

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

Challenges faced by the Committee

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

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

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

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

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

The Committee further recommends the Parliamentary Bureau should explore the potential for one of the committees established in session 6 of the Parliament to be able to look at the quality and standards of administration provided by the civil

service in the Scottish Government in a similar vein to the role of the Public Administration and Constitutional Affairs Committee in the House of Commons.

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

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

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

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

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

is yet another example where the Scottish Government's approach to records management has impeded the work of the Committee and which the Committee considers requires to be addressed.

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

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

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

Despite saying that he had "upheld at every stage in this process" the anonymity of complainers, Mr Salmond, through his solicitors (Levy & McRae), on multiple occasions sent documents directly to Committee Members rather than using the Committee's document-handling procedure to ensure that no material which may inadvertently reveal the identity of a complainer is released. This resulted in unredacted documents being sent to Members. Given the focus that the Committee has had on confidentiality, this is a very serious situation.

Development of the Scottish Government Procedure

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

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

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

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

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

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

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

However, the Committee considers that the procedure would have benefitted from more consultation and this was not undertaken in the time allowed for the drafting of the procedure. For example, there could have been more wide-ranging engagement with staff, in addition to further formal consultation with trade unions.

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

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

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

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

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

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

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

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

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

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

The Handling of the Complaints

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

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

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

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

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

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

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

It is evident that the Head of People Advice had, by the time of her appointment, built up a rapport and relationship of trust with Ms A and Ms B. The Committee therefore finds it astonishing that the potential for challenge around the perception of impartiality of the Investigating Officer was not identified at this point. The Committee was given no evidence that a risk had been identified around the suitability of the Head of People Advice to take on the role of Investigating Officer. As will be explored further in the Judicial Review section, the Scottish Government appears not to be concerned

because it interpreted paragraph 10 of the procedure as meaning the Investigating Officer will have had no involvement with the subject matter of the complaints rather than having no prior involvement in any aspect of the complaints’.

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

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

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

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

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

It is essential that contact is made with individual complainers by their employer in exercising that duty of care by informing them of what is happening and letting them know what are the next steps. However, because the Permanent Secretary contacted the complainers and because she was also the Deciding Officer, this left her open to accusations of having had inappropriate contact. The Committee is therefore sympathetic to the idea that contact with complainers and former ministers should be

delegated to a senior member of staff who does not hold a formal role within the procedure. The Committee believes that this has the potential to remove any perception that contact with those involved in the complaint could influence the Investigating officer or the Deciding Officer. The Committee notes recommendation 8 of the Dunlop review in relation to impartialityⁱⁱⁱ.^{iv}

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

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

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

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

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

The Committee supports individuals coming forward with their concerns and experiences. Nothing should be done to dissuade people from speaking out about sexual harassment. The Committee also notes that Ms A and Ms B said they had both been made aware from the outset that a police referral may follow, because of the Scottish Government's duty of care to staff. Nevertheless, the impact of them was

profound. They were also clear that it would have been helpful for them to have had specialist support throughout this period, rather than such support being filtered through HR. The Committee agrees it is essential for such support to be made available if matters are referred to the police.

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

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

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

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

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

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

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

The Committee is of the view the lack of detail on the process to be followed in the case of an investigation under the procedure also has the potential to undermine confidence in its fairness. The Committee notes the detail which the office of the

Ethical Standards Commissioner for Scotland provides on the process followed in the investigation of complaints made to the Commissioner. It is the Committee's recommendation that the Scottish Government give serious consideration to adopting a similarly robust approach.

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

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

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

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

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

It is not for the Committee to investigate or speculate on the source of the leak. However, the Scottish Government had responsibility for the safe custody of this information and for having in place the appropriate and sufficient technical and

organisational measures to protect it. The number of people who knew about and saw the report should have been reduced to the bare minimum. The Committee expects the Government to have undertaken a thorough review and implemented demonstrable measures, including any recommendations from the ICO, to minimise the risk of this ever happening again.

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

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

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

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

The Judicial Review

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

The Committee considers that the major flaw in the conduct of this judicial review was the significant failure to identify all the relevant documents at the outset of the judicial review in August 2018. It is inexplicable that these were not identified by October 2018 when the issue of prior contact was identified as a concern by counsel. The process for recovering of documents was fundamentally flawed and contributed to the awarding of the maximum expenses to the Petitioner. This also doubtless prolonged the length of the judicial review process.

