Additional Alex Salmond assertions from evidence session on 26/02/2021

Contents

General / criticisms of SG

1. Assertion:

I note that the First Minister asserts that I have to prove a case. I do not. That has already been done. There have been two court cases, two judges and one jury.

Evidence:

(See separate note on AS's six points of "evidence" to support his malicious plan theory)

Line to take:

- Mr Salmond has set out detailed allegations of a "malicious and concerted attempt to damage [his] reputation and remove [him] from public life in Scotland". To be credible, he needs to provide evidence and he has not done so. The Judicial Review and criminal court case do not provide this.

2. Assertion:

I am just about your only witness who has been actively trying to present you with evidence as opposed to withholding it.

…

This committee has been blocked and tackled at every turn, with calculated and deliberate suppression of key evidence.

Line to take:

- The Scottish Government is cooperating fully with the Committee. 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.
- The Scottish Government's programme for providing documents to the committee was held up by objections received from a data subject whom I can't lawfully identify.

3. Assertion:

I watched in astonishment, on Wednesday, as the First Minister of Scotland used a Covid press conference to effectively question the result of a jury

Factual position:

[Redacted]

Line to take:

- The First Minister did not question the verdict but reflected the public acknowledgement by FFM himself and his lawyers that his behaviour was not always appropriate

4. Assertion:

For two years and six months, this has been a nightmare. In fact, I have every desire to move on, to turn the page and to resist talking yet again about a series of events that have been among the most wounding that any person can face.

Line to take:
[Redacted]

5. Assertion:
This inquiry, in my opinion, is a chance to assert what type of Scotland we are trying to create.

Evidence:
Extract from statement by Sandy Brindley, Chief Executive of Rape Crisis Scotland, 02/02/2021

"In amongst the noise and politics of this committee inquiry the experiences of the women who reported their experiences has been side-lined, manipulated and exploited by some for political and personal gain. This is completely unacceptable.
…
"The focus of this inquiry should be on organisational accountability and capturing any possible learning for improved responses going forward. Far greater care needs to be taken to avoid worsening the intimidation and harassment of the women involved in this case."

Line to take:
- The Committee's inquiry should indeed be "a chance to assert what type of Scotland we are trying to create" as Mr Salmond suggested – and it should do that by sticking to its remit, focussing on organisational accountability and lessons to be learned. The Scotland we are trying to create should be one where victims of harassment have the confidence to come forward and make a complaint.

6. Assertion:
There are Government documents that I have seen that were disclosed as part of the disclosure in the criminal case that should have been provided to the committee. Under its remit, the committee should have seen those documents. They were disclosed during the criminal case, but they are not about the criminal case; they are about the judicial review.
…
a specific search warrant was applied on the Government, a year past October or November, that specifically asked for contact between the permanent secretary and complainants, and that contact was not disclosed even to a search warrant by the Crown Office.

Line to take:
- The SG has provided documents in three different situations:
  - JR – SG has accepted that identification of documents in a timeous fashion was not satisfactory and the committee has heard evidence about

some documents relevant to the specification being discovered after the commission.
    - Warrant – all SG documents subject to the warrant were handed over to the police [See separate note on warrant process]
    - Committee – all documents held by SG relevant to the specific requests of the committee – with the exceptions already detailed to the committee – have been provided.
- Each request or requirement was specific, requiring a specific response, and SG endeavoured to comply fully with its obligations. It is not the case that documents provided in one situation should automatically have been provided in another.

7. Assertion:

As I have said, Mr Fraser, everything that I have said in the evidence that I have submitted to you can be backed up by documentary evidence—every statement that I make.

…

I am speaking under oath, yes. That is whole point of speaking under oath. You will not be getting a correcting letter several days hence to correct that statement. I have absolute reason to believe that the legal advice on 31 October, as I understand it—it was certainly provided about then—indicated that, on the balance of probability, the Government was going to lose the judicial review.

…

It was not disclosed across the judicial review, despite the duty of candour, which was explained to the Government by its own counsel and by Lord Pentland.

Evidence:

The second part above was in response to challenge from Mr Wightman on whether Mr Salmond had evidence to support his claims about the detailed content of legal advice to the SG. Fuller exchange:

Andy Wightman: You say quite clearly: "By October they were told". How do you know that?

Alex Salmond: I am saying that that is the case, and I have every reason to believe that that is the case, and I believe that that is the reason why you have not been shown the external counsel legal advice.

Andy Wightman: Have you seen it?

Alex Salmond: No, but I would not be here saying that that was the case unless it absolutely was the case.

Andy Wightman: Because you are speaking under oath.

Alex Salmond: I am speaking under oath, yes. That is whole point of speaking under oath. You will not be getting a correcting letter several days hence to correct that statement. I have absolute reason to believe that the legal advice on 31 October, as I understand it—it was certainly provided about then—indicated that, on the balance of probability, the Government was going to lose the judicial review.

Mr Salmond also makes a specific claim that duty of candour was explained to SG to its own counsel – again, it is not clear how he could know this. It would be covered by LPP if correct.

(See separate note on AS's six points of "evidence" to support his malicious plan theory)

Line to take:

- Mr Salmond claims that every statement he makes can be backed up by evidence but that he has been prevented from disclosing the evidence. However, when challenged on this point by Mr Wightman, he said he had not seen the legal advice he claimed intimate knowledge of, and the only evidence he offered was that he was stating it under oath.

8. Assertion:

A committee request to have the full transcript of the commission on diligence would be well received by my legal team, and we would be very happy. Of course, the committee could then make whatever redactions it felt were necessary. I think that you would find the documents most informative.

