to address any concern or complaints from staff should also include any complaint received about the conduct of current or former Ministers". Liz Lloyd replies 17/11/2017 @16:13 with a suggested amendment in [XX015](#) "but also former Ministers, including from previous administrations regardless of party"

[YY023](#) – Routemap sent on 7 November 2017 of various scenarios included a paragraph on "Allegation by a current member of staff against a former Minister" and noted that there was no formal process to capture this.

XX021 – Letter from FM to PermSec 22 November 2017 makes it clear that “following continued media focus on case of sexual harassment, people are now making complaints regarding actions that took place some time ago... you should not be constrained by the passage of time... While I appreciate that the conduct of former Ministers would not be covered by the current Ministerial Code, I think it fair and reasonable that any complaints raised about their actions while they held office are considered against the standards expected of Ministers.”

Line to take:

- Former ministers were in scope of the procedure from the very first draft, ten days before the email quoted by Mr Salmond.
- The addition of the words quoted by Mr Salmond and characterised by him as a “radical expansion” did not change the effect of the note or the scope of the review.

26. Assertion (19):

The second political intervention was when the First Minister and the Permanent Secretary reached agreement, perhaps at their meeting on November 29th but certainly before December 5th 2017, that the policy should be recast in order that FM should be taken out of the policy proper and only consulted or even informed after the process was complete. This was a fundamental change in the policy.

Also Assertion (20):

When the Permanent Secretary agreed with the First Minister that she should take over as key decision maker in terms of this new policy she was already aware of the developing complaints against me. Therefore she put herself at the centre of a policy in the full knowledge that I would likely be the first (and perhaps only given the subsequent declaration of illegality) subject of its implementation. Doing so from a position of already being tainted by bias is an extraordinary decision.

Factual position:

There were various changes during the course of drafting of the Procedure, and this did include a shift in descriptions of roles of the Permanent Secretary and First Minister in the process. The initial draft stated that the FM would be informed of the complaint at the same time as the Permanent Secretary if the former Minister was a member of the Party of the current administration, and would consider the report from the perspective of the actions of the former Minister.

Over the course of multiple drafts the FM's role in the operational side of the procedure was reduced and then removed. Two key points in this progression in relation to complaints about former ministers of the FM's party were:

- 24/11/2017: Version 5 of the Procedure sets out that FM had instructed Perm Sec that complaints should be investigated using the process set out in the Procedure. This change was made following a meeting between James Hynd and Liz Lloyd.
- 06/12/2017: Version 6.4 sets out that FM would be informed about the nature of the complaint and the process being undertaken.

- 06/12/2017 (later the same day): Version 6.5 states that the FM would be informed of the outcome of the investigation.

One specific change made directly at the request of the First Minister on 12 December 2017 inserted the words “when the investigation is complete” in the description of the First Minister being informed. That insertion did not materially change the effect of the description.

Under the final Procedure the Permanent Secretary has a role to determine if there is cause for concern and what lessons might need to be learnt and applied as a result. The First Minister (or the relevant Scottish Party Leader) is responsible for any further action following the investigation.

Evidence:

James Hynd first draft of Procedure (07/11/2017), provided to the Committee as [ZZ006](#): *“The Permanent Secretary will be advised at that point about the nature of the complaint and whether the matter is being taken up with the former Minister in question. If the former Minister is a member of the Party of the current Administration the First Minister will also be advised...A report will then be prepared for the Permanent Secretary setting out the information that has been obtained during the above process. The Permanent Secretary will consider the report from the perspective of ensuring the welfare and support arrangements for the staff member.”*

Version 5 of the procedure (24/11/2017), provided to the Committee as [XX030](#): *“The Permanent Secretary will be advised at that point about the nature of the complaint and that the matter is being taken up with the former Minister in question, as described in paragraph 15 below. If the former Minister is a member of the Party of the current Administration the First Minister will also be informed. The First Minister will take any steps necessary to ensure that the former Minister cooperates with the investigation.”*

Version 6.4 of the Procedure (06/12/2017), provided to the Committee as JRP128 but not yet published by the Parliament: *“If the former Minister is a member of the Party of the current Administration the First Minister will also be informed in their capacity as Party Leader about the nature of the complaint and the process being undertaken.”*

Version 6.5 of the Procedure (06/12/2017), provided to the Committee as [XX046](#): *“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 of the investigation.”*

First Minister change to draft of Procedure 12/12/2017 (submitted to the Committee as [XX056](#)):

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 ~~of the investigation~~. In their First Ministerial role they will*

wish to take steps to review practice to ensure the highest standards of behaviour within their current Administration.

Line to take:

- Mr Salmond offers no evidence to support this very specific claim, and it is not clear what evidence he could possibly have to support it.
- The respective roles of the Permanent Secretary and First Minister in the Procedure were explained in the written statement provided to the Committee. The Permanent Secretary is responsible for ensuring the health and safety and well-being of Scottish Government staff. Final decisions relating to the conduct of serving Ministers are a matter for the First Minister under the ministerial code.
- The descriptions of the roles of the Permanent Secretary and First Minister varied as the drafting of the Procedure developed, but it was clear throughout that each had distinct responsibilities.
- During the drafting was a general shift away from the First Minister being directly involved in the operation aspects of the investigation.
- Mr Salmond's reference to the Permanent Secretary "agree[ing] with the First Minister that she should take over as key decision maker in terms of this new policy" is not an accurate description of the process.
- Mr Salmond suggests that simply by being aware of concerns being raised it was not possible for the Permanent Secretary to act as impartial Deciding Officer. This is not credible as a Deciding Officer role would only be required when specific complaints have been raised.
- The reference to "declaration of illegality" of the procedure is inaccurate.

27. Assertion (21):

In her letter of 21st June 2018 to Levy and McRae she describes the policy as "established by me". She claimed ownership of it then, but not now. When asked at the Committee she said "there seems to have come into being a tradition of calling it my procedure. It is not; it is a Scottish Government procedure and one that has been agreed by Cabinet..." In fact, this procedure was never even seen by Cabinet or Parliament.

Factual position:

Perm Sec stated in evidence to Committee on 17 November "There are two points to make. First, I did not create the procedure; it is a Scottish Government procedure that, quite rightly, was based on legal and HR advice at every step of the way. There seems to have come into being a tradition of calling it my procedure. It is not; it is a Scottish Government procedure—and one that has been agreed by Cabinet and is therefore part of an armoury of procedures that we have. That question is therefore largely irrelevant. The procedure was adopted by the Scottish Government and was based on clear professional advice at every stage".

As Scottish Government evidence has made clear, the Procedure was finalised and cleared by the First Minister and Permanent Secretary in December 2017. After that there was consideration of the wider Fairness at Work HR policy, which included engagement with unions. . As set out in the written statement evidence provided to Committee and the [Permanent Secretary's oral statement to the Committee on 18](#)

August the development of the new procedure was informed by legal advice and HR best practice and through engagement with the trade unions, Cabinet Office, Scottish Parliament, Police Scotland, and drawing on ACAS guidance.

