



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Finance and Public Administration Committee

**Tuesday 25 January 2022**

**Session 6**



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**FINANCE AND PUBLIC ADMINISTRATION COMMITTEE**

**3<sup>rd</sup> Meeting 2022, Session 6**

**CONVENER**

\*Kenneth Gibson (Cunninghame North) (SNP)

**DEPUTY CONVENER**

\*Daniel Johnson (Edinburgh Southern) (Lab)

**COMMITTEE MEMBERS**

\*Ross Greer (West Scotland) (Green)

\*Douglas Lumsden (North East Scotland) (Con)

\*John Mason (Glasgow Shettleston) (SNP)

\*Liz Smith (Mid Scotland and Fife) (Con)

\*Michelle Thomson (Falkirk East) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Lesley Fraser (Scottish Government)

Ian Mitchell (Scottish Government)

John Swinney (Deputy First Minister and Cabinet Secretary for Covid Recovery)

**CLERK TO THE COMMITTEE**

Joanne McNaughton

**LOCATION**

The Robert Burns Room (CR1)



# Scottish Parliament

## Finance and Public Administration Committee

Tuesday 25 January 2022

*[The Convener opened the meeting at 10:00]*

### Implementation Plan Progress and Updated Complaints Procedure

**The Convener (Kenneth Gibson):** Good morning, and welcome to the third meeting in 2022 of the Finance and Public Administration Committee. This morning, we will take evidence from the Deputy First Minister and Cabinet Secretary for Covid Recovery on progress in delivering the actions in the Scottish Government's implementation plan from June 2021, which is part of its response to the findings of three recent harassment investigations, and an updated complaints procedure for handling formal complaints by civil servants regarding the behaviour of a minister or former minister.

The Deputy First Minister is accompanied, from the Scottish Government, by Lesley Fraser, director general corporate; and Ian Mitchell, deputy director for propriety and ethics.

Today's scrutiny falls within the public administration element of the committee's remit. The evidence session will therefore focus on the lessons that have been learned, the actions that have been taken and the progress that has been made by the Scottish Government in response to the findings of the three investigations that concluded last year, rather than on revisiting the events that led up to them. We have about 90 minutes for the discussion.

I welcome the Deputy First Minister and his officials to the meeting. I thank him for advance sight of his opening statement, and I ask him to put those remarks on the record.

**The Deputy First Minister and Cabinet Secretary for Covid Recovery (John Swinney):** Thank you, convener. I welcome the opportunity to appear before the committee.

In June last year, the Scottish Government set out its response to the review by Laura Dunlop QC, the investigation by James Hamilton and the report by the Scottish Parliament Committee on the Scottish Government Handling of Harassment Complaints. At the heart of those reports were complaints from two women concerning the unacceptable behaviour that they experienced

while carrying out their duties as civil servants. The Scottish Government apologises unreservedly to the two women we let down, and it is only right that we ensure that the lessons that we have learned are put into practice.

In the development of the updated procedure for making a formal complaint about the behaviour of a minister or former minister, we are determined to build a culture in Government in which concerns are addressed early and in which all those who are involved with a complaint have confidence and can engage constructively and fairly in the process.

Since the publication of our response, we have put significant effort into engagement and into updating the procedure. We have worked in partnership with our trade unions, and we have listened to those with lived experiences of bullying and harassment. Careful thought and detailed work have been put into the procedure's development, and we have drawn on the three reports' findings, professional perspectives and lessons that have been learned within the Scottish Government.

During this time, we have also made progress on the wider context in which the procedure fits. We have invested in the routes to support and the alternative resolutions that are available to staff where appropriate. I am deeply grateful to all the people who have worked on and contributed to the procedure that we will discuss today.

I believe that the procedure is fair and robust. It is crucial in helping us to build a positive and respectful culture in which there are the highest standards of behaviour, in which productive working relationships are valued and nurtured, in which bullying and harassment are not tolerated and, crucially, in which there is trust in how matters will be handled if things go wrong.

We have deliberately dedicated more time to engagement on the procedure. Having listened to stakeholder feedback, including external perspectives, we are publishing our progress to Parliament as a first phase of improvement and as part of a wider programme of work. We are presenting the procedure with a short period of time to offer a further phase of engagement with staff, trade unions and Parliament before it comes into operation in February.

Important as the updated procedure is, it will not in itself lead to the change in culture and behaviour that we want to see; it is a matter of continually improving. The necessary improvements go beyond the updated procedure. We have been responsive to that and have set out a comprehensive range of actions to apply the insights from the reports. The specific activities that are highlighted in the implementation plan

have been completed, but the work does not stop there. We will continue to apply insights from the lessons that we have learned to ensure that we build a positive culture that values inclusion and supports staff wellbeing.

I assure the committee that ministers are committed to fulfilling our responsibilities in building a culture of mutual respect between ministers and officials. Such relationships require on-going care and attention, being clear on standards of behaviour, promoting the best relationships and being open and honest at an early stage when there is a sense that relationships might be strained and we might be in danger of falling below our high standards.

Above all, we must ensure that we have a safe and respectful working environment, and I believe that our work in the months since the conclusion of the inquiry and the reports has laid a strong foundation for that to happen.

**The Convener:** Thank you very much for that opening statement. In a relatively short statement, you mentioned on three occasions that the lessons that have been learned have been put into practice. The committee and I are well aware that we are in the middle of a process, but what specific lessons have been learned so far?