Factual position:

The Scottish Government does not possess the transcript of the commission on diligence and has made this clear to Mr Salmond's lawyers. Mr Salmond's lawyers have continued not to provide it to the committee or to the Scottish Government. They were able to instruct and obtain the transcript because Mr Salmond was the party seeking the Commission.

Line to take:

I'm pleased to note that Mr Salmond's lawyers are now offering the transcript of the Commission to the committee. The Scottish Government confirmed to them months ago that we do not have a copy of it and I'm disappointed it has taken until the final weeks of the inquiry to offer it to the committee.

9. Assertion:

For clarity, I have never suggested for a second that the original complaints and complainers had anything to do with a motivation in regard to me and politics, or anything like that.

Lines to take:

- Mr Salmond's assertion that he has never suggested that the original complainers had any political or malicious motivation against him makes it even more questionable that he has offered them no form of apology.
- It is also hard to see how it is reconciled with his allegations of a concerted malicious plan against him.
- Mr Salmond has not said that the complainers had no legitimate reasons to raise their complaints. As a result it was not only legitimate but necessary for SG to investigate those complaints.

10. Assertion:

I suggest that you use your powers under the Scotland Act 1998—it is a matter for this committee—to serve an order on my solicitors, who are extremely willing to give

you information. It is a matter for this committee, but, if you do so, I am sure that you will get full co-operation under the law from my solicitors.

Factual position:
[Redacted]

Lines to take:

- Whether it is lawful for Mr Salmond's solicitors to provide the documents to the committee is a matter for them and COPFS. Scottish Government will have no role or part in this.

11. Assertion:
The next day, in the offices of Levy & McRae, we went through a series of messages. It was one of the most extraordinary days of my life. I am not allowed to describe the messages in any detail, but let us say that I recognise the one that you have just read out.

Factual position:
[Redacted]

12. Assertion:
When a police investigation starts, all other activity should stop

Factual position:
Mr Salmond seems to be suggesting that employer's duty of care to its staff ceases where a police investigation has started. An employer continues to have a duty of care for its all staff at all times. That may include providing support to any staff who want to come forward with concerns or complaints.

ACAS guidance on sexual harassment says: "If the incident has been reported to the police or it's going through a court, you must still investigate the complaint. You can carry out a disciplinary procedure without waiting for the court outcome, as long as this can be done fairly."[1]

Line to Take:

- Mr Salmond spoke about a parallel process alongside the Police investigation. He provided absolutely no evidence of the Police investigation being pressurised or compromised. Professional police officers concluded that criminality may have occurred and referred these matters to the Crown Office.

[1] Handling a sexual harassment complaint - ACAS

Conduct / outcome of the Judicial Review

13. Assertion:

We can hypothesise about the issue all we like, but what is certain and what is factual is that, on 8 January 2019, the actions and content of the policy, and the behaviour, therefore, of the permanent secretary and the interested party, the First Minister, were judged in the Court of Session to be "unlawful", "procedurally unfair" and "tainted by apparent bias".

…

However, you will note that it was not just the application of the policy that was judged in Lord Pentland's interlocutor but the procedural unfairness of the policy. The interlocutor says that it was "procedurally unfair" and "tainted by apparent bias" because of its application

…

Although the permanent secretary has been very anxious to give the impression that that judgment was about only one aspect of the application of the policy—I think that she said in one press statement that other parts were dismissed—the reality is that, as you rightly say, many aspects of the problems with the policy were not considered.

…

They did not need to be considered, because the Government had thrown in the towel and conceded everything that could possibly be conceded, so the rest of the arguments did not have to be explored.

…

As I said in the earlier session, it was not a botched policy but an unlawful and unfair policy "tainted by apparent bias", according to the court ruling.

…

Of course, our first petition for judicial review— our draft petition—was drawn up in July, long before the illegal, unlawful application of the policy was known

Line to take:

- Mr Salmond has referred to "illegality" in relation to the Procedure's application – this would means that the application was criminal in nature – that was not the case and has no basis in fact, so that description is inappropriate.
- The Court accepted the SG concession of the case which was clearly on one basis only. This basis is set out in the interlocutor by Lord Pentland.
- Mr Salmond's repeated assertions that the content of the Procedure was judged unlawful are not correct. The court interlocutor declared unlawful only the decision being judicially reviewed (the decision of the Permanent Secretary in the application of the Procedure). The interlocutor says nothing about the Procedure itself. The court did not consider the lawfulness of the procedure. Any inferences that Mr Salmond believes can be drawn from the judge's questions about the basis of settlement at that final hearing in court are supposition by him and not supported by the decision of the court issued at the end of that hearing.
- The Permanent Secretary's public statement at the end of the JR was not misleading. The specific part highlighted by Mr Salmond – "All the other grounds of Mr Salmond's challenge have been dismissed" – is accurate. The

joint minute agreed in the Court of Session states: "*Quoad ultra* the petition shall be dismissed.

14. Assertion:
On the first part of the question [who signed the certificate confirming there were no further documents]*, my legal team will certainly know that, and we will write to you, Ms Mitchell.*

Factual position:
Sarah Davidson, Director General Organisational Development and Operations, signed the certificate on 14 December 2018. The certificate states (underlining is not in the original document but highlights an important caveat):

I hereby certify with reference to the cause (P850/18) in relation to the enclosed specification of documents, served on the first respondent, that the documents which are produced and which are listed in the enclosed inventory signed by me and so marked, are, to the best of my knowledge and belief, all the documents in possession of the first respondent and the Scottish Government, so far as falling within the specification.