Evidence:

Perm Sec letter to Levy & McRae of 21 June 2019 which has been provided to the Committee in this – Perm Sec states she remains satisfied that the Scottish Government’s Procedure for investigating complaints against current or former Ministers is fair and legally competent. In light of widespread concern about reports of harassment across public life, including at Holyrood and Westminster, the Procedure was established by me to ensure that staff in the Scottish Government have confidence that any complaints of harassment by current or former Ministers would be seriously and investigated properly

INV278 -4- Redacted or Watermark version FINAL (A30303954)

Line to take:

- This is a Scottish Government procedure that was developed and informed by legal advice and HR best practice.
- The Permanent Secretary was given the role on behalf of the employer to ensure that the duty of care to staff could be discharged.
- It is inaccurate and misleading to describe a workplace policy which drew on ACAS guidance - and was subject to engagement with trade unions, Cabinet Office, Scottish Parliament, Police Scotland, as belonging to any individual.

28. Assertion (26):

The repeated claim that the terminology somehow changed for the first to the final drafts of the procedure thus causing confusion for those implementing the policy is not just irrelevant (since it is only the final version that matters) it is also untrue. In fact one of the very few unchanged provisions in the policy as it went through numerous drafts and redrafts between November 8th to the final iteration on December 20 2017 was that the Senior Officer/ Investigating Officer should have “no prior involvement”.

Evidence:

This assertion refers to Judith Mackinnon’s evidence to the Committee on 27/10/2020:

“Part of the challenge was the role of the investigating officer as set out in the procedure. In earlier drafts of the procedure, we clearly set out the role of the investigating officer, which included a clear description of the engagement that the investigating officer could have with potential complainers. Through drafting changes in the procedure, that detail was removed, and the final phrase that was left in paragraph 10 of the procedure, which was that the IO would have no involvement with the issues that were being raised, has, it seems, left that open to interpretation and potentially to accusations of apparent bias.”

Line to take:

- The Scottish Government is clear that the final published version of the Procedure is the one that applies, and that was followed in this case. No Scottish Government witness has suggested otherwise.
- SG witnesses have referred to additional detail provided in earlier drafts which illustrated the range of roles that might be undertaken by the senior officer, including ensuring support was offered and explaining options.
- The Scottish Government has set out in detail at the JR and in evidence to the Committee that officials' understanding of the meaning of that phrase, both during drafting and implementation, was that it referred to prior involvement in any aspect of the complaint.

29. Assertion (27):

Nor is it credible that the claim that the need for impartiality of an investigating officer or equivalent was misunderstood. On the contrary, both James Hynd (10th November 2017) offering 3 names at "arm's length" and Judith McKinnon (7th November 2017) seeking to engage an "independent party to investigate" recognised this at an early stage.

Factual position:

This assertion seeks to characterise the differing interpretation of paragraph 10 of the Procedure as being about whether impartiality was needed, which is not and never has been the position

Evidence:

The SG arguments set out in the [Open Record](#) and in evidence from the Lord Advocate and others shows that this is a misrepresentation of the SG position.

Line to take:

- The need for impartiality of the investigating officer was not and never has been misunderstood. The Investigating Officer had no involvement in events relevant to the complaints: she did not work for the Scottish Government at the time of events referred to in the complaints.

30. Assertion (50):

The procedure was devised when the Permanent Secretary, as decision maker, had knowledge of emerging complaints against me.

Line to take:

- The Permanent Secretary has set out in detail the triggers and context for the development of the Procedure. These were not connected with Mr Salmond but were the #metoo movement, the letter from Sir Jeremy Heywood, and – most directly – the specific commission from FM at Cabinet.
- Mr Salmond suggests that simply by being aware of concerns being raised it was not possible for the Permanent Secretary to act as impartial Deciding Officer. This is not credible as a Deciding Officer role would only be required when specific complaints have been raised.

31. Assertion (51):

The procedure was unsound not just in its implementation but in its genesis. It was devised “at pace”, probably with the purpose of progressing complaints against me and certainly without proper care or regard to its legality or effective consultation with the unions.

Evidence:

Malcolm Clark oral evidence (01/09/2020) ([UNSPECIFIED](#) (parliament.scot) page : *“Obviously, there is also the more bespoke ministerial policy that was developed in 2017-18. That was undertaken at pace, I would say, but it was a very specific and narrow piece of work, and the timescale seemed appropriate at the time.”*

Line to take:

- This has been covered in previous evidence to the Committee. The Procedure was developed to appropriate timescales, with the benefit of legal advice and consultation with unions.
- Malcolm Clark of the Council of Scottish Government Unions specifically confirmed this to the Committee.
- The Permanent Secretary has explained in her evidence that development of the Procedure was prioritised because it was a specific commission from Cabinet, and also with a view to the letter from Sir Jeremy Heywood and the wider societal focus on #metoo issues.
- The court did not make any finding that the procedure was unsound, unfair or unlawful.

32. Assertion (55):

The procedure was conceptually flawed and would have collapsed on principle even if it had been properly implemented. It is a retrospective, hybrid policy, which claims jurisdiction over private citizens who might have no connection whatsoever with the Scottish Government and shows complete confusion between the legitimate roles of Government and political parties.

Factual position:

The Procedure was an employment policy with the primary purpose of fulfilling our duty of care to employees. That duty of care does not disappear because the alleged perpetrator has left the organisation.

The court did not make a ruling to support any of the other grounds of criticism by Mr Salmond of the procedure. The assertion assumes that every ground would have been successful – there is no certainty of this.

Line to take:

- As the ACAS guidance, Scottish Parliament and many other organisational processes make clear, it is legitimate and good practice to have a policy that covers historical complaints
- ACAS guidance recommends that an employer should take a complaint of sexual harassment seriously, even if it is made some time after the incident took place

- The court did not make any finding that the procedure was unsound, unfair or unlawful.
- To suggest otherwise is unfounded and untrue.

33. Assertion (56):

It is demonstrably unfair. It transgresses the most basic principles of natural justice in not even allowing the person complained about the right to prepare their own defence. In addition, the Permanent Secretary denied access to civil servants, witness statements or even my diaries until they were pursued in a subject access request.

Factual position:

L&M raised a number of objections about the fairness of the procedure in correspondence with the Permanent Secretary during the investigation in 2018.

The court did not make a ruling to support any of the other grounds of criticism by Mr Salmond of the procedure. The assertion assumes that every ground would have been successful – there is no certainty of this.

Sufficient detail about the complaints was provided to Mr Salmond to enable him to respond and this point was tested with legal colleagues. [Redacted]

Evidence:

There are various documents setting out L&M's objections to the procedure as a whole - INV275 and INV196 are particularly relevant and INV278 sets out the Perm Secs response (all contained in [FN33](#)).

Line to take:

- Mr Salmond was provided with a number of opportunities to input into the investigation process, including extending the deadline on several occasions. The SG position was and remains that the harassment procedure is lawful and fair.
- The Permanent Secretary commissioned an external review of the Procedure in January 2019 to ensure we apply learning to any future complaints.
- The court did not make any finding that the procedure was unsound, unfair or unlawful – to suggest otherwise is unfounded and untrue.

Role of the Investigating Officer

34. Assertion (22):

As the Committee has already discovered the “prior contact” of the Investigating Officer with the complainants was not “welfare”, as was indicated to Parliament, but was specifically contact about emerging complaints, weeks before the policy under which they were to be pursued was even approved.