The Committee accepts that the Scottish Government is entitled to decide whether to proceed to continue to defend a petition for judicial review so long as it believes in the merits of doing so. It is for Ministers to make any such decision informed by advice from the Law Officers. The Committee does not call into question the opinions of Counsel or the Law Officers

The Committee also acknowledges that decisions as to whether to continue defending a petition for judicial review is, at the end of the day, a matter of judgement, informed by legal advice but also by the wider public interest, particularly in the case of any public body. The Committee cannot stand in the shoes of the Scottish Government and pretend to make such a decision.

The Committee does, however, note that from 31 October, substantial concerns were being expressed by Counsel as to the prospects of success in relation to the challenge under paragraph 10 of the Scottish Government's procedure on handling harassment complaints. These concerns related to both the interpretation of paragraph 10 as well as the possible violation of paragraph 10 if prior contact were to be found to have the meaning suggested by Counsel. The Committee acknowledges that the opinion of law officers until at least the 11 December 2018 continued to be that the Scottish Government should defend the case.

The Committee acknowledges that had the petition been conceded earlier, it is an open question as to whether the complainers would have been willing to make renewed complaints following any adjustments that the Scottish Government might have made to paragraph 10. The complainers were not consulted on this at any stage leading up to the concession, although the Committee notes the complainers concerns about resubmitting their complaints following the Scottish Government's concession. It is also an open question as to whether the Petitioner may have lodged a fresh petition. These and other considerations may have been in the minds of the Scottish Government at the time.

However, the Committee notes that had the Scottish Government identified all relevant documents and complied fully and promptly with its duty of candour at an early stage, the prior contact that had already been identified by 31 October 2018 and which was subsequently to prove fatal due to the failure to disclose key evidence, would have been brought fully to the fore.

By 31st October, senior external counsel had concluded that the Government would likely lose the judicial review. That assessment only worsened as the case progressed and prior contact between the investigation officer and complainers emerged. The Committee is also concerned that the First Minister decided to proceed with the judicial review despite clear advice that it would likely fail.¹

The key people involved in the investigation were known. It was obvious by this time that the prior involvement of the Investigating Officer was a fundamental issue. Therefore, the Committee cannot understand why the Scottish Government did not recognise there needed to be a full interrogation of all electronic devices belonging to that individual, regardless of what they believed the search criteria to be.

The Permanent Secretary outlined in evidence^{vii} improvements that had been made to its processes for interrogating corporate information and in a letter of 20 November 2020, stated that a review of corporate information management processes for storage, retrieval and deployment of corporate information was underway and was due to report in December 2020.

The outcome of this review should be published and, if not carried out as part of this work, the Scottish Government should review its compliance with its duty of candour, understand how a Commission and Diligence came to be required, how the Government responded to it and its governance arrangements.

The Committee concludes that the Scottish Government was responsible from an early stage for a serious, substantial and entirely avoidable situation that resulted in a prolonged, expensive and unsuccessful defence of the Petition. The Committee finds that this state of affairs is unacceptable by an organisation such as the Scottish Government and that those responsible should be held accountable.

The Committee is conscious that the Permanent Secretary's office was identified as coordinating the supply of information for the judicial review and that the Permanent Secretary was one of a few people who had been aware of the prior contact of the Investigating Officer. It must be questioned why the Permanent Secretary in her role and with her knowledge did not ensure that the relevant information was extracted and processed at a much earlier stage. This individual failing is as significant as the general corporate failing already described.

¹ This paragraph was agreed to by division: For 5 (Jackie Baillie, Alex Cole-Hamilton, Murdo Fraser, Margaret Mitchell, Andy Wightman, Against 4 (Alasdair Allan, Linda Fabiani, Stuart McMillan, Maureen Watt)

The Committee's view is that the Scottish Government's procedure for and handling of document disclosure during the judicial review proceedings was seriously flawed and it was this significant failure to disclose documents – in the run up to and following counsel's urgent note of 31 October 2018 – and to allow statements to be made to the court that all documents had been disclosed when they had not been that led to the awarding of costs at the level set out above.