The certificate was signed in good faith with no intention to mislead or lie, and no-one in authority in the case (the judge or Commissioner) has suggested otherwise. The SG has already made clear to the committee that there were deficiencies in how the Commission was handled by SG. Mr Salmond appears to be raking over known failures in an attempt to criticise civil servants.

Fairness at Work policy

15. Assertion:

[The Procedure] *has in effect been wiped out altogether, which I think is a very retrograde step. We are now in a situation where, as far as I understand it, fairness at work still applies to ministers where bullying is concerned but, as far as harassment is concerned, there is in effect no policy, because the policy that was developed in 2017 was the subject of my judicial review and has been declared unlawful, so it is now in limbo. That is a totally unsatisfactory situation.*

Factual position:

Both Fairness at Work and the Harassment Procedure are still in force. The review led by Laura Dunlop QC is currently considering the Procedure.

Evidence:

The Permanent Secretary explained this in evidence to the Committee on 12 January 2021.

It is also clearly explained to staff on the SG intranet:

Fairness at Work policy

As part of an ongoing review of our Fairness at Work policy new guidance has been developed to offer clear procedures and support for staff in raising sexual harassment complaints. This forms part of the broader review commissioned by the Permanent Secretary to ensure our procedures are robust and effective and has been carried out in consultation with the Council of Scottish Government Unions (CSGU).

The key updates are:

- *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*

Work to review our policies is continuing with trade union colleagues and further updates will be made in due course.

We are committed to providing workplaces free from discrimination where all colleagues are treated fairly.

The Fairness at Work (FAW) policy applies to all Scottish Government staff, senior civil servants and associated bodies.

The policy aims to prevent colleagues suffering because of:

- *bullying, harassment or victimisation*
- *equality and diversity issues*
- *relations with colleagues*

- *unfair working methods, conditions and workloads (including health and safety)*
- *reorganisation of work or other organisational change*

Everyone has a part to play in reporting incidents and supporting colleagues, regardless of whether or not the perceived harassment, victimisation, discrimination or bullying is unintentional.

Anyone who witnesses unacceptable behaviour, as well as anyone who experiences it directly, has a responsibility to raise concerns.

The policy doesn't apply where there are more appropriate policies or procedures in place, such as attendance management or performance management.

Line to take:

- Mr Salmond's claims that Scottish Government HR policies are "in limbo" or that there is effectively no policy are not accurate. Both Fairness at Work and the Harassment Procedure still apply. The JR did not make any ruling about the alleged unlawfulness of the Procedure.
- Fairness at Work is a wide-ranging HR policy and does not apply where there are more appropriate specific policies or procedures in place, for example attendance management, performance management, or the Harassment Procedure. Guidance to staff makes this clear.

16. Assertion:

The informal resolution process is not only for ministers: it applies across the policy [Fairness at Work]*, and in fact dominates it. Barbara Allison told the committee that she thought it was a good thing and I think she is right to think that.*

Evidence:

Barbara Allison evidence 27/10/2020:
As I said, I think that mediation can be very successful; it depends on the particular complaint

We have previously provided evidence on the application of the Procedure. On the development of the Procedure, and how this fits with the position under Fairness at Work: Phase1FN16.pdf (parliament.scot)).

Fairness at Work is clear that mediation is appropriate at informal and formal stages (so, not purely formal stages):

4.2 It is in everyone's best interests to try to resolve problems before they develop into major issues. The first step is normally always to try to resolve matters locally and informally. This can mean agreeing to use a mediation service. The use of the service is voluntary and must be agreed to by both parties. This will not prevent you from raising a formal grievance but the process is suspended during mediation (see Mediation - Annex B)

6.2.1 Depending on the outcome, your or your manager may find it useful to discuss the use of mediation in resolving matters before taking further action through formal stages. This can be put in place at any point and, if this happens during the formal process, it will be suspended while mediation takes place.

Fairness at Work also covers where it may not be appropriate:

Annex B
8. Mediation may not be appropriate if:

- *there is a significant power imbalance between the parties which cannot be bridged.*
- *behaviour is going on between the parties which makes one or the other or both feel unsafe to negotiate.*
- *external rules need to be applied, for example if criminal activity is involved.*
- *one or other side or both sides are unwilling or unable to mediate.*
- *if a complaint involves behaviour which requires action against one of the parties e.g. serious misconduct, less than effective performance.*

Line to take:

- Ms Allison stated that she is an advocate of information resolution and mediation in response to a general question about policies and support to staff. She stated clearly that it depends on the particular complaint and offered no suggestion that either might have been appropriate in this case.
- Fairness at Work includes provision for mediation but also sets out examples where it may not be appropriate, including in two situations which were relevant to the complaints made against Mr Salmond: where there is a significant power imbalance; where the complaint involves serious misconduct or where any party is unwilling to participate.

17. Assertion:
For the permanent secretary to say, as she did when she was before this committee, that she did not think that harassment was covered by the fairness at work policy, when it is item number 1 in the areas to be covered, strikes me as showing not only that she was not an expert on the policy but that she did not familiarise herself with the policy that she wanted to replace.