Factual position:

Para 18 of the [“Further Response to Committee on the Scottish Government Handling of Harassment Complaints: Investigation of Complaints”](#) dated 18 December 2020 states:

“The Director for People and the Head of People Advice made further contact with the individuals later designated Ms A and Ms B in November and December 2017 in line with the expectation that they, given their HR responsibilities, would provide access to support and guidance as well as explain the range of options that were available.”

The Committee has not, despite the assertion suggesting it is a fact, made any findings about the nature of that contact.

Evidence:

Para 18 of the [“Further Response to Committee on the Scottish Government Handling of Harassment Complaints: Investigation of Complaints”](#) dated 18 December 2020

Footnotes [17](#), [18](#) and [19](#) refer.

Line to take:

- The Director for People and the Head of People Advice had contact with complainers prior to submission of formal complaints to provide access to support and guidance as well as explain the range of options that were available.
- This assertion appears to be pre-judging the committee’s ability to decide for itself on the evidence it has seen.

35. Assertion (23):

Documentation which finally emerged at the Commission and Diligence ordered by the Court of Session at the end of December 2018 demonstrated that the Government pleadings were false in terms of the nature of this contact. This has been admitted by the Lord Advocate in his evidence to the Inquiry on 8th September 2020. Again, such conduct appears to carry no sanction. These are serious matters, especially so for a Government making statements to a public court.

Factual position:

The pleadings by SG in the JR indicated there was no prior contact by the IO with the complainers. As soon as it became clear that there was, and the documents which evidenced that were provided at the Commission, the SG concluded that the case could not be defended and it was conceded. So SG has already publicly

accepted that its position as set out earlier its pleadings was not correct and the case settled. One could say that the level of expenses awarded reflected the volte face in the SG position, and its late timing.

Line to take:

- The Scottish Government has already publicly accepted in 2019 that its position as set out earlier in its pleadings was not correct and the case was settled.

36. Assertion (24):

For example the “OneNote” from Judith McKinnon dated January 9th 2018, and revealed as a result of the Commission process, speaks to “changing” the position of a reluctant complainant, the sharing of complaints, and of it “being better to get the policy finalised and approved before formal complaint comes in” and of not telling the FFM until we are “ready”. It is this information that was completely at odds with the government pleadings in the Judicial Review and indeed stands in stark contrast with the oral evidence presented to the Committee

Factual position:

The document is a record of discussion that took place between Judith McKinnon and Nicola Richards around possible next steps around the sexual harassment work, including if a complaint is made by Ms A. It does note that it would be “better to get the policy finalised and approved before complaints come in” and that there will need to be “judgement about not letting FFM know the investigation has begun until ready to speak with him”

Ms A had already indicated before Christmas that she was likely to make a formal complaint but was encouraged to consider the position fully with a view to concluding in January. Therefore this discussion was taking place in the knowledge that a formal complaint was highly likely so planning was essential.

Evidence:

JR003 - [Phase2FN15\(3\).pdf](#) (parliament.scot) – page 8

Line to take:

- This document was submitted to the Committee by SG and reflects rough personal notes of a conversation about appropriate handling of a potential complaint.

37. Assertion (53):

The Investigating Officer had not just “prior involvement”, but subsequently regular contact with the complainants of a nature and level which was self-evidently inconsistent with that of an impartial official.

Factual position:

The Investigation Office and the Director for People maintained contact with the complainers throughout the investigation to keep them informed of progress. This is good practice.

Evidence:

Para 28 of the SG [Statement](#) "*Further Response to Committee on the Scottish Government Handling of Harassment Complaints: Investigation of Complaints*" dated 18 December 2020 refers:

"Both complainers were kept up to date by the Investigating Officer and the Director for People as the investigation progressed."

Footnote 41 refers.

Line to take:

- As has been explained already to the Committee, the Investigating Officer maintained contact with the complainers throughout the investigation process to keep them informed of progress

Interests of complainers and referral of complaints to police

38. Assertion (31):

I also want to make a submission about the claims by the Scottish Government to have promoted the interests of the women who raised complaints. That is, on the evidence before the Committee, clearly false. The Permanent Secretary claimed to the Committee that the interests of the complainants were paramount in the Government thinking. This is very far from the case.

Evidence:

Documents provided by SG to the Committee show that the interests of the complainers were central to the handling throughout. Examples include:

INV012: Gillian Rusell and Barbara Allison inform complainants that the key concern is that they are getting the right support and their complaints are dealt appropriately. (page 2)

INV010: organisational response to the complaints and support provided

INV287 (page 2): the complainants are urged that they shouldn't feel they need to take action unless they take personal decision to do so.

YY073 (page 4): this document lists support SG offered the complainants

Line to take:

- The interests of the complainers and potential future complainers are and have been central to Scottish Government handling of these matters. We have apologised on multiple occasions for the unintended and unfortunate impact of SG actions on the complainers. Other parties have not done so.

39. Assertion (32):

The complainants were assured that they would be in control of the process and that any police involvement would be their choice.

Also Assertion (36):

The reports to the Crown Office (instead of the police) were made against the express wishes of both complainants and in direct conflict with the terms of the policy at paragraph 19.

Also Assertion (58):

The Permanent Secretary ordered her decision report to be sent to the Crown Agent, David Harvie, against the terms of the policy and the wishes of the complainants. At that time I understand that she was his line manager.

Factual position:

The Scottish Government and the Lord Advocate have provided the Committee with oral and written evidence about the decision to refer complaints to the Crown Office for onward transmission to the Police. That decision was informed by legal advice.

The Government took account of the views of complainers. However, it concluded that criminal behaviour may have occurred and that this should be brought to the attention of the Police. As set out in the letter of 8 February from the Lord Advocate, that decision was consistent with the strong policy stance which the Scottish Government had taken in relation to sexual offences and with the general responsibility of the Scottish Government to support the rule of law.

On 28 November 2017, in the context of the 16 Days of Action Against Gender-Based Violence, MSPs in the Scottish Parliament agreed unanimously a motion which ends in the following terms: *“That the Parliament...agrees that it is for every individual, community and institution to stand up to abuse and harassment, hold perpetrators to account for their behaviour and work together to build a Scotland where everyone can live equally safe.”*

Para 33 of *“Further Response to Committee on the Scottish Government Handling of Harassment Complaints: Investigation of Complaints”* dated 18 December 2020 states:

“33. Consideration was at this stage given by the Scottish Government as to whether the allegations constituted offences sufficiently serious to warrant review by Police Scotland. The views of the complainers were sought so that their wellbeing could be considered as part of the decision. It was concluded that as the alleged conduct could have amounted to potential criminality, there was a significant public interest in referring the matter to the relevant authorities to be investigated. Having regard to all relevant advice received, in accordance with the process set out at paragraph 9 and as set out in evidence to the Committee on both 18 August and 8 September 2020, the Permanent Secretary decided on behalf of the Scottish Government that 3 of the incidences should be referred to the Police.”

It is true that Perm Sec was the Crown Agent’s line manager at the time the referral took place in Aug 2018. However, this has never involved oversight of the prosecutorial side of his role.

Changes were made to David Harvie’s performance appraisal arrangements for the reporting year 2019-20, agreed in time for the EYR process in 2020. Under current arrangements, the Crown Agent is not a direct report of the Permanent Secretary or a member of Executive Team and this is clear from the organisational charts which are shared on a regular basis from Cabinet Office.

Evidence:

Paragraphs 18 and 19 of the procedure refer:

“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.”*

Documents provided by SG to the Committee show that their views were sought and taken seriously by officials.