**John Swinney:** I will highlight the crucial lessons that have been learned. First, there is a need for a clearly articulated policy approach for the handling of any complaints that arise. A great deal of thought and care has gone into consideration of the relevant issues and how they should be handled and expressed. That information is in front of the committee. As I stressed in my opening remarks, we have shared it with Parliament at this stage, but it is not the final product. There is still space for us to reflect on any points that the committee raises with me, and there is on-going discussion with recognised trade unions and with staff.

The second lesson that we have learned is the importance of ensuring that, should any issues arise, they are addressed promptly and early. That might be by means of informal resolution, which is one option in the handling of such matters. However, if that is not practical or possible, as I have just expressed, there will be a policy through which we can refer the matter and have it handled.

Thirdly, it is necessary for there to be independent decision making at every stage of the process.

The final lesson is that we must all dedicate our energies to creating a respectful working environment in which relationships between ministers and officials are appropriate for all circumstances.

**The Convener:** Culture was mentioned often in your statement. You said:

“we are determined to build a culture in Government in which concerns are addressed early and in which all those who are involved ... have confidence and can engage constructively and fairly in the process.”

What difficulties were there prior to the new process? What changes have been made?

**John Swinney:** The comments that I have put on the record are a recognition of what everybody who is involved in the activity, whether they are a civil servant or a minister, should expect. The culture in which tasks in public office are undertaken must follow the style and approach that I talked about in my opening statement. That is the focus of our thinking and activity. My contention is that many such elements and foundations are deeply ingrained in the operation of the civil service and of Government, but we must ensure that it feels like that for absolutely everybody. In all circumstances, that must be the experience of individuals who work in that environment. We are committed to ensuring that that is the case.

**The Convener:** Throughout the process, what steps have been taken to ensure that the procedure is lawful and conforms to natural justice?

**John Swinney:** Those are essential elements of the character and nature of any policy approach. It is critical that both those tests or maxims are properly followed in how the policy is exercised. To achieve that, we have sought detailed advice on employment and public law.

There is not always a neat compatibility between the requirements of employment law and the requirements of public law, so there is a need to essentially reflect on those streams of thinking in arriving at a rounded policy approach. In my judgment, I have presented to the committee an approach that takes due account of protecting the employment rights of individuals and ensures that those are handled in the appropriate public law environment that allows natural justice to be properly taken into account in any aspect of the decision making. For example, there is an appeals mechanism in the policy that might not be present to the extent that it is present in this policy in an employment law situation, but to take due account of the public law issues, I consider it to be safer to have that appeals mechanism to the degree that it is in the policy, to address the fundamental issue that you put to me, convener.

**The Convener:** In relation to the procedures for making a formal complaint, there is no time limit in relation to complaints of harassment, but there is a time limit of six months in relation to complaints of bullying; why is there a difference?

**John Swinney:** Essentially, it is to recognise that, in relation to issues of harassment, it may take longer to get to a position where an individual is able to address those issues and come forward to raise concerns. In relation to issues of bullying or any other behaviour that is judged to be unacceptable, my view is that it is possible to address those in a timeous fashion, because that will have a direct bearing on the ability for tasks and functions to be exercised appropriately and effectively.

**The Convener:** Why did you decide on six months instead of three months or a year, for example? Is there a specific reason?

**John Swinney:** Ultimately, convener, there will be a judgment about the appropriate timescale. Three months feels to me to be a bit abrupt and a year feels a bit too long, so six months feels like an appropriate judgment to come to.

**The Convener:** Thank you for that clarification. Are the definitions of bullying and harassment that are detailed in the ministerial code and for staff who work with ministers clearly explained to ministers and civil servants, and will they be updated as the procedures develop?

**John Swinney:** It is important that there is proactive engagement with staff and ministers on the appropriate culture of mutual respect. I would address that question in a different fashion, convener, by referring to the proactive work that is being undertaken. We saw that with the ministerial induction programme that took place post-election to make sure that ministers were aware of what was expected of them in terms of their conduct and behaviour. We also saw that with the wider roll-out to staff of the culture of mutual respect that we believe is essential. That is undertaken in a way that promotes best practice rather than working by definition in the fashion that you put to me. My response to that point is to indicate that we need to invest our energy in ensuring that there is a culture of mutual respect between ministers and staff, in which productive working relationships are valued and nurtured and we are all aware of what good practice is and follow it at all times.

**The Convener:** It is clear that all parties that are involved in the process are expected to maintain confidentiality at all times, including when the process has concluded. The rights of staff are protected from detriment if they have made a qualifying disclosure known as whistleblowing. What constitutes a breach of confidentiality and what is considered to be whistleblowing?

10:15

**John Swinney:** Whistleblowing covers the entitlement of members of staff to raise their

concerns without fear and favour, so that the concerns can be addressed. That is what the policy is designed to do, if necessary.

The requirement to maintain confidentiality is about creating an appropriate climate and a trusted and respectful environment in which genuine issues can be properly aired, addressed and resolved.

**The Convener:** The procedure will consist of potentially five stages. The first is named "Initial contact and assessment", the second is named "Investigation" and the third is named "Decision". Should the decision find against the minister in question, there will be a fourth stage named "Employer Action" and a potential fifth stage named "Appeal". Given that there would undoubtedly be stress on both sides in such a process, what steps will be taken to ensure that a robust process is carried out timeously? Although each case will be different, what sort of timescale is envisaged for completion of the process?

**John Swinney:** It is difficult to be precise, but the process is set out in a fashion to encourage the swiftest movement through each stage, while giving individual parties the appropriate time to formulate their views. For example, it is envisaged that the initial contact and assessment stage, in which the Government judges whether a complaint is within the scope of the policy, will be undertaken very timeously. An individual member of staff would not wait a long time to hear whether the issue that they were concerned about would be considered under the auspices of the policy.