Line to take:

- 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.
- Mr Salmond's claim that Perm Sec "did not familiarise herself with the policy that she wanted to replace" is inaccurate. The Perm Sec, and other evidence provided to the Committee, has set out clearly what happened:
    - In response to a Cabinet commission and a letter from Sir Jeremey Heywood, and the wider impetus of #MeToo, she asked staff with the relevant expertise to undertake a review of SG policies and procedures;

- Officials identified a specific gap in relation to former Ministers and drafted a Procedure to fill that gap, liaising closely with trade unions.
- Wider work was already underway to consider potential changes to Fairness at Work and this continues.

Development and general application of the Procedure

18. Assertion:

I have seen the documents that have come to the committee, Ms Watt, and there is a reason why the trade unions have not accepted a new policy applying to the workforce. The reason is not that they necessarily think that the fairness at work policy is perfect; it is that they think that the fairness at work policy is an extremely strong policy, which is why it still applies to the thousands of people who work in the civil service.

…

Back in 2009-10, there was obviously not the same heated discussion, but the development of the policy took 18 months. People might say that that is very slow, but it is not if a policy of that importance is being developed. I hope and believe that I would have taken the policy that we had and asked what we had to do to adjust it to meet the change in circumstances and, above all, I would have taken the workforce representatives with me on that.

…

I do not think that Malcolm Clark, Sir Peter Housden or anyone else would agree with the policy that was defeated in the Court of Session so resoundingly.
If you are going to apply any policy, you should do so in comprehensive, full discussion with the trade unions. As the committee has found, that did not happen in this case. In my experience, it happened with every workplace policy, but somehow not with this one.

Evidence:

The Committee took oral evidence on 01/09/2020 from Dave Penman, General Secretary, FDA; and Malcolm Clark, Convenor of the Council of Scottish Government Unions and PCS Scottish Government Group President.

Dave Penman:

In any industrial relations process, we come with a shopping list of the things that we want to achieve, and, at various points, we have to concede what we will get and what we will not get.

I am sure that we raised other issues at the time that we did not get; Malcolm Clark was closer to the negotiations than I was. It is not a surprise that we would have raised issues, particularly the ones that were unique at that point, including on independence, that there would have been less of an appetite to achieve. Ultimately, we are trying to reach an agreement, and we work out whether we are likely to achieve something or not and then we move on.

With hindsight, we should probably have dug our heels in a bit more, but I say that on the basis of lived experience since that time and what we have experienced elsewhere. At that time, the Scottish Government was the only part of the civil service in the UK that had a policy, and, essentially, we were improving it. That would have been the context in which to judge any concession or change that was made.

Malcolm Clark:

"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."

Fairness at Work is a wide-ranging employee policy which is in daily use. Its initial development was, therefore, a lengthy process involving replacing a number of other policies and setting out principles and standards of behaviour which necessitated wide consultation.

Line to take:

- Mr Salmond in his evidence has stressed the time taken to develop Fairness at Work, and the significant engagement with trade unions, and has contrasted this with the development of the Procedure. This contrasts with the evidence given directly by the trade unions themselves.
- The trade unions, in their evidence under oath were clear that they welcomed SG taking action in this area before any other UK jurisdictions, that trade unions were effectively engaged with and listened to in the process, and that the timescale for development was appropriate given the specific focus of the Procedure. The Committee took evidence on 1 September 2020 from Dave Penman of the FDA and Malcolm Clark of the Council of SG Unions and PCS.

19. Assertion:

It is also not clear from the documents that you have received just how much ministerial consideration was given to this. On one hand, it is argued that this was something that was done by the civil service, totally independently of ministers. On the other hand, there are areas that look like ministerial intervention. What you can certainly say, from the documents that you have, is that the policy arrived in early November, with no discussion in Parliament and no discussion in Cabinet. There was no discussion in Cabinet or Parliament of a new policy dealing with former ministers.

…

I put to you, Mr Wightman, that if that had been an issue that was being contemplated at the time as the major issue that must come up, somebody—perhaps you, Mr Wightman, or any other person—would have mentioned it in the parliamentary debate. If I remember correctly, there was a full parliamentary statement by Mr Swinney. No one mentioned it in the parliamentary statement and no one mentioned it in the Scottish Cabinet, where of course the policy was never discussed. Therefore, wherever it was coming from, it was not something that was seen as the major issue.

Line to take:

- The evidence provided to the Committee makes clear that the Procedure was developed as a SG process following a Cabinet commission that the SG should review what it had in place.
- Both the Cabinet discussion and the Parliamentary debate were about the #MeToo movement and the need to take action in that context. Neither of these forums would be expected to go into detail about specific HR policies the SG should develop.
- Mr Salmond has made several references to the fact that the Procedure was not debated at Parliament, but when asked by Ms Watt whether the Fairness at Work Procedure was debated in Parliament, he did not answer. It was not,

of course, because Parliament does not have a role in approving SG HR procedures.
- Sexual harassment in the workplace was always wrong – all this procedure did was to clarify the process by which a complaint should be handled.

20. Assertion:
Of course, one of the other issues that your inquiry has thrown up is that last-minute suggested changes were being made to the newly developed policy on, I think, the day that it was being signed off by ministers, and that it was being considered even after that. In fact, no substantive changes were made, but that is not how you develop workplace policies

Evidence:
This seems to be a misreading of documents submitted by SG to the Committee including correspondence in January 2017 around engagement with trade unions on the wider Fairness at Work consideration following the finalisation of the Procedure (email provided to the Committee as JRRec045 but not yet published on the Parliament website).

Lines to take:
- No changes were made or proposed to the Procedure after it was approved by FM in December 2017. There was discussion of how the new Procedure sat alongside Fairness at Work and wider consideration and discussion with trade unions about SG HR policies and how these should be communicated to staff.