INV320 (contained in [FN43](#)): Ms A: *“I don’t feel comfortable committing to a process that would culminate in me – or anyone else - being required to ‘face off’ against FFM in court. I’m extremely grateful that colleagues have cooperated with the SG internal investigation, but it’s a very different thing to put anyone in that position, and I’d absolutely understand if they weren’t willing to do it, but equally think I would find it a very difficult thing to feel I was pursuing alone – particularly given that, as I say, a criminal process has never been an outcome I was actively seeking.”*

Ms B: *“I have been reassured by the level of anonymity of the internal process and while I am uncomfortable that this will can no longer be guaranteed when this comes into the public domain through the FOI, the risk is at a level that feels acceptable to me. However, if the police were to become involved, I would no longer be afforded this level of anonymity - particularly if this went to court. I feel that to me, the risks of police involvement outweigh what could be achieved.”*

Line to take:

- The procedure sets out that the Scottish Government may decide to refer a complaint to the police even if the complainer does not want this to happen in certain circumstances.
- There is nothing in the Procedure that prevents a report being made to Police Scotland via the Crown Office
- Documents submitted to the Committee show that the complainers felt uncomfortable with the potential loss of anonymity in a criminal process but were prepared to co-operate with a police investigation.

40. Assertion (33):

This assurance has been stipulated from the earliest origins of the policy (e.g. Nicola Richards' email to Permanent Secretary of 23 November 2017) and remained in place until the Permanent Secretary countermanded it in her instruction to Ms Richards to send her decision report to the Crown Agent in August 2018, a move taken against the direct wishes of the complainants.

Line to take

- The procedure sets out that the Scottish Government may decide to refer a complaint to the police even if the complainer does not want this to happen in certain circumstances.

41. Assertion (34):

However, when it came to actually protecting the anonymity of the complainants through a court order in the Judicial Review in October 2018 the Government was not even represented by Counsel in court. It was, in fact, me who instructed Counsel to seek that anonymity on the part of the women concerned.

Factual position:

SG had been considering ourselves a motion to protect the identities of the complainers, so clearly when the Petitioner intimated his motion to that effect, SG had no objection. We would not routinely appear, instructing Counsel at public expense, at a hearing of a motion when we are not opposing. Further, the court had indicated they were not expected Counsel for Scottish Ministers to attend and the Keeper of the Court of Session was also aware.

Line to take:

- The Scottish Government is committed to protecting the anonymity of the complainers, and this is clear from the Procedure and SG handling of the case.
- We were actively considering a motion to protect the identities of the complainers in the JR when the Petitioner intimated his motion. SG therefore clearly had no objection to the motion so on that basis there was no need to appear at the hearing. The Court had indicated they were not expecting Ministers to attend and there was no need for Ministers to be represented.
- This is an attempt to portray routine court processes in such a way as to place SG in a bad light.

42. Assertion (48):

The Judicial Review cannot be viewed in isolation. The effect of it, and its likely result of a defeat for the Scottish Government led to the need to escalate these matters to the police, even if that meant doing so entirely against the wishes of the two women who had raised concerns.

Factual position:

The Scottish Government has confirmed to the Committee that Police Scotland was consulted on generic issues relating to the handling of complaints and sources of support for complainers, in the context of the Procedure agreed in December 2017.

At this time the Scottish Government was dealing with internal employment matters, not a criminal investigation, and our HR staff are experienced in carrying out investigations on sensitive issues within an employment setting. As the procedure makes clear, we may refer to the police if we see evidence that raises concerns of potential criminality.

Evidence:

ACAS guidance - : *'If they do not want to tell the police, you should still encourage them to do so. You might still need to report it but should always tell the person affected if you're going to do this.'*

Line to take:

- The procedure sets out that SG may decide to refer a complaint to the police even if the complainer does not want this.
- There may be important public policy reasons for SG to act differently to the wishes of one of its employees.
- ACAS guidance for employers recognises this

Investigation of complaints

43. Assertion (35):

The investigation was carried out against the advice of the police who pointed out that the Scottish Government were not competent to conduct the investigation. This has been made available to the Committee in the police evidence from the Chief Constable.

Factual position:

The Procedure is intended to fulfil SG's employment obligations to staff.

Evidence:

This assertion is based on Police Scotland's submission to the Committee from January 21;

Microsoft Word - 210119-SGHHC Committee Response-Final v2 (parliament.scot)

This refers to discussions with SG officials from that time;

"Police Scotland advised that, without specific details, no appropriate response could be given and no assessment of risk could be made. It was further emphasised that individuals should be directed to the relevant support services as it appeared that the hypothetical questions were predicated upon a specific set of circumstances and the SG response to that set of circumstances, rather than development of a generic procedure.

The hypothetical questions suggested more than one victim of potential criminality and as such, it was stressed that, without knowledge of the detail, any risk that a suspect might present, could not be properly assessed or mitigated. It was highlighted that SG staff were not trained to undertake such investigations, or to engage with victims."

Line to take:

- The Scottish Government had a duty to investigate the serious and specific complaints raised relating to their employment and it was absolutely right and proper to do so.
- That process was undertaken by staff acting on behalf of the Scottish Government, in line with its duty of care to protect staff from harassment.
- It would always be appropriate for Police Scotland solely to investigate allegations of criminal acts.

44. Assertion (54):

The Permanent Secretary who in her own words "established" the procedure met or spoke to both complainants on multiple occasions (including in mid process) and failed to disclose this in either the civil or criminal case.

Factual position:

The Permanent Secretary met with both complainers on three occasions: in early March after consideration of the initial investigation report, on 22 August after compiling the Decision Report, and in January 2019 when the JR was conceded.

Contrary to what the assertion suggests, the Permanent Secretary was not a witness in the criminal trial.

Evidence:

Perm Sec in her evidence to the Committee on 12 January 2021 set out her contact with the complainers ([Official Report \(parliament.scot\)](#) page 20):

“I had three contacts with the complainers in the entirety of the procedure. I met only one of them face to face, and did not meet the other one in that way at all—it was always a phone conversation. As you said, the first of those conversations was in the week commencing 5 March. It would have been on 6 March or, possibly, the morning of 7 March when I had that conversation, after the report had been completed on that part of the investigation. Subsequently, I had contact in August, after the process had been completed and was being communicated more widely. I also spoke to the complainers very briefly at the time when we conceded the JR.”

Para 23 of the SG Statement “*Further Response to Committee on the Scottish Government Handling of Harassment Complaints: Investigation of Complaints*”([SGHHC Further Written Statement Investigation of Complaints - 18 December 2020Redacted.pdf \(parliament.scot\)](#) dated 18 December 2020 states:

Having made the decision that the investigation should move to the next phase, the Permanent Secretary spoke with both complainers in early March 2018 in her capacity as Deciding Officer under the Procedure. The purpose of this contact was for the Permanent Secretary to explain her role and the Scottish Government’s duty of care to them, explain her consideration of the initial Investigation Report, and to inform the complainers of her decision and what this meant in terms of the next steps in the Procedure. The meeting also provided an opportunity for the Permanent Secretary to repeat the options for further support and assistance available to the complainers.”

Footnote 31 refers.

Para 34 also states;

“The Permanent Secretary spoke with Ms A and Ms B on 22 August 2018.”