As the most senior civil servant, we recognise that the Permanent Secretary has the responsibility and accountability for the Scottish Government procedure on the handling of harassment complaints and the implementation of that procedure. However, given her role and interest in the procedure and in the investigation of the complaints, the Committee suggests it might have been a wiser course of action to involve, on a more formal basis, other senior staff (for example Directors General) in the decision-making process for the judicial review.

The Committee notes that the procedure still appears to be live and in operation. It can be found on the [Scottish Government website](#) with no indication that it has been suspended. However, we understand that it has not been used following the experiences of Ms A and Ms B. This may be because individuals are understandably reluctant to use the procedure, given what occurred. The Committee believes that there should be no barrier to staff raising concerns and progressing them to formal complaints if they so wish. It is for the Scottish Government to consider how it would deal with such concerns in light of the challenge to its current procedure following the experiences of Ms A and Ms B.

Furthermore, whilst the Committee appreciates that Laura Dunlop's review has been underway and has only recently reported, it fails to understand why the Scottish Government has not made any changes to the procedure in relation to the role of the Investigating Officer to date^{viii}. At the very least, the Committee believes that further guidance should have been drawn up on the interpretation of paragraph 10 of the procedure to avoid the same mistakes happening again should someone else have come forward.

To avoid this happening in the future, the Committee's view is that the Investigating Officer should be someone who has not been previously involved in any way with the complaints. The Committee is dismayed that senior officials did not see that having someone investigate the complaints who had provided support to those women when they first raised concerns was problematic and could lead to challenge.

While this could present challenges for a small organisation, the Scottish Government is a large organisation where it should be possible for someone with the relevant experience to conduct the investigation who has not been previously involved in providing support to the complainers.

Scottish Ministerial Code

As such, we ask that the First Minister responds favourably to our request to revise and strengthen section 1.7 of the Ministerial Code. In particular we recommend that in the future the independent advisers should be invited to review the referred actions against the Ministerial Code as a whole rather than being invited to consider specific sections.

We also note that there may be a general requirement to amend the Ministerial Code as a result of the outcome of this inquiry and the work carried out by James Hamilton and Laura Dunlop QC. We recommend that the First Minister gives consideration to a full review of the Ministerial Code with a view to considering what changes are required.

The Committee seeks the Scottish Government's commitment that, once it receives Mr Hamilton's report, it will be published as soon as possible, and certainly in advance of 24 March 2021 (assuming it has been received by then). The Committee appreciates that the Scottish Government must make certain legal checks before publication, but we stress that these should be undertaken as a matter of urgency. The Committee notes that the First Minister responded "yes" [when asked at First Minister's Question Time](#) on 3 March 2021 if the Scottish Government would release Mr Hamilton's report on the day it was handed over.

For all these reasons, the Committee believes that James Hamilton's report is the most appropriate place to address the question of whether or not the First Minister has breached the Scottish Ministerial Code.

Overall Conclusions

The Scottish Government must have policies and procedures in place to tackle and eradicate sexual harassment in the workplace.

Scottish Government employees must have the confidence to be able to report inappropriate behaviour and to know that they will be taken seriously. Complaints must be dealt with fairly, sensitively and robustly regardless of who is being complained about.

It was right that the Scottish Government reviewed its procedures; indeed, it would have been extremely remiss if they had not. It is clear there was a determination to change the culture of the organisation and to ensure everyone is treated with dignity and respect.

However, two women brought forward complaints and they were badly let down. This was a policy and procedure in which they should have had confidence. Instead, their complaints were thrust into the public domain in a way they could never have imagined, through the leaking of the allegations, a subsequent judicial review and ultimately this inquiry.

These were the first complaints to be taken forward under this new procedure and they were significant in terms of the person being complained about. It was imperative that everything was done to make sure that the procedure was robust and fair and just as importantly, seen to be robust and fair.

However, fundamental errors were made which called the procedure into question. These errors were compounded by the way in which the judicial review was dealt with by the Scottish Government. This resulted in over £500,000 of public money being spent on defending a judicial review that ultimately had to be conceded.