21. Assertion:
Where retrospectivity has been allowed legally—again, I am straying into things, and perhaps you are as well, Mr Wightman, that we do not necessarily have expertise on. However, where there has been no policy, or no available policy, a retrospective argument has much more sway.
…
I do not think that you can make that argument. Legally, I have been informed that you could perhaps try that argument pre-2010 when there was no such policy, but it would be very difficult to make that argument and to make it legal or lawful.
…
indeed, arguably, it is a breach of the ministerial code in terms of the policy that was put forward. It is also a breach of the European convention on human rights, which of course every minister in all their actions in this Parliament has to follow and which is something that we have embraced since the start of the Parliament.
…
The second issue that is required in terms of policy is the consent of the people who it could be applied to—stretching back, presumably, to the dawn of this Parliament. Those people would normally be consulted or give their approval in some way.

Factual position:
Whether a policy stems from a workplace policy or from legislation, its lawfulness is about what it provides for and not its source. There is nothing intrinsic to being

legislation which would affect the retrospectivity of a provision applying to former Ministers. The current SP Bill demonstrates that retrospectivity can be lawful.

Mr Salmond argued in the JR that the procedure was a breach of ECHR but this was not considered or decided by the court so there is no certainty that it would be a breach. He should not tell the committee that arguments he was making in the case are fact when they are not.

Lines to take:

- Whether a policy stems from a workplace policy or from legislation, its lawfulness is about what it does, not its source. The current Bill in the Scottish Parliament demonstrates that retrospectivity can be lawful.
- Mr Salmond's claim that you need the consent of everyone a policy might apply to is nonsense.
- The suggestion that complaints should not be considered simply because they are retrospective is not tenable. There may be strong reasons why someone would not be confident to raise complaints at the time when a person being complained about is in a senior position of power and authority.
- As the ACAS guidance says: "If the complaint has been made a long time after the incident took place, you must still take it very seriously. You should not ignore or cover up a sexual harassment complaint."

22. Assertion:

Indeed, there was a letter, which has emerged quite recently, that was meant to be sent to former First Ministers—myself included, presumably—but I know that it was not sent to former First Ministers. Among other things, it asked them to consult ministers in their Administrations from the past, which struck me when I saw it as a quite extraordinary thing to be happening.

Evidence:

The Scottish Government has been open with the committee - An email chain submitted to the Committee in June 2020 as ZZ010 makes clear that letters to former First Ministers was drafted. In an email from James Hynd dated 30/11/2017 he says:

Dear all

Just so everyone is aware, I have now sent [Redacted Private Secretary 2] *a pack of material which includes:*

- *A further iteration of the v6.1 process, with the 3 introductory paras in a separate background note.*
- *Suggested changes to the Scottish Ministerial Code*
- *A new letter to go to all former Ministers. With further copies of the letter to FFMs and to current Party leaders*

As some of the docs contain information shared with us in confidence, I am not sending around more widely.

James

The text of the draft letter to former FMs is as follows. This was not issued at the time, and has not been provided to the Committee by SG (though they have obtained it from another source):

Dear

I am sure you will share my deep concern about the recent reports concerning allegations of sexual harassment and other inappropriate conduct by those in public life. I am pleased that the Scottish Parliament and Scottish political leaders have spoken with one voice to condemn such behaviour, wherever it occurs.

We each have a duty, in our own areas of responsibility, to take whatever action we can to demonstrate zero tolerance of inappropriate behaviours of this sort. To that end, I recently asked the Permanent Secretary to carry out a full review of the Scottish Government's internal policies and procedures to ensure that they are effective and offer assurance to SG staff that they can expect to be treated with respect and dignity. It is also of great importance that staff can be confident that any concerns they have about their treatment will be fully investigated.

In parallel, I have also been reflecting on how we might further underpin the standards of behaviour expected of Ministers. As you know, if a question arises about the conduct of a Minister it is, under the Scottish Ministerial Code, the responsibility of the incumbent First Minister to instruct an investigation into the matter and, in light of the investigation, to decide if the Minister in question should remain in post.

To provide further reassurance to Scottish Government staff, I have decided that in future any formal complaint from a staff member relating to sexual harassment against a serving Minister will be investigated automatically by the Permanent Secretary without my intervention. I intend to bring forward a change to the Ministerial Code to make clear that current Ministers will be required to cooperate fully in any such investigation. It will remain the case that, as now, the final decision will rest with me on whether or not a Minister's behaviour has fallen below acceptable standards.

We also need to consider the position of former Ministers in relation to any formal complaints against them from staff that relate to the period in which the former Minister was in office.

In the event of such a complaint, I believe that, again, it would appropriate for the Permanent Secretary to take the matter up directly with the former Minister so that they have the opportunity to respond. As the provisions of the Ministerial Code do not apply to former Ministers, the report of the investigation would be provided to both the former Minister and the current leader of their political party (if any) to consider. I would therefore only be involved in complaints about a former SNP Minister. I would have no involvement in complaints against a former Minister of another party.

Given your position as a former First Minister, I wanted you to be aware of this approach. I hope you will agree that it should help provide additional assurance to staff that any complaints they raise will be fully investigated, no matter when the alleged concerns occurred.

I intend to write to all former Ministers who have served in my Administration to make them aware of these arrangements. Similarly, you may wish to consider making Ministers who served in your Administration aware of them too. If you, or they, would find it helpful, the Permanent Secretary will be happy to discuss how these new approaches would work in practice.

I will be writing in similar terms to Scottish Party leaders.