Footnote 48 refers

Line to take:

- Nothing in the procedure prevents the Perm Sec from making contact with the complainers at the appropriate stages in the investigation.
- The Permanent Secretary has been completely open with the Committee about that contact.

- The Permanent Secretary was not a witness in the criminal trial.
- There was no formal note of the Permanent Secretary's meetings with the complainers in early March and so no documentation to produce under the warrant
- However, there were documents that referenced the administrative arrangements in setting up these meetings [and took the form of correspondence between a member of the Senior Civil Service and one of the 5 individuals named in the warrant]. These documents were duly produced under the warrant.
- It is therefore entirely wrong to suggest that these meetings were concealed.

Public statement / alleged leak to press

45. Assertion (37):

However, it had been the Permanent Secretary's own intention, despite police advice to the contrary, to issue a press statement confirming the fact of the complaints on Thursday 23 August 2018.

Factual position:

Mr Salmond asserts it was the Permanent Secretary's decision alone to issue a press statement. That is not accurate. The timeline on the Complaints Handling phase of the Committee's remit sets out the basis on which a decision was taken on the possible issuing of a public statement about the complaints raised under the Procedure. This was in the context of a Freedom of Information request that had been received at the time asking for "Any information relating to complaints about the conduct of Alex Salmond while he was First Minister." Having taken account of all relevant advice received, the Scottish Government had intended to release a limited public statement on 23 August 2018 as the investigation was complete. However, that public statement was not subsequently issued.

Para 41 of the SG Statement "Further Response to Committee on the Scottish Government Handling of Harassment Complaints: Investigation of Complaints" dated 18 December 2020 refers:

"41. The Scottish Government considered the balance between the need to maintain confidentiality and the public interest in relation to the Scottish Government's wider obligations, including in relation the Civil Service Code, and the need to respond to the Freedom of Information request that had been received at that time. Having taken account of all relevant advice received, the Scottish Government had intended to release a limited public statement on 23 August 2018 as the investigation was complete. This would have included basic factual information that complaints had been made and of the investigation and the decision."

Evidence:

Footnote 53 of the SG [Statement](#) "Further Response to Committee on the Scottish Government Handling of Harassment Complaints: Investigation of Complaints" dated 18 December 2020 refers to the FOI:

<https://www.gov.scot/publications/foi-18-02575>

Line to take:

- Because of an FOI request, which the Scottish Government is required by law to consider, the Scottish Government had intended to release a limited public statement on 23 August 2018 as the investigation was complete.
- That public statement was not issued because of the interdict applied for by Levy and McRae. The FOI was later answered on 20 September 2018.

46. Assertion (38):

In my view, the circumstances of the leak of the details of the complaints to the Daily Record on 23rd/24th August 2018 should be thoroughly examined. It is highly likely

that the leak came from within the Scottish Government and, in all likelihood, from one of the Special Advisers to the First Minister.

Factual position:

An internal SG leak inquiry was conducted and showed that information relating to the original investigation was processed in a controlled and compliant manner; the forensic searches of SG corporate systems did not detect any evidence of a data breach. The ICO also investigated, following a complaint by FFM to the ICO. The ICO found no evidence to corroborate the complaint that an employee of the Scottish Government unlawfully obtained and disclosed personal data relating to Mr Salmond.

Following the ICO's decision, Mr Salmond requested a review of the ICO's decision to discontinue its investigation. This found that the original complaint had been appropriately investigated, with all reasonable avenues of inquiry considered and pursued. The reviewer noted that it remained possible that the leak had come from a range of sources including Mr Salmond himself and his lawyers.

Evidence:

SG Leak investigation report:

*" 1. **Purpose***

1.1 This report sets out the findings of the Data Protection Officer in reviewing compliance with the SG's data handling obligations regarding the alleged unauthorised disclosure of official information that appeared in the press between 24 and 26 of August 2018.

*2. **Action***

2.1 The Senior Information Risk Officer is asked to note the findings in this document and the conclusion that no further action is required in light of the findings.

*3. **Background***

3.1 Details of a complaint made by staff, in January 2018 under the Scottish Government procedure for handling harassment, appeared in the press on Friday 24 August and over the following weekend.

3.2 On Monday 27 August, The Scottish Government Senior Information Risk Officer asked the Data Protection Officer to review information handling procedures around the processing of these complaints within Scottish Government. The scope of the Review is set out at Annex A.

3.3 Allegations about a potential breach have been made directly to the Permanent Secretary. No communication regarding this allegation has been reported to the Scottish Government Data Protection Officer mailbox address given on the corporate website.

....

*6. **Conclusions***

6.1 *The review into data handling compliance showed that information relating to the original investigation was processed in a controlled and compliant manner.*

6.2 *The forensic searches of our corporate systems have not detected any evidence of a data breach.*

6.3 *In light of these conclusion, I am not proposing to take any further action in terms of the alleged breach.”*

ICO investigation Decision letter (dated 6 March 2020):

“Conclusion

Based on the information gathered during our investigation, we are satisfied that we can close our investigation into the s170 DPA 2018 allegation and any potential breach of Article 5 (1) of the GDPR. We are satisfied that there is no evidence to corroborate the complaint that an employee of the Scottish Government unlawfully obtained and disclosed personal data relating to Mr Salmond. We are also satisfied that there is no evidence that the Scottish Government acted in breach of Article 5(1) of the Regulation in relation to the processing of Mr Salmond’s personal data.”

ICO Review report (dated 28 May)

“Review of the evidence

3.1 *In order to identify a suspect, it would be necessary to identify the method of disclosure used.*

3.2 *A forensic examination of the IT systems used by the SG was carried out as part of the Data Handling Review conducted by the Data Protection Officer at the SG following the data leak.*

3.3 *No evidence was found that data was leaked through email, document sharing or downloading to portable media device. Furthermore, no evidence was found that a third party had unlawfully accessed the SG’s IT systems.*

3.4 *Without an electronic trail to follow, it was difficult to uncover the method of disclosure used.*

3.5 *To progress the investigation, a witness would be needed who would be willing to provide information about the method of disclosure (for example, by hard copy being passed in person) and the identity of the culprit.*

3.6 *The Daily Record had declined to provide information as to how or by whom they came by the copy of the report, relying on the journalistic exemption within the DPA 2018, clause 14 of the Editors Code of*

Practice and s.10 of the Contempt of Court Act 1981.

3.7 23 members of staff were identified as having knowledge of, or involvement in, the internal misconduct enquiry. These members of staff were interviewed by the Data Protection Officer at the SG as part of their Data Handling Review. The interviews did not disclose any information which would enable a suspect to be identified.

3.8 In the absence therefore of any further information coming to light, or any witness coming forward, there was insufficient evidence to point to any specific suspect and to allow the investigation to move forward.

5. Review of decision by CRIT

5.3 During this investigation, it is clear that CRIT gathered extensive information from the SG, seeking further information and clarification where needed.

5.4 The result was no suspect could be identified from the evidence collated and the decision was taken that the investigation could not be progressed without further information coming to light.

5.5 I am satisfied that the complaint had been investigated to an appropriate extent, with all reasonable avenues of inquiry considered and/or pursued.

5.6 When deciding whether to proceed to prosecute in any case, I am required to apply the two stage test prescribed by the Code for Crown Prosecutors issued by the Crown Prosecution Service.