Each stage is designed to move at pace, because it does not serve the interests of anybody for there to be anything other than a swift addressing of any issues that emerge.

**The Convener:** According to the draft procedure,

"For complaints which are not upheld, this could include actions to resolve remaining issues informally or other management actions."

What sort of actions would be contemplated?

**John Swinney:** Again, it is difficult for me to be precise. I refer back to the desire to create a mutually respectful environment in which ministers and staff work. Specific and appropriate steps to ensure that that approach was being applied in all circumstances would be at the heart of any remedial action that was required under the policy.

**The Convener:** I have a final question before I bring in colleagues around the table. You wish to have the process in place—more or less, but not fully—by the end of this year. Why will it take such a long time? I realise that culture might not change, but surely processes can change a bit more quickly than that.

**John Swinney:** My proposal is that the policy process should be in place by the end of February—the end of next month—provided that we are satisfied that we have addressed any issues that come from the further round of consultation and dialogue that we are undertaking.

There are a range of other aspects in the schematic diagram that has been provided to the committee. The diagram shows other work that is under way to tackle some of the deeper cultural questions across the organisation. That work will take slightly longer, but the policy process will be in place by the end of February, provided that we are satisfied that we have addressed all the issues that are raised with us.

**The Convener:** The schematic diagram to which you referred says that, for example, building “complaint investigation capability, to ensure confidence of those participating”

and

“Staff training on grievance policy and best practice refresh”

will not be achieved until December this year, so there are still a number of steps to be taken. There are other issues to be addressed beyond December, such as a

“Review of the processes in use, including Propriety & Ethics”.

Do you envisage that the process will not end as such and that it will be about continuous development?

**John Swinney:** That has to be part of our approach to ensuring, on an on-going basis, that we are a good employer, and that we follow best practice and put in place the arrangements that we have set out for all staff and ministers.

**The Convener:** I am sure that colleagues will want to explore in more detail some of the issues that we have touched on. I open up the session to Liz Smith, to be followed by Daniel Johnson.

**Liz Smith (Mid Scotland and Fife) (Con):** Good morning, Mr Swinney. I have two questions for clarification. In an answer to the convener, you mentioned that, following the election, ministers go through an induction period. Who carries out that induction?

**John Swinney:** It is carried out by civil servants in the Scottish Government.

**Liz Smith:** Secondly, I would like clarification of what happens in an appeal process, should that arise. You mentioned that if there was to be an appeal, an external person who has no involvement with any aspect of the complaint would be brought in. Who would make the decision on appointment of that external person?

**John Swinney:** That decision would be made within the management function in the Scottish Government. The Scottish Government has to handle the administration—if I can use that term—of the complaint, and that aspect is literally an administrative handling function. It would be done within Ian Mitchell’s propriety and ethics team, which would apportion a case to a panel of external investigators and adjudicators.

We are currently recruiting—my officials will correct me if I am wrong—five external investigators and five external adjudicators. From that panel, the Scottish Government propriety and ethics team will select individuals. Crucially, at each stage in the process, the same person cannot revisit detail of the previous stages. If the case came to appeal, the individual who was selected to handle the appeal would be a different individual from the one who had taken an earlier decision in the case.

**Liz Smith:** Would you agree that the process is crucial in trying to ensure that there is trust? It is vital that everybody who is involved trusts that the system is robust and that, should there be an appeal, the external appointment is completely objective and not biased at all, and the appointed person has not previously been involved in the case.

**John Swinney:** That is crucial at every stage of the proceedings—not just at the appeal stage. The investigation stage, for example, will be carried out by an investigator, and their report will be passed at stage 3 to a decision maker, who will be a different person. If there is to be an appeal, it will be handled by another, entirely different, person. That fundamentally recognises the importance of ensuring that individuals have no prior involvement at any stage of proceedings as the issues are properly addressed—not only to address the issue of trust but to guarantee independence and transparency.

**Liz Smith:** That would be very welcome, because there is an issue in politics with trust—it is not necessarily to do with the Scottish Government—and ensuring that the public can trust a political process in which somebody is quite clearly guilty of alleged offences. Public trust in politics is crucial; we are currently seeing that play out in various domains.

**John Swinney:** Lesley Fraser or Ian Mitchell will set out the process that is being undertaken to recruit the panel of five independent adjudicators and five independent investigators. Perhaps Ian can provide some detail on that.

**Ian Mitchell (Scottish Government):** As has been said, a key feature of the process is that there is external independent investigation of the case and that the decision maker is also

independent. That has been the central feature of the scheme. We looked at various options for achieving that independence, and we decided to go down the public appointments route and to appoint, against a number of criteria, a pool of investigators and a pool of decision makers. The reason for the pool is obvious—it is about needing to have different people involved at different stages.

The individuals were interviewed by a panel that included non-executive directors and trade unions. A central feature of the process—it continues to be central, and we are still doing it—is employment checks to ensure that individuals can be as impartial and independent as possible. In Scotland, an individual may, in the past, have had contact with MSPs, ministers and public sector life, but we make it clear in the guidance that there should be no prior involvement with any aspect of the matter that is being raised, and no association at all with the person who is making the complaint. That is an administrative judgment—as Mr Swinney put it—that the Scottish Government and its propriety and ethics team will retain. We will ensure that the people who are selected from the panel have the necessary independence. As the Scottish Government, we will not be involved in aspects of establishing the facts or coming to a conclusion on those facts.