Nicola Sturgeon

Line to take:

- 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.
- In documents provided by the SG to the Committee in June last year the SG were open that letters to former First Ministers, former Ministers and current Party leaders, informing them of the existence of the policy, were drafted but not issued.
- The draft letters would have informed recipients of the Procedure; they did not seek views or consent. They did not consult former FMs on the Procedure and nor did they ask former FMs to consult with former Ministers of their Administrations, instead saying: "*I wanted you to be aware of this approach… you may wish to consider making Ministers who served in your Administration aware of them too*"

23. Assertion:
If I remember correctly, when the Cabinet Office was consulted in mid-November 2017, the response was, "Does this apply to former civil servants?" Of course, answer came there none.

Evidence:
This is a reference to a document already provided by SG to the Committee: YY092 includes the question "Is this process/guidance more than you have in place for complaints about current or former civil servants?"

Line to take:

- Complaints about former civil servants would be investigated using Fairness at Work – 'complaints about an external third party'.

24. Assertion:
What you might find more interesting is why, if it is all a question of making things independent, the First Minister still has a role in the policy as it applies to current

ministers and is informed at the same time as the permanent secretary in that policy. Does it not strike you as somewhat curious that the First Minister is informed about current ministers but not about past ministers?

Line to take:

- The Procedure itself makes clear why it is appropriate for the First Minister to be informed and have a role in relation to complaints against current Ministers: *"the First Minister, however, has ultimate responsibility to judge the standards of behaviour expected of a Minister, including in their interactions with civil servants, and of the appropriate consequences of a breach of those standards. Ministers can only remain in office for so long as they retain the First Minister's confidence."*
- The Ministerial Code, for which the FM is final arbiter, only applies to current ministers.
- It would not be appropriate for a current FM who was from a different party to that of the former minister to be informed of the complaint.

25. Assertion:

[Stuart McMillan: My final question is, again, on the point about intervening. Have you ever heard of any Government minister intervening in an independent Government procedure at the request of a friend or colleague? Did you ever do that as First Minister?]
Alex Salmond: Any previous policy would have allowed for the First Minister role, because it affects ministers. You just need to check the fairness at work policy.
…
Actually, there is nothing to prohibit the First Minister from making an intervention.

Line to take:

- Mr Salmond's assertion that it would have been appropriate for the First Minister to intervene in an investigation that she was independent of is clearly not correct. The Procedure makes clear the FM should not be informed of the investigation until it is complete.
- Mr Salmond said in his evidence that Sir Peter Housden had at the time been of the view that an FM role at two points in the Fairness at Work process would have been unlawful, so it's not clear why Mr Salmond would think intervention would have been legitimate under earlier policies.

26. Assertion:

[Convener: As First Minister, what would you have done if you had received a complaint about a former minister?]
Alex Salmond: You cannot proceed when there is no policy and no lawful way to do it. You would have to ask huge questions on the basis of the complaint. The primary one would be, "Was there a policy in place at the time of the supposed or purported incident?"

Line to take:

- SG as an employer would be obliged to deal appropriately with a complaint raised by staff whether a specific policy was in place or not. SG witnesses have confirmed this to the committee.
- Mr Salmond's answers to the committee did not address what he would have done if he had received a complaint about sexual harassment involving a former Minister during his time as First Minister.
- As ACAS set out: "You should not ignore or cover up a sexual harassment complaint".

27. Assertion:

In terms of this policy, the fact that mediation is included for current ministers but not for former ministers would lead me to believe that the word processor was not working properly—or whatever happened—but I certainly cannot believe that it was a deliberate act to exclude mediation.

…

the mediation offer was rejected by the permanent secretary before it was put to the complainants. That is in your papers. They were presented with it later as a fait accompli, and told that it had been done. Again, if you examine your papers, you will find that one complainant said that she might wish to consider mediation at a later stage. However, the offer was rejected by the permanent secretary before it was even put to the complainants.

…

one of the other things that certainly would have been problematic, and which Lord Pentland commented on, although there was no requirement for him to do so, is that there is a mediation proposal in the policy for current ministers, but no mediation proposal in the policy as it applies to past ministers. As I say, Lord Pentland noted that when delivering his interlocutor on 8 January 2019

Factual position:

By mid-November the draft procedure was further developed to include provision for a "mutually agreed resolution between the parties involved" to be established where a formal complaint of harassment is raised about the conduct of a **current** minister.

There is no explicit reference to mediation in contrast to the extensive provisions on the role and purpose of mediation set out in the Fairness at Work policy.

This is because mediation would not generally be recommended in cases of sexual harassment. Dame Laura Cox's report said that "it is generally very difficult to use mediation in any case of sexual harassment, or in cases involving more serious bullying or harassment".

However, it was concluded there may be instances where there has been a difference in perception of a minor event and a wish on both sides for a working relationship to be preserved. The procedure therefore allows for this mutually agreed resolution where a complaint is raised about a current minister in these limited circumstances but was not deemed relevant in the case of a former minister.

Harassment complaints are fact and case specific, and require sensitive handling.