5.7 The first stage is to consider whether there is sufficient evidence to provide a realistic prospect of conviction. Without a suspect, there is simply no realistic prospect of conviction because there is nobody to prosecute and/or convict. I do not therefore even reach the second stage of the test, which is to consider whether it would be in the public interest to prosecute.

5.8 I am satisfied that in the absence of any suspect, the decision to discontinue the investigation was correct and reasonable in all the circumstances.

5.9 If further information comes to light, for example if a witness comes forward, then I have no doubt that the matter would be properly revisited. At the present time, however, I am satisfied that there are no grounds to re-instate the investigation.”

Line to take:

- The leak has been thoroughly investigated.

- An SG investigation, an independent investigation by the ICO and a subsequent review of the ICO investigation were clear in their findings: there was no evidence of a leak by Scottish Government staff.
- The ICO stated that it remained possible that the leak had come from a range of sources including Mr Salmond and his lawyer;
- The review report stated that following investigation, there was no evidence to identify any specific individual within SG as a potential suspect.

47. Assertion (39):

The Crown Agent, according to the police informed them of the Government's intention to release a story of the fact of the complaints to the press and the Chief Constable and another senior officer advised against it and refused to accept a copy of the report. We know, therefore, that the desire of the Scottish Government to get these matters into the public domain is fully supported by evidence.

Factual position:

SG was obliged by law to consider making the matters public because of an outstanding FOI request. L&M was informed of the intention to make the fact of the complaints public, and responded saying Mr Salmond had instructed senior counsel to draft JR proceedings against the decision and interdict preventing publication of the information about the complaints and the investigation.

Mr Salmond's reference to the Chief Constable advising against releasing the fact of the complaints comes from the ICO Review Report submitted by him to the Committee and previously unseen by the SG. These extracts from ICO Review Letter and Police Scotland written evidence to the Committee suggest that Police Scotland's concerns were not expressed to SG at the time.

ICO Review Letter

4.3 I have also considered the statement of Detective Chief Superintendent [Redacted], helpfully provided by Levy & McRae. The statement confirms that at a meeting on the 21 August 2018, the police were offered a copy of the internal misconduct investigation report but refused to take it. Furthermore, at that meeting, DCS [Redacted] [Redacted] voiced concerns about the SG making a public statement about the outcome of their investigations.

Police Scotland Written Evidence to Committee (third last paragraph)

I can confirm that on Tuesday 21st August 2018, the complaints were referred to Police Scotland by the Crown Agent. This took place during a meeting at the Crown Office, Edinburgh, involving the Crown Agent, the Chief Constable and the DCS, Head of Public Protection.

Evidence:

Extract from Perm Sec letter to Levy & McRae 23/08/2018:

"In relation to the points you make about confidentiality, I have been clear that the Scottish Government would act in accordance with its legal obligations and could therefore not provide an absolute guarantee of confidentiality at any stage. Our view is that taking all reasonable steps to maintain confidentiality while the investigation

was ongoing was necessary and appropriate. Now that the investigation is complete, and as my letter of 22 August indicated, we have been considering the public interest in determining our response to an outstanding FOI request, and additionally whether the fact and outcome should be made public.

"I have concluded that the balance between maintaining confidentiality now that the investigation is complete and the public interest in relation to the Scottish Government's wider obligations, including in relation to the civil service code lies in favour of limited public disclosure of the fact of the complaints. For that reason the Scottish Government will issue a short statement at 5pm today. The text of the statement is attached. The FOI response will refer to the text of the statement."

Line to take:

- It is not true that the Scottish Government desired to get these matters into the public domain.
- FOI legislation creates a legal requirement on public bodies like SG to consider each request made for information.
- The Permanent Secretary wrote to Mr Salmond's lawyers on 23 August 2018 to explain that the SG had to act in accordance with wider obligations, including Freedom of Information legislation and the civil service code. There was a relevant outstanding FOI request which required consideration of the public interest.
- The Scottish Government were not involved in the police referral after providing information to the Crown Agent, and were not aware of police advice against a public statement.

48. Assertion (40):

This leak was (according to the ICO) prima facie criminal, deeply damaging to my interests and those of the complainants and a direct contravention of the assurances of confidentiality given to all. After I formally complained to the ICO, the conclusion of the ICO reviewer assessing these facts was that she was "sympathetic to the thesis that the leak came from a Government employee". The only reason no further action could be taken was because the specific individual could not be identified without police investigation.

Factual position:

Under the relevant legislation, mishandling of personal data can be a criminal offence. The FFM's complaint to the ICO was referred to their Criminal Investigation Team to investigate whether an offence had been committed, due to the nature of the alleged processing. The Criminal Investigation Team investigated whether an offence had been committed by an unknown employee of the SG, specifically whether an employee had unlawfully obtained and disclosed personal data relating to Mr Salmond.

The ICO found no evidence to support the complaint that any employee of the SG unlawfully obtained and disclosed personal data relating to Mr Salmond. Mr Salmond was unsuccessful when he asked the ICO to review its decision. The reviewer noted that it remained possible that the leak had come from a range of sources including Mr Salmond himself and his lawyers, and closed its investigation.

Mr Salmond subsequently requested a review, which upheld the ICO's decision to discontinue the investigation.

The review report noted that no evidence was found that data was leaked electronically and that without an electronic trail to follow, and in order to progress the investigation, a witness would be needed to provide further information (for example, to identify a culprit).

While the review report acknowledged Mr Salmond's representation that the timing of the leak could lead to the conclusion that it came from within the SG, it is not correct to suggest that a police investigation would be required in order to progress the investigation. It can also be inferred from Mr Salmond's assertion that the ICO reviewer suspected that the leak came from within the SG – this is not supported by the full text of the report, which also states that “[t]here remains the possibility that the leak came from elsewhere”, including Mr Salmond himself and his lawyers.

Evidence:

ICO investigation Decision letter (dated: 6 March 2020):

“Conclusion

Based on the information gathered during our investigation, we are satisfied that we can close our investigation into the s170 DPA 2018 allegation and any potential breach of Article 5 (1) of the GDPR. We are satisfied that there is no evidence to corroborate the complaint that an employee of the Scottish Government unlawfully obtained and disclosed personal data relating to Mr Salmond. We are also satisfied that there is no evidence that the Scottish Government acted in breach of Article 5(1) of the Regulation in relation to the processing of Mr Salmond's personal data.”

ICO Review Report (dated 28 May 2020):

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

4.7 The interviews with the relevant staff members didn't provide any leads however and no other person had come forward volunteering information.

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

4.9 The list of stakeholders who had access to the legal advice provided by the Lord Advocate during the misconduct investigation included staff within the Lord Advocate's office, the Permanent Secretary's Office and officials in the SG's Legal Directorate.

4.10 Following investigation, there was no evidence to identify any specific individual within these lists, or any member of staff working for anybody

within these lists, as a potential suspect.

The quote Mr Salmond attributes to the ICO reviewer comes from a review report included in the evidence submitted by Mr Salmond to the Committee (and is slightly misquoted). This is the first time SG has seen this, and we were not informed that Mr Salmond requested a review.