**Liz Smith:** That is very welcome.

Some people might feel that they have been harassed or bullied, or discriminated against. It is important, in order for them to be able to come forward relatively quickly, that there is trust and a line of independence. If it is felt that that is not there, that makes it all the more difficult for people to come forward, so I thank you for clarifying that.

I have one further question for you, Mr Swinney. Stage 4 of the draft procedure states:

“Where a complaint about a former Minister is upheld, the Permanent Secretary or delegate will consider steps to review practice ... This may include sharing structural lessons with the First Minister”.

Can you expand on what is meant by “structural lessons”? I am not quite sure what that is.

**John Swinney:** That might mean identification of aspects of procedure or working practice that need to be addressed as a consequence of a case. It essentially puts the onus on us—I referred to this in my response to the convener—to constantly improve how we operate as an organisation in order to ensure that no opportunity to learn lessons is missed in the handling of an issue.

**Liz Smith:** For absolutely clarity, is that about the structure of the process or the actual process itself?

**John Swinney:** It is about any aspects of working practice. That would be the best definition to use.

**The Convener:** I will bring in Daniel Johnson.

**Daniel Johnson (Edinburgh Southern) (Lab):** Thank you, convener. I apologise for not being able to attend in person this morning.

I begin by asking about how the policy will be reviewed and maintained. One would hope that, by its very nature, it would be seldom used. However, such things are often left on the shelf and are sometimes, therefore, creatures of their context and time. It is imperative that the policy be proactively reviewed and renewed on an on-going basis to ensure that it is appropriate for its current time. What thought has gone into that? How will the procedure be reviewed on an on-going basis?

10:30

**John Swinney:** That is a fair point. I like to think that the procedure will never be used; I hope that we have a culture that avoids the necessity to use it.

However, if, as I hope, the procedure is seldom used, there is a risk that it will not be given the necessary focus of review. Therefore, we are building into the work that is undertaken a focus on continuous improvement. We want, through our dialogue with staff trade unions and staff representatives, to identify issues. Given the volume of open dialogue and communication on the policy approach that we are taking, it is appropriate for me to thank the staff trade unions, which have contributed a huge amount of time to helping us with development of the approach.

One of the lessons that we have learned is about how important a constant channel of open communication is to ensuring that we take the right policy approach. That will be the focus of our work to review the procedure.

**Daniel Johnson:** My second question is about the outcome of the procedure. I understand that the focus of the procedure is about establishing fact and doing so in a transparent, robust and independent way, but is it purely focused on that narrow outcome? To what extent is there also a need to establish the severity and seriousness of what is complained about? Does the process address that sufficiently?

**John Swinney:** I think that that issue is addressed. It is addressed at all stages of the procedure, but it is addressed at stage 4 in particular.

As a serving minister, I would be horrified and mortified—there are various other words that I would use—if I were to be involved in the

procedure. Therefore, there is a necessity for ministers to operate in a respectful fashion at all times.

Stage 4 of the procedure clearly delineates the relationship between an outcome of the process, whereby a report finds fault with the conduct of a minister, and the ministerial code. At the moment, there is a lot of debate about the conduct of ministers and how that relates to the ministerial code, but as a serving minister, I constantly consider the necessity of my acting in a way that is consistent with the requirements of the ministerial code, because I know that that is the standard against which I will be judged. That is why the procedure that we are discussing must establish a relationship with the ministerial code.

I do not want to get into all the other debates that are going on elsewhere, but—this goes back to the point that Liz Smith made—there has to be accountability around the conduct of ministers, and that is driven by the ministerial code. Therefore, a complaints-handling process must have a relationship with the ministerial code when it comes to the conduct of ministers.

**Daniel Johnson:** I thank the Deputy First Minister for that answer and completely accept the sincerity with which he has given it, but I have to wonder whether this is the key tension in the process.

Ultimately, decisions on whether the ministerial code has been broken will be made by the First Minister or the Deputy First Minister, for a serving minister, but there are two or three issues with that. First, it is almost impossible for a serving First Minister to deliver a decision on one of their own ministers without the pressure or filter of political reality entering into it. Does not that make exceptionally difficult the independent decision making that the Deputy First Minister correctly identified as being important to this? I wonder whether it places too much pressure on the decision maker.

Secondly, the processes are required not only to be robust and transparent but to be seen to be so. If a First Minister is to make the final decision on one of their own ministers, is it possible for the public to see that as robust?

Thirdly, in her recommendation 10, Laura Dunlop says:

“complaints against a former Minister should be investigated and adjudicated ... independently.”

I wonder whether that final decision making on the breach of the ministerial code, which ultimately is an adjudication, is actually independent at that point, and whether that is a flaw in the process. I understand why, ultimately, you might wish for the decision to be made by the First Minister. I

understand the argument in that respect—because of the democratic process, the First Minister has to be the final decision maker—but I wonder whether the procedure adequately addresses those three flaws.

**John Swinney:** I would not describe the three points that have been raised by Mr Johnson as flaws. Instead, I would describe them as three essential points that are at the heart of the conduct of ministers and how they are expected to act. Ultimately, ministers hold office only because they are appointed as a result of the First Minister's recommendation, the Parliament's vote and, subsequently, Her Majesty the Queen's approval. Fundamentally, though, it is the First Minister who appoints individuals.

The ministerial code is anchored in the choice of ministers being a prerogative of the First Minister and, ultimately, in the First Minister's judgment of an individual's suitability to be a minister. That is why the policy and the ministerial code need to conjoin at some point, as they do at stage 4.