Line to take:

- Mr Salmond's claim that the Procedure allows for mediation in the case of current Ministers but not former Ministers is not correct.
- Mediation is not provided for in the Procedure for Harassment complaints against Current or Former Ministers because it would be likely to fall into the instances set out in FaW as inappropriate for mediation i.e. significant power imbalance between parties and an allegation of serious misconduct.
- Mediation would not generally be recommended in cases of sexual harassment. Dame Laura Cox's report said that "it is generally very difficult to use mediation in any case of sexual harassment, or in cases involving more serious bullying or harassment".
- However, it was concluded there may be instances where there has been a difference in perception of a minor event and a wish on both sides for a working relationship to be preserved. The procedure therefore allows for the possibility of a mutually agreed resolution where a complaint is raised about a current minister. This was not relevant in the case of a former minister.
- However, the option for an individual to have their concern acknowledged without pursing a formal complaint remains for both current and former ministers.
- The Permanent Secretary has been clear in her evidence, and documents provided to the Committee back this up. Levy & McRae made a suggestion of mediation, and she replied that it was not appropriate at the fact-finding stage. When L&M persisted the suggestion was put to the complainers and both clearly rejected it.
- Lord Pentland did not write anything about mediation in the interlocutor. During the hearing on 8 January he did explore paragraph 10 as part of the usual process of the court making sure it understands why the parties are settling the case. He did not issue any findings about the meaning of the paragraph, despite what Mr Salmond suggests.

Public statement / alleged leak to press
(additional chronology of public statement/referral to Crown Agent to come)

28. Assertion:
As you know, the Information Commissioner's Office has investigated the matter. The prosecutor came to the conclusion that she was sympathetic to the idea that the source of the leak was within the Scottish Government, as she said. The Government's internal review—it was not an investigation—identified 23 people who had access to the information.
…
The ICO said that the leak was prima facie criminal—it was a criminal leak—but it had 23 suspects and no ability to go beyond that to determine who might be responsible for the leak.
…
The report lists the principal private secretary to the First Minister in that group of people. I must be absolutely correct here. I am not suggesting that the principal private secretary to the First Minister leaks things to the Daily Record, but when he came before this committee he confirmed first that he had—or had received on behalf of the office—a copy of the report; he subsequently wrote to the committee to say that that was not correct. My question is quite simple: why did the prosecutor for the ICO list the First Minister's office in the list of interested parties who had access to the report?

Line to take:
- The ICO did not describe anyone as "suspects" and using that language misrepresents the ICO investigation and report.
- 23 people were identified in the SG internal review as potentially having access to some relevant information. Not all of those interviewed had access to the full Decision Report. Mr Salmond's confidence that he knows who was responsible for the leak seems to be based on an assumption that they all had access to the full Decision report.
- When Mr Salmond sought a review of the ICO's decision, the reviewer told him that it remained that case that a variety of people might have leaked the report including Mr Salmond himself and his legal advisers.

29. Assertion:
Therefore, I think that the leak was politically inspired—from whom it came should require further investigation. I think that the matter should not be at an end; it is a hugely serious matter.

Line to take:
- The alleged leak has been thoroughly investigated:
  - the SG undertook an internal review which found no evidence that SG staff were responsible;
  - Mr Salmond complained to the ICO who investigated and found no evidence that SG staff were responsible;
  - The ICO reviewed this decision, and still found no evidence that SG staff were responsible.

- These findings do not seem to have damaged Mr Salmond's conviction that he knows who was responsible, but he has offered no evidence of this.
- The ICO noted that it remained possible that the leak had come from a range of sources including Mr Salmond himself and his lawyers.

COPFS

30. Assertion:

My evidence has been published, then subsequently censored by intervention of the Crown Office—evidence that it had previously agreed was lawful.

…

It is an intervention that has drawn widespread criticism—including, I note, this morning, from Lord Hope, the former Lord President of our Court of Session.

…

Secondly, in relation to the further blocking of evidence from the committee, I draw its attention to the decision of the Crown Office to prevent disclosure of evidence demonstrating the conduct of key individuals in this inquiry, under reference to section 162 of the Criminal Justice and Licensing (Scotland) Act 2010. I know—because I was First Minister when it was introduced—that that provision was not passed by the Parliament to prevent a parliamentary inquiry from getting to the truth on matters of the utmost public interest. It is being misused in its current context.

Evidence:

Extract of Lord Advocate letter to Convener 25/02/2021:

"I also reject the criticisms of the steps which the Crown has taken in respect of the evidence to the Committee. All decisions, in relation to these matters have been taken by senior professional prosecutors, exercising their professional responsibilities independently and with a view to the proper application of legal rules and restrictions which are designed to protect the integrity of the administration of justice.

"The Committee is well aware of the legal restrictions which apply, but, in the interests of wider clarity, it may be helpful if I set them out here.
First, the High Court of Justiciary pronounced an order protecting the anonymity of the complainers in the criminal trial. That order was made for good and important reasons.

"Its breach would be a contempt of court. In any case where the Crown apprehends that a publication may be a contempt of court, it considers whether it should take any action in that regard. It may communicate its concerns to the publisher of the publication in question. It is, though, a matter for the publisher to decide, having taken its own legal advice, what it can lawfully publish.

"Ultimately, only the Court can determine whether any particular publication was a contempt of court. That was the basis for the Crown's interactions with the Parliamentary authorities about the publication of Mr Salmond's written submissions.

"Those interactions, which as I advised Parliament on 24 February were undertaken without reference to the Law Officers, were directed to ensuring compliance with the Court's order. The decision as to what should or should not be published was ultimately one for the Parliamentary authorities.