Line to take:

- The ICO declared itself satisfied that there was no evidence to corroborate the FFM's complaint that an employee of the SG unlawfully obtained and disclosed FFM's personal data. This was confirmed in the review report submitted by Mr Salmond to the Committee.
- The ICO noted that it remained possible that the leak had come from a range of sources including Mr Salmond himself and his lawyers.
- The review report stated that following investigation, there was no evidence to identify any specific individual within SG as a potential suspect.

49. Assertion (41):

John Somers, The Principal Private Secretary to the First Minister confirmed that her office had received a copy of the Permanent Secretary's report in evidence on 1st December 2020. However, that evidence was then corrected to say that it had not been received. However, that is difficult to reconcile with the ICO review report (paragraph 4.8) which list the PPS, and therefore The Private Office as one of the stakeholders "who has access to the internal misconduct investigation report".

Factual position:

Jackie Baillie asked John Somers who had seen a copy of the Permanent Secretary's Decision Report. She told him that a letter dated 22 August was the Decision Report. On that basis, John Somers agreed that he would have seen it but undertook to check his records and write to the Committee. In his letter to the Committee he confirmed that in his evidence, he had been referring to the letter of 22 August (letter by the Permanent Secretary to the FM to inform the FM of the outcome of the investigation) but this was not, and did not include, the Decision Report. He further confirmed that neither the First Minister nor he had received a copy of the Decision Report.

The ICO Review Report (which reviewed the original ICO decision) does state that the FM's Principal Private Secretary was one of the stakeholders that had access to the "internal misconduct investigation report", however that has been incorrectly inferred by the ICO from the Interview Notes taken by the SG's Data Protection Officer during the SG internal leak investigation.

John Somers has seen the letter dated 22 August but not the Decision Report.

Evidence:

1) Extract from Official Report (1 December 2020) ([Official Report \(parliament.scot\)](#) page 44-45)

Jackie Baillie: I was just being curious. I refer to the events of 23 August 2018. That was the occasion on which you, as PPS, would have received for the First Minister a copy of the permanent secretary's decision report. That document, or at least part of it, was leaked at the time to the Daily Record. What were the circumstances of the leak and, as far as you are aware, who among the civil servants and special advisers had access to the report?

John Somers: I cannot comment at all on the leak. I do not know anything about it. An investigation was taken forward by the Scottish Government, in which we were all asked to disclose any information that we had. I have never seen the decision report. I have seen the letter to the First Minister—I think that it was dated 22 August, not 23 August—but I cannot comment any further.

Jackie Baillie: Do you know who received a copy of the report? Which civil servants and special advisers—

John Somers: I would not have been involved in anything to do with that.

Jackie Baillie: Would you not be copied in to a minute saying, "Here is a copy of the report"?

John Somers: I would be copied in only to anything that was to be transmitted to the First Minister.

Jackie Baillie: But that report was to be transmitted to the First Minister, was it not?

John Somers: Is the letter of 22 August the permanent secretary's decision report?

Jackie Baillie: Yes. That is my understanding.

John Somers: I beg your pardon. Yes—I have seen it.

Jackie Baillie: So you were copied in to that report, as other people would have been. Who else was copied in?

John Somers: I do not know. I could go back and check my records.

Jackie Baillie: Could you? That would be helpful, just to know who had access to the report.

John Somers: Of course; certainly.

2) John Somers letter to Convener from 7th December 2020 ([First Minister.dot \(parliament.scot\)](https://www.parliament.scot/FirstMinister.dot)):

"Dear Convener

On 1 December 2020, I undertook to write to the Committee to provide further information in response to one question raised by Jackie Baillie.

Ms Baillie referred to the Decision Report, saying that as Principal Private Secretary I would have received a copy of the report for the First Minister, and asked who else had access to the report.

Can I offer a correction to Ms Baillie's assertion that I would have been sent a minute including the decision report. In keeping with the Procedure for Handling of Harassment Complaints involving Current or Former Ministers, the Permanent Secretary wrote to the First Minister on 22 August 2018 to inform her of the outcome of the investigation, in her capacity as both First Minister and Party Leader. It was that letter that I referred to in my response to Ms Baillie.

The Permanent Secretary also informed the First Minister at that time of the decision to refer matters to Police Scotland. The First Minister did not receive a copy of the Decision Report, nor did I. I hope this is helpful."

3) ICO Review report (taken from evidence submitted by Mr Salmond)

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

Line to take:

- As set out in his letter to the Convener, John Somers has seen the letter that the Permanent Secretary wrote to the First Minister to inform her of the outcome of the investigation but did not receive, but has not seen a copy of the Decision Report.

General criticism of SG and its staff

50. Assertion (25):

Watching the evidence before the Committee, it is apparent to me that even after having conduct declared illegal in the Court of Session, those at fault in the civil service still cannot accept the fact that they did something seriously wrong. In reality behaving unlawfully is as serious as it gets for any public servant.

Factual position:

Mr Salmond erroneously asserts that the Court “judged” the Scottish Government Procedure as unlawful. This is untrue. The court did not make a ruling or finding about the substance of the case including the fairness of the procedure. The case was conceded by the Scottish Government on one ground only before the hearing on the substance (covering a number of grounds advanced by Mr Salmond) was due to take place. The court agreed to the parties’ joint request to settle the case on the basis that there was the appearance of bias in the application of the procedure. The Scottish Government’s position was and is that the Procedure is lawful and fair.

The retrospective application of the Procedure to former Ministers was one of the original grounds for Mr Salmond’s judicial review. As set out in evidence by the Lord Advocate, the Scottish Government was and remains content that this ground could be defended and the arguments are set out in the text of the Open Record shared with the Committee. Mr Salmond implies, without evidence, throughout his submission that all his grounds in the court case would have been successful.

Perm Sec has acknowledged and apologised in writing and in her evidence to the Committee, for the procedural failing that came to light. And that the organisation has committed to apply valuable learning across the Scottish Government from the outcome of the judicial review, the forthcoming conclusions of the review led by Laura Dunlop QC, the findings of the committee’s inquiry and our own internal review of information management, to ensure that staff have confidence in our commitment and approach to tackling sexual harassment in the workplace.

Evidence:

Official report – [Official Report \(parliament.scot\)](#) -Lord Advocate evidence 17th November 2020

Official report 12 January 2021 [Official Report \(parliament.scot\)](#)– Perm Sec evidence Open Record - [JR - Open Record - as redacted 23rd October 2020.pdf \(parliament.scot\)](#)

Line to take:

- The court did not make a ruling or finding about the substance of the case including the fairness of the procedure.
- The case was conceded on one ground only by the Scottish Government. The court did not consider his other arguments and there is no certainty any of his other arguments would have succeeded.
- SG rejects the attempts to personalise this matter against individual civil servants who have acted professionally in good faith and are bound by the requirements of the Civil Service Code to act with integrity, honesty, impartiality and objectivity.

- As the Lord Advocate set out in his evidence, when the judicial review was raised, the Scottish government was satisfied that it could answer all of the grounds raised by Mr Salmond, and that remains the case on all but one of the grounds.
- As the Permanent Secretary said in her statement of 8 January 2019, the full picture only became evident in December 2018 as a result of the work being undertaken to produce relevant documents in advance of the hearing.
- At this point the Scottish Government quickly conceded the case on the single ground of a possible perception of bias.