However, this is not just about procedures or public money. It is about ensuring that in the future, anyone complaining about sexual harassment is not let down in the way these women have been.

We know that Laura Dunlop QC has concluded her review of the procedure and made recommendations. We also know that neither Ms A or Ms B were asked about their experiences as part of this. Therefore, we think the Scottish Government should give them the opportunity to comment on the recommendations of that review.

Having robust policies and procedures in place is only one side of the equation. Equally important is that the culture and leadership of any organisation is such that people feel able to come forward. The Scottish Government must be clear about what behaviour is acceptable and not acceptable in the workplace and make sure people feel able to call out inappropriate behaviour and know their complaints will be dealt with seriously and sensitively.

Wider reflections²

The process of this Inquiry has been unsatisfactory for all the reasons set out at the beginning of this report. The Committee believes that it is the duty of Government, in the wake of serious failings, to be open and candid with Parliament and to publish all relevant material and an account of what went wrong in a case such as this. Parliament, if it so wishes, can then scrutinise the matter. To leave it to a Committee to have to drag information out of Government and other bodies is a wholly unacceptable response to the accountability that is meant to exist by the executive to Parliament³

The Committee's inquiry has been constrained by the circumstances set out at the beginning of this report. Had there been full disclosure of all relevant information at the outset of this Inquiry, our job would have been easier, our task accomplished quicker and our conclusions more comprehensive. If such inquiries in future are not to be afforded such full disclosure, then the Committee believes that only a judge-led inquiry would have the powers to investigate matters to the full extent.

The events involved also highlighted the dual role of the Lord Advocate as legal adviser to the Scottish Government and head of the Crown Office and Procurator Fiscal Service. This was placed firmly in focus by the handing over of the decision report by the Scottish Government to the Crown Agent. As described by the Lord Advocate^{ix} this involved the Lord Advocate acting as an adviser to Ministers, and as the conduit to the Crown Agent in order to ensure appropriate handling arrangements were put in place. The Committee has no question that this process was managed with integrity and professionalism, but it provides a good example of a long-standing tension in the Lord Advocate's dual roles. The Committee notes that public perceptions are important in this regard and seeks reassurance that the existing arrangements continue to command confidence in the independent exercise of these two important roles.

The experience of our committee, particularly in respect of its efforts to obtain Government legal advice, suggests that the Parliament may have insufficient powers to hold the executive to account. The Committee recommends the establishment of a commission to review the relationship between the executive and the legislature and make recommendations for change.

ⁱ [Report of Laura Dunlop QC's review of the Scottish Government procedure on the handling of harassment complaints involving current and former Ministers](#), paragraph 8.60

ⁱⁱ [Dunlop review report](#) 11 March 2021, paragraphs 8.28-8.29. Recommendation 6 introduces the idea of a screening step in the investigation of complaints.

² The inclusion of this section was agreed to by division: For 5 (Jackie Baillie, Alex Cole-Hamilton, Murdo Fraser, Margaret Mitchell, Andy Wightman, Against 4 (Alasdair Allan, Linda Fabiani, Stuart McMillan, Maureen Watt). Alasdair Allan, Linda Fabiani, Stuart McMillan and Maureen Watt disagreed with the inclusion of this section on the grounds that it is not in the Committee's remit, there was no evidence to draw on and it detracted from the overall conclusions

³ Paragraphs 730 to 733 were agreed to by division: For 5 (Jackie Baillie, Alex Cole-Hamilton, Murdo Fraser, Margaret Mitchell, Andy Wightman, Against 4 (Alasdair Allan, Linda Fabiani, Stuart McMillan, Maureen Watt)

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

iv [Dunlop review report](#) 11 March 2021, page 4. Recommendation 8: Anyone involved in factual investigation to any extent of a complaint against a Minister should be free of prior involvement with any aspect of the matter being raised and should have no close association with either party before or during the investigation.

v [Dunlop Review report](#), 11 March 2021 paragraphs 8.15-8.17

vi [Dunlop Review report](#), 11 March 2021, paragraph 8.21

vii [Official Report](#), 17 November 2020, column 64

viii [Dunlop Review report](#), 11 March 2021

ix [Official Report](#), 2 March 2021, column 26-27