"Secondly, section 162 of the Criminal Justice and Licensing (Scotland) Act 2010 prevents an accused person from using material disclosed by prosecutors to the

accused's solicitors for any purposes other than the criminal proceedings in relation to which the information was disclosed or an appeal. Section 162 applies where a prosecutor discloses information to an accused person's solicitors in terms of the prosecutor's duty of disclosure. Section 162(2) provides: "The accused must not use or disclose the information or anything recorded in it other than in accordance with subsection (3)". Subsection (3) refers to the use of the material for the purposes of the criminal proceedings in relation to which the information was disclosed, and any appeal. This section applies to material which was disclosed to Mr Salmond's solicitors by the prosecutor in the context of the criminal proceedings against him, and Mr Salmond, like anyone in the same position, is bound to observe the law.

"Section 162 is not limited or qualified in the way Mr Salmond suggests in his "Final Submission". The section is designed to protect the integrity of the administration of justice, and to secure the confidence of those who provide evidence that it will not be used by the accused or his agents for any collateral purpose. There are no relevant exceptions. Indeed, when the Bill which became the 2010 Act was first introduced into the Parliament, it contained a provision which would have allowed for an accused person to apply to the court for permission to use in other ways material to which section 162 applies, but that provision was removed from the Bill at stage 2 by a Government amendment moved by the then Cabinet Secretary for Justice and agreed to unanimously by the Bill Committee."

Line to take:

- Descriptions of Crown Office actions during Mr Salmond's evidence session – by both Mr Salmond and members of the Committee – were inaccurate.
- As the response to PQ S5W-35498, on behalf of the Scottish Parliament Corporate Body, makes clear, it was the Corporate Body that decided to publish Mr Salmond's evidence, and then decided to redact sections of the evidence.
- The Lord Advocate wrote to the committee on Thursday (25 February) setting out these issues, including an explanation of the application of section 162, and rejecting the assertion that Crown Office had misused it. The Policy Memorandum prepared by the SG during the passage of what became the 2010 made clear the basis of section 162.
- It was Mr MacAskill who, as Cabinet Secretary for Justice, withdrew an amendment to the provision during its Parliamentary passage which would have allowed disclosure to third party, and his Policy Memo for the Bill was clear about the general administration of justice purpose of the new offence being created. This gives the lie to Mr Salmond's assertion that he and Mr Macaskill knew the meaning of the legislation because they were responsible for it.

31. Assertion:

[Alexander Allen: Should Scotland's Parliament not be subject to the same court orders and have the same liability for consequences from the Crown Office as anyone else in the country?]
Alex Salmond: I think that there are very good reasons for Parliaments having privilege in a range of ways. Without parliamentary privilege, some of the major scandals of the age would never have been revealed and some of the major issues

of the age would never have been tackled, because, at some point, a parliamentarian had to use that privilege in the public interest, which could not have been done outside Parliament. I think that the Scottish Parliament should very much be using that privilege.

Factual position:
There is no clear reason why the Parliament should be able to, or would want to, flout a law designed to protect people complaining about alleged sexual offences.

Line to take:
- There is no clear reason why the Parliament should be able to, or would want to, flout a law designed to protect people complaining about alleged sexual offences.

32. Assertion:
That evidence has been widely shared. Everybody in the committee has read it, I presume, even though they are not allowed to discuss it in detail. Is there anyone who seriously thinks that that evidence prejudices the identity of complainants or in any way breaks the anonymity that has been given to complainants? I have not met anybody who says that who has read the evidence.
…
[The Convener: Can I interrupt here? As convener, I want to make it plain to everyone here and to everyone listening that it is the Scottish Parliamentary Corporate Body that is the publisher here, not the committee. All these questions are for the SPCB.]

Evidence: It is not known what the specific concerns of COPFS are or why they may have changed over time. The changing position may reflect other information made available publicly in recent weeks and the risk, as a result, to jigsaw identification of complainers.

Line to take:
- The Scottish Parliament Corporate Body unanimously decided to redact the information so it clearly felt there was good reason to.
- The role of COPFS in deciding how to ensure compliance with the Contempt of Court Act is not a matter within the remit of the committee.
- The Convener intervened several times to point out that these questions are for the SPCB yet a significant amount of time was spent during Mr Salmond's evidence on these issues that everyone agreed were outside the Committee's scope.

33. Assertion:
The reason we were able to give the ICO a copy of that statement is because the Crown Office permitted us to do so. We have just had a discussion to pinpoint whether this committee was entitled to see information under section 162. That statement was provided for the ICO with the permission of the Crown Office. In itself, that was an exemption to section 162. The idea was put forward a few seconds ago that the Crown Office has no discretion on such matters; clearly, it found discretion as far as the ICO was concerned. I have no complaints about that. Providing that

information to assist the ICO in its investigations was exactly the right thing to do. My argument is that it would also be the right thing to do to assist a committee of the Scottish Parliament.

[Redacted]

Line to take:

- SG does not know if the statement in question was subject to the section 162 offence.
- SG was not party to any alleged agreement by COPFS and Mr Salmond's lawyers that it could be disclosed to the ICO or the terms of that agreement.

35. Assertion

Murdo Fraser: This is my final question… Who should resign?

Alex Salmond: The people responsible for the disaster of the judicial review should. In terms of the Scottish Government, the Crown Office and the overall approach, the people who are responsible should resign. The people I have named, as I have the evidence for their behaviour, should all be considering their positions.

Line to take:

- It is disconcerting for a Member of a Parliamentary Committee - that is still not concluded its evidence gathering, let alone published its report, to prompt and encourage a witness to opine on who should resign, including public servants.
- It does not speak to an objective process or a desire to hear the full evidence before reaching judgement.
- As Mr Salmond himself acknowledged, he is not "impartial observer" of the events the Committee has been asked to consider.