The decision making in the process is entirely independent. If a complaint goes forward, there will be an independent investigation and an independent decision, and a report will be passed to the First Minister, who is charged by Parliament—in fact, by the Scotland Act 1998—to select ministers. As a result, that relationship has to be in place. I think that independent adjudication of an outcome is incompatible with the process of ministerial appointment, which is by virtue of decisions of the First Minister. Obviously, the First Minister's expectations with regard to the conduct of ministers are set out in the ministerial code.

The policy is designed to ensure that we can have a completely independent process, so when the process reaches the First Minister, there has to be a relationship with the ministerial code, which I think is intensely understood by all ministers as being a requirement for their personal conduct.

**Daniel Johnson:** I thank the Deputy First Minister for his answers.

**The Convener:** Thank you, Daniel. That was the first question that I was going to ask as well, but the Deputy First Minister is absolutely right that the First Minister appoints ministers, so if a minister has broken that code and been seen to do so, or has been involved in issues such as we have already discussed, the likelihood of their being able to survive in post is zero, I would have thought. Let us move on.

**John Mason (Glasgow Shettleston) (SNP):** Maybe I can pursue that a little further, because I was also thinking along those lines. The draft procedure says that it will be for the First Minister

“to decide on the appropriate response.”

Later, it says:

“The First Minister may wish to consider any lessons relevant to ensuring awareness”.

At first reading, that struck me as being a bit weak. I take your point that it is the First Minister’s decision, but would it be right to say that Parliament has the ultimate decision on that? You have experienced the concept of a vote of no confidence.

**John Swinney:** Thankfully, it was unsuccessful.

**John Mason:** Absolutely. However, if there was a blatant case in which it was found by the external system that somebody had been guilty of something and that the First Minister at the time had ignored that, could Parliament not still come in at that point?

**John Swinney:** Yes—of course.

**John Mason:** Therefore, ultimately, the First Minister does not really have the final decision.

As a more general question, in your opening statement, which the convener quoted, you talked about a culture in which people have confidence and can engage constructively. Later, you talked about having a positive culture. How far away are we from that at the moment?

**John Swinney:** I think that we are in a good place. I think that we have a good working culture in the Scottish Government. The environment between ministers and civil servants is appropriate and respectful. Through their actions, the permanent secretary and his team have the proper responsibility for the creation of the work environment. It might be appropriate for Lesley Fraser to talk a little about that, as the director general who leads on those questions. Fundamentally, I think that there is a good, respectful working environment. There is respect for the respective contributions of ministers and civil servants, and there is an understanding of and respect for the fact that civil servants advise but ministers decide. That advice is provided in the context that there should be no anxiety about the testing of advice, so that we can focus on the real, clear, substantive issues that need to be addressed and, as a consequence, the Government can take good decisions. Lesley might wish to say a little about that.

**Lesley Fraser (Scottish Government):** Yes, that is a fundamentally important point, and it is something that we keep under very regular review. For example, in our annual people survey, the vast majority of civil servants report that they feel that this is a respectful and good place to work, and most civil servants feel that they can challenge in this environment. We have seen those people

survey scores increase. I am not yet at a place where I would say that I am absolutely satisfied that we are there, because there is definitely more work to do. That is why we are looking across the piece at all the culture, systems and business practices that can help and support that.

In the course of the past year, we have rolled out training and awareness for managers and all our staff, in order to recognise areas for concern and identify particular groups of staff for whom the matter might be more difficult. As the Deputy First Minister has already said, the induction process that we brought in for all ministers who came in after the election has been very important and much more extensive than what we had done in previous years.

We have made structural changes. My own post as director general for corporate matters is new and offers an additional place where all these matters can come together without the permanent secretary being the sole point at which they would be handled. The creation of Ian Mitchell’s new directorate in propriety and ethics is also part of that recognition.

We have looked at other aspects of our governance as well and brought in external advisers to support me in some of the decision making. We are considering all the different aspects of culture and the systems that we have in place and looking at how we operate the business with the process of continuous improvement in mind.

10:45

**John Mason:** That is helpful.

Moving to more specific points, I note that the Deputy First Minister’s letter in the annex to paper 1 talks about “further engagement”, including, obviously, with the committee and specifically with the trade unions. Mr Swinney has already said that the trade unions have been involved. Is it fair to say that they are basically happy with the policy?

**John Swinney:** When we published the proposals, the trade unions made clear their public support for the policy, as it has been developed. However, I have other accountability, such as to the Parliament, to think about. It is important that the Parliament is able to express any views that it wishes to express. Were the Parliament to provide us, through the committee, with other issues that it judged should be addressed, we would obviously discuss those issues further with the trade unions.

**John Mason:** Under the heading “Where parties involved may be the victim of a crime”, the draft procedure states:

“No pressure will be put on a complainer to make any particular decision; if they do not want to tell the police, they do not have to.”

It goes on to say:

“the Scottish Government may have an obligation to bring the matter directly to the attention of the police.”

I do not quite understand how that works. Could you explain that point a bit?

**John Swinney:** This is perhaps not the best way to express it but, as an employer, the Scottish Government is not under an absolute duty to report to the police, in all circumstances, matters that it believes might be a crime. That duty is not statutory. However, for the purposes of ethics, if the Scottish Government considered that it had knowledge that a crime had potentially been committed, it would have to seriously consider referring that matter to the police, even if a member of staff—perhaps a victim of that alleged crime—did not want that to happen.

As a Government, we have a particular duty to uphold the rule of law. In those circumstances, we have to be candid with staff. Although staff might say that they do not have space in their lives for an issue to go anywhere near the police, the Government has to reconcile different considerations and is under an ethical duty to think deeply about whether reporting to the police is appropriate.