51. Assertion (30):

It is highly probable that had this documentation not been concealed from the court (and from the Government's own counsel) the falsity of the Government's pleadings would have been avoided. The fact that even after the Government case collapsed, misinformation then appeared in both a press release from the Permanent Secretary and the First Minister's statement to Parliament of 8th January 2019 speaks to an organisation unable and unwilling to admit the truth even after a catastrophic defeat, the terms of which they had conceded to the Court of Session.

Factual position:

There is no misinformation in the FM and Perm Sec's statements when the judicial review was conceded. Mr Salmond appears to be suggesting that there was because he was certain of succeeding in his case on all grounds, not just the one ground conceded by SG.

The court did not consider his other grounds and there is no certainty he would have been successful.

There was no deliberate intention to conceal documents from the court. The committee has been shown no evidence that civil servants acted in anything other than good faith at all times. The Lord Advocate's evidence to the committee acknowledged that documents should have been identified and provided sooner and that this was regrettable.

Line to take:

- The Scottish Government stands by the statements made by FM and the Permanent Secretary on 8 January 2019. The SG conceded the Judicial Review on one specific ground that there was the appearance of bias in the application of the procedure.
- The Scottish Government's position was and is that the Procedure is lawful and fair.
- Following concession the petition was dismissed by the Court of Session.
- The Lord Advocate has already acknowledged that the provision of documents during the case was regrettable.
- There is no evidence of any deliberate intention to conceal documents from the court.

52. Assertion (49):

The Permanent Secretary's "we've lost the battle but not the war" message of January 8th 2019 to Ms Allison whilst on holiday in the Maldives is not (as she tried

to claim) a general appeal for equality but rather shows her knowledge that there were further proceedings to come and her confidence that the criminal procedure would render such a loss in the Court of Session irrelevant. I note in passing, that such language is, in any event, totally incompatible with the role of a professional civil servant.

Factual position:

Perm Sec set out in her evidence to the Committee the context in which this text was written - Perm Sec confirmed “that phrase was intended to demonstrate that I will continue to champion equality and inclusion in the organisation, not just because I think that it is right—although I think that it is—but because that is at the heart of the equalities policies that the Scottish Government embraces”.

Furthermore we would refute the assertion that the wording of the text is “totally incompatible with the role of a professional civil servant”, there is nothing set out in the Civil Service code or elsewhere that would suggest that is the case.

It is not clear how Ms Baillie knew the location of Ms Allison’s holiday. This information may only have been information provided to police and disclosed to Mr Salmond as part of the criminal investigation. It is not known how Ms Baillie then obtained this information.

Evidence:

Official report – Perm Sec evidence 17 November 2020 [Official Report \(parliament.scot\)](https://www.parliament.scot/Official-Reports/2020/2020-11-17)

Line to take:

- The SG categorically rejects unfounded and untrue accusations of a ‘conspiracy’.
- The Permanent Secretary was very clear in her evidence to the Committee that the message referred to her ongoing commitment to equality and inclusion policies as an employer.

COPFS

53. Assertion (7):

Thirdly, the crown response to the section 23 request has hindered rather than assisted the Committee. The information provided was neither sought nor publishable by the Committee. Those in Crown Office providing that information must have been well aware of that. However, text messages which could be properly considered and published and which have been part of the Committee's questioning and would bear directly on the veracity of evidence given under oath to this Committee have been withheld.

Factual position:

Crown Office and Procurator Fiscal Service exists and operates entirely separately from the Scottish Government

Evidence:

Committee wrote to COPFS asking for text or WhatsApp communications between SNP operating officer Susan Ruddick and Scottish Government ministers, civil servants or special advisers from between August 2018 and January 2019, that may be relevant to the inquiry. Committee subsequently decided not to publish the material it received from the Crown Office, with the Committee Convenor stating these message chains represented "safe spaces for confidential support.

Line to take:

- Any decisions on the release of evidence held by the Crown Office is a matter for the COPFS.
- Any decisions on what evidence to seek from the Crown Office is a matter for the Committee.

54. Assertion (59):

The Crown Office has intervened three times to deny this Committee information for which it has asked.

This has been done by reliance on legislation which was never designed to obstruct the work of a Parliamentary Committee acting in the public interest and investigating the actions of the Scottish Government. I know this to be true because I was First Minister when the legislation was passed in 2010. The true purpose of s. 162 of the Criminal Justice and Licensing (Scotland) Act 2010 was to prevent witness statements falling into the hands of the accused and being used to intimidate or exert retribution on witnesses and further because of instances of evidence ending up held or disposed of in an insecure fashion. The basis of the legislation was Lord Coulsfield's Report(2007) and the intent was to clarify the legal requirements of disclosure and to establish practical arrangements to prevent the misuse of disclosure. Thus section 162 (and 163) had nothing whatsoever to do with preventing relevant evidence being presented to a parliamentary Committee and its misinterpretation as such by the Crown Office is a profoundly disquieting development which strikes at the heart of the parliamentary system of accountability.

Factual position:

Mr Salmond's understanding of the meaning of s.162 of the Criminal Justice and Licensing (Scotland) Act 2010 is mistaken. That section is of general application and is not limited in the way he suggests. It is designed to protect the integrity of the administration of justice, and to secure the confidence of those who provide evidence that information they provide will not be used by an accused person to whom such evidence is disclosed for any collateral purpose. There are no relevant exceptions. This is clear from the policy memo which accompanied the Bill at the time the Parliament considered it in detail. A provision which would have allowed an application to the court to permit onward disclosure of material to which that section applies was removed by a Government amendment moved by the then Cabinet Secretary for Justice, Mr Macaskill.

The courts have not had to consider to date any objections by former accused to the use of the power by COPFS. The committee has its own powers to compel the provision of evidence held by Scottish Government or Police Scotland which would not be subject to the same restrictions as information held by COPFS or Mr Salmond's lawyers.

It is incorrect to allege that documents were "concealed" from the court during the judicial review. It was, and is, deeply regrettable that all the relevant documents were not identified at an earlier stage in the process. The process of document recovery and disclosure has been explained in evidence to the Committee.

Assertion:

In his latest letter of 8th February 2021 ([20210208LordAdvocatetoConvener.pdf \(parliament.scot\)](#)) the Lord Advocate pointedly fails to answer the specific question from the Committee Convener of 3rd February 2021 ([20210203ConvenertoLordAdvocate.pdf \(parliament.scot\)](#)) seeking confirmation that all Government records had been provided.

[Redacted]

Assertion:

As was glaringly clear from his evidence and his inability to address the most basic of questions, his denial of provision of the legal advice of external counsel, his costly delay in settling the case, his refusal to confirm what the Committee eventually found out that both Counsel threatened to resign from the case, the Lord Advocate is deeply compromised between his twin roles as head of prosecutions and chief government legal adviser.

[Redacted]

Assertion:

However the matter goes further yet. The Permanent Secretary has confirmed in evidence to the Committee that the referral to the crown office was contrary to the express wishes of the complainants. In spite of his protestations that he recused himself from anything to do with the criminal investigation. I believe that the Committee should ask the Lord Advocate directly whether he instructed two unwilling complainants to make police statements.

[Redacted]

Assertion:

Secondly the Committee has heard of the highly unusual route via the Crown Agent that the Permanent Secretary ordered her staff, against the wishes of the complainants, to present her report to the Chief Constable. Crown Agent David Harvie's line manager at that time was Leslie Evans, the Permanent Secretary.

[Redacted]