**John Mason:** The seriousness of the matter would largely be considered case by case.

**John Swinney:** Absolutely.

**John Mason:** That is fair.

The draft procedure contains different stages and processes, including that of “informing” the complainer

“that they may be accompanied by a trade union representative or work colleague.”

It struck me that there is no space for legal representation at that point. Could the person bring along a lawyer, or could the trade union decide that it might have a lawyer involved as part of its team?

**John Swinney:** We are anxious to ensure that matters are handled very much within the space of employment practice. Obviously, if an individual wishes to pursue some other grievance against the organisation, it might well be appropriate for them to have legal representation, but the setting of this policy is very much in the context of employment-related activity, where support for the individual’s employment or personal position is the prerequisite of the support that has been identified.

**John Mason:** So if somebody wanted to bring along a lawyer, that would—

**John Swinney:** I suppose that there is nothing to prevent them from bringing along a lawyer but, fundamentally, we are trying to set the process in the context of the resolution of the issues in an employment space rather than a legal space.

**John Mason:** I will move on to my final question. The table towards the end of the implementation plan says that an

“updated version of the Ministerial Code”

will be published

“within three months of publication of the updated Procedure.”

Is that still the target?

**John Swinney:** Yes. There is a natural sequence to these things. We have to do the part of the process that involves setting out the approach to complaint handling, and that then has to inform, to whatever extent is judged appropriate, the revisions to the ministerial code.

**John Mason:** Thank you.

**Douglas Lumsden (North East Scotland) (Con):** I want to talk a little more about the timings of complaints. It is clear from the procedure that, if a complaint is made within six months of an incident, it will be investigated. I want to ask about cases where complaints are made after that six-month period. From reading the procedure, it is not clear to me who decides whether the issue should be looked at. If it is decided that an incident will not be investigated because it has been too long since it occurred, will the appeal process kick in at that point, so that the complainer can take the issue further if they wish to do so?

**John Swinney:** At different stages in the procedure, we have tried to put in time factors to suggest pace and momentum around the process. Fundamentally, the issue that Mr Lumsden raises is a matter for stage 1, which I view to be a pretty routine administrative exercise to determine whether a complaint is within the scope of the policy as defined. If it is, it will proceed. If not, there is a designated process, which again is quite swift, for engagement with the complainer to set out why the matter is judged not to be in the scope of the policy.

I suppose that that is the moment at which, if the Government has missed something in the administrative process, the individual will be able to raise that. That is a sort of appeal. At the very beginning, if an individual has been told that we do not judge the complaint to be within the scope of the policy, they will have an opportunity to have an early conversation and to say that they disagree, and why. Obviously, there is the opportunity to revisit those questions, which could perhaps lead to consideration.

We have put in certain timescales depending on the nature of complaints. The convener raised with me the question of having a time limit for some matters and no time limit for others. That is simply to try to ensure that we are respectful to members of staff and the issues that they may wish to raise, but also that issues are resolved as quickly as possible.

**Douglas Lumsden:** If the six-month period has passed, who makes the decision on whether the matter will be investigated?

**John Swinney:** The decision would be taken at that early stage of considering whether the complaint is within the scope of the policy. However, the member of staff would have the ability to challenge that in a subsequent follow-up discussion.

**Douglas Lumsden:** But who makes that decision?

**John Swinney:** It would be made within Ian Mitchell's propriety and ethics team.

**Douglas Lumsden:** Inward secondees and agency workers are not covered by the procedure. I understand that there are reasons for that—they are not employed by the Scottish Government—but are there legal reasons why they cannot be covered by the procedure? Bad behaviour is bad behaviour, whether it is towards an employee or an agency worker. Is there almost a loophole being created by excluding such workers?

**John Swinney:** I do not think so, but I will reflect on that point. I agree with Mr Lumsden's fundamental point that bad behaviour is bad behaviour in whatever circumstances it manifests itself, so I will take that point away and reflect on it. My view is that this is, in essence, an employment policy about our employees. Let us say for argument's sake that a member of contracting staff who is temporarily in the organisation has an experience that they want to complain about. I suggest that that should be taken forward through their employment channel and by whoever manages their contractual relationship. The issue can be resolved in that way, because there might well be a contractual relationship between the Government and that external party. However, I will take that point away to consider it further.

**Douglas Lumsden:** Thank you.

My next question is on openness and transparency. From reading the procedure, it seems to me that a complaint could be made and upheld but that would never be made public. Is that right? It is difficult, because we have to respect the confidentiality of the complainer and the person who is complained about, but it seems to me that there is a balance there, and I am not sure that it has been struck.

**John Swinney:** Frankly, that is the dilemma. There are many legal considerations that we have to focus on, one of which is our duties in relation to the general data protection regulation, which obviously applies significant obligations on us in relation to how we handle information internally. In a sense, Mr Lumsden's question airs the dilemmas on the issue. However, having looked at all the various obligations, I think that the way in which the policy sets out the position takes due account of them.

**Douglas Lumsden:** My next question ties into that. At the end of stage 1, if a complaint is not going to be proceeded with, will the person against whom the complaint has been made ever find out that a complaint has been made?

**John Swinney:** If the matter is not proceeded with following stage 1, the person will not find out about that.

**Douglas Lumsden:** Thank you.

**Ross Greer (West Scotland) (Green):** I will start with a point of clarification on the process for potential updates to the ministerial code off the back of the procedure. The progress report that you submitted to the committee mentions that, from March, James Hamilton and Elish Angiolini will be asked to consider potential changes to the code. The paper notes that the timescale for that will very much be dependent on their availability. Does the Government have an indicative or preferred timescale within which it would expect to receive a response from both the independent advisers?

**John Swinney:** We hope to be able to operate within the timescale that I set out, but I suppose that I have to insert the caveat that we are dependent on a lot of dialogue with external parties, which might not come in the timescale that we envisage. Obviously, I will keep the committee updated on progress on those questions.

11:00

**Ross Greer:** Is it, on the timescale as outlined, the intention to have asked the advisers in March and to have received a response for consideration by June?

**John Swinney:** We hope to be in a position to complete any issues in relation to the ministerial code within three months of the formalisation of the policy. I hope to formalise it by the end of February, subject to the various views that we want to listen to, and then take the three months to resolve any issues with the ministerial code.

**Ross Greer:** I just want to follow up John Mason's questions about engagement with trade unions. It sounds as if that engagement has been good and has had the desired outcome, but has

there been any engagement with those who specialise in representing marginalised groups or those who are disproportionately likely to be on the receiving end of inappropriate behaviours? Given how we have ended up in this situation, I am thinking of groups such as Scottish Women's Aid or, in a different context, the Equality Network or Enable. Has there been any engagement with such organisations, which specialise in representing, in particular, groups with characteristics that are protected under the Equality Act 2010?

**John Swinney:** We have within our staff members a broad range of such characteristics. I might invite Lesley Fraser to say more about this, as it falls within civil service territory, but it is an active recruitment—or, I should say, personnel—priority for the Scottish Government to make our employment as diverse as we can. We have a number of networks in the organisation with which we regularly discuss staff matters; those discussions are conducted through civil service channels, and a huge amount of energy is taken up with ensuring that that dialogue is appropriate.

**Lesley Fraser:** As the Deputy First Minister has described, we have involved the staff networks, and their input has been incredibly important to us. I want to pay tribute to everyone who has contributed their own personal experience of being involved in any of our processes and procedures, because that direct experience has absolutely informed our development of the policy.

The DFM is absolutely right. We have put in place race and disability recruitment and retention plans that aspire to ensuring that the organisation of the Government fully represents the diversity of Scotland, and for us to be successful in that, we must have a culture and environment that everybody can bring their whole selves to and really thrive in. The openness and transparency that we are endeavouring to embed in this particular procedure lie at the heart of our approach.

We are also ensuring that we are regularly in touch with our trade unions. They are fantastic and are ensuring that they, too, are listening to those who are most likely not to receive appropriate behaviour. We are also listening to people through that route. We are looking at all the different ways in which we can increase our understanding and make appropriate responses precisely through procedures such as the one that is under discussion.

**Ross Greer:** Just for the record, can you confirm which staff networks were involved in the process? I am aware that the civil service staff network for LGBTQ people is very well thought of, but I personally am not familiar with the other staff networks that are active and engaged.

**Ian Mitchell:** I will make a couple of points. First, we are currently working on equality impact assessments. As part of that, meetings will be planned with all the equality networks, the protected characteristic groups and, indeed, the outlier offices, because often the culture in the central part of any organisation can be different from that in the outliers. Those specific meetings with the groups that I have mentioned will commence after the initial scrutiny phase. I will check and clarify this, but my understanding is that there have been meetings and engagement with the Scottish Women's Aid network.

**John Swinney:** We are happy to give Mr Greer and the committee a definitive list of the dialogue that has taken place.

**Ross Greer:** That will be very useful. Those are my questions for now, convener.

**Michelle Thomson (Falkirk East) (SNP):** I have four questions, all on slightly different areas, and I will add an extra one, because I want to go back to a point that John Mason made about making a police report.

I realise that the nature of the issue depends on the circumstances, but where it concerns sexual impropriety or worse, I am very clear that people make a complaint because they want to be heard, and not because they necessarily will take the steps that will result in the matter ending up in court. What active consideration have you given to the possibility that the Government's approach could have a cooling effect on complainants, which is completely the opposite of the intention?

**John Swinney:** That is a difficult question. There are dilemmas here; however, what I have to air is essentially the dilemma for Government. If the Government comes into possession of information that suggests the possibility of criminality, the Government, given its special role in society—like all of us, I believe fundamentally in the rule of law and the importance of Government acting within the law and supporting the exercise of the functions of the law—has to consider that very carefully. The specific position of Government is recognised as putting an obligation on Government to consider how to address such issues.

Therefore, although I completely understand the point that Michelle Thomson puts to me, I think that there also has to be an acceptance of the particular obligations that apply to Government in considerations that might have an issue of proximity to the exercise of the rule of law.

**Michelle Thomson:** I will press you on this issue a little. We know that loss of control over situations will be regarded by many as further abuse. Although I fully accept what you are saying from the point of view of Government, ethics—to

go back to that term—would require equal consideration of both sides.

I would also make the point that, in a circumstance such as that, the evidence tells us that there can often be a loss of cognitive capacity because emotion is running high. There is also a risk to the Scottish Government that, in taking the initial evidence where that might be the case, without necessarily saying, “You do realise that we could make a police report,” the chance of a successful or consequentialist ethical outcome could be diminished.

**John Swinney:** That is why, in my answer to John Mason, I indicated that a judgment has to be arrived at on a case-by-case basis. I am not, in any shape or form, saying that all matters must be referred to the police—I am expressly not saying that. I am expressly saying that we have to give consideration to that question on a case-by-case basis and that, in that judgment, we have to be aware of the particular obligations that Government carries to exercise its functions in a transparent and open fashion, given the information that comes into the Government’s possession.

**Michelle Thomson:** I fully understand the position that you are giving from a Government point of view, but, personally, I think that it would be beneficial to sit down and look at it from the exact opposite point of view, as well.

**John Swinney:** I will take that point away and consider whether we have the balance of that thinking correct. I come at this from the perspective of thinking about the extent to which there will be a public expectation that Government will act in the fashion that I have talked about, because of Government’s role. However, we will give further consideration to whether our thinking on that is in the right space, given the points that Michelle Thomson has put to me.

**Michelle Thomson:** I suppose that my issue is about agency for victims, to be specific.

**John Swinney:** I understand that.

**Michelle Thomson:** To go back to the issue of culture, culture is the hardest thing to change in any organisation. It is well understood in a programme management context that the process normally takes years and involves values-based frameworks, staff training and all the rest of it. The issue has been well covered, but I have not yet heard you reflect on the issue of changing culture in a hierarchical organisation, where there are particular considerations in relation to the balance of power.

I realise that that is a slightly technical question, but I would like to hear your reflections on culture

change in a situation in which there is a strict hierarchy, as exists in the civil service.

**John Swinney:** Hierarchy is not exclusive to the civil service. I am sometimes struck by the obvious signs of anxiety that some civil servants exhibit in having to appear in front of someone as mild mannered as me, and I try to take account of that in how I deal with issues. It can be obvious that people are anxious about what lies ahead of them. It is important that, as part of the culture, there is an understanding of the effect that that has on the interaction of people who are in different positions when it comes to the exercise of power and responsibility. Having a respectful environment is absolutely fundamental to that.

**Lesley Fraser:** Those are really important points, particularly in a large hierarchical organisation such as the civil service.

We have addressed that issue in a number of ways. We started the training at the top. That involves giving people an understanding of the kind of the impact that the Deputy First Minister described. That can also apply to senior people in positions such as mine.

We have also created a number of routes for people to use to get assistance and advice and to air concerns, other than through their line manager or someone who works in their own area. For example, we have an external employee assistance programme and we have created a propriety and ethics function, which we are not keeping in a corner. We are very open about that and have explained how it works. We have explained that anyone who has a concern but does not know what to do about it can approach colleagues in Ian Mitchell’s team and get some initial advice.

There are a number of different routes available to people that are not to do with the hierarchy, as it were. Fundamentally, the work in this area is part of the continuous improvement programme. We want to make sure that we are using all the different levers and mechanisms to explain the organisation that we want to be and to put in place practical steps that will help to reinforce the change and improvement that we want to make.

As I said, as an organisation, we are not coming from a bad place. Most colleagues—seven out of 10, I think—would say that they feel that it is safe to challenge. However, that leaves a gap for improvement. We will continue to monitor that and to get informal feedback through all the different routes that we have discussed.

**Michelle Thomson:** Within the process and the culture that we have talked about, what specific consideration have you given to the complexity of having special advisers as civil servants? It is a slightly special challenge, because special

advisers come in through a political route and then become civil servants. Obviously, civil servants have different obligations. It seems to me that that is worthy of additional consideration and reflection. What have you done in that respect?

11:15

**John Swinney:** There is a special adviser code, which channels considerations about special advisers through a civil service channel, with a few unique elements added on. The code essentially specifies that they are temporary civil servants, so they have the obligations and the rights of civil servants in relation to how they are handled in the employment sense. They have a couple of additional obligations and opportunities around the space of political engagement, which civil servants do not have. That is all regulated by the special adviser code. The issues that affect special advisers are fully and properly considered by the nature of their code, which channels them into the civil service grouping.

**Michelle Thomson:** Okay—this is my last question. Again, it is a wee technical thing. Within the process, how much active consideration have you given to managing the weighting of evidence?

We know that contemporaneous, third-party evidence carries much more weight than evidence that is brought out at a later period, but it is quite a complex and technical area in terms of risk. Have you given that active consideration? It is quite complex, and it does skew results.

**John Swinney:** The important point is that there is the obligation within the policy that all matters have to be handled fully and independently. Essentially, the judgment that will be available to address the issues that Michelle Thomson puts to me is contained within the freedom that is given to investigators to look at all the material that is put before them. A separate adjudicator can consider all those questions without us prescribing weightings or setting out expectations about how it will be handled.

We are recruiting individuals who we think will be able to do justice to a proper investigation and a proper, independent adjudication of a case before it proceeds any further. With those caveats, we essentially leave it to the professionalism and the judgment of those individuals to inform the proceedings.

**Michelle Thomson:** And their expertise, as well, of course. Thank you.

**The Convener:** That appears to have exhausted questions from the committee members. I have a couple to finish with. One is a follow-up to your response to Douglas Lumsden, cabinet secretary. You said that if a complaint

against a minister is dismissed at stage 1, which is initial contact and assessment, the minister concerned will not be informed. How will you deal with potentially malicious complaints against a minister?

**John Swinney:** That would be addressed by the fact that the complaint went no further than stage 1. If a complaint emerged and then was judged to be outwith scope, subject to the caveats that I set out to Mr Lumsden about the engagement with a complainer—if that did not produce any different outcome—that would be the end of the matter.

**The Convener:** Okay. I do not expect that this would transpire but if it did, in theory, no action would be taken against someone for doing that, so anyone could bring any case forward, and it would be hit or miss, so to speak.

**John Swinney:** Part of this is about acknowledging that we have to have an open culture to hear people's concerns and to have a process in place to be able to handle and judge those complaints, of whatever degree of seriousness they happen to be. If a complaint is judged not to warrant further examination, subject to the caveats I put on the record earlier, the issue would be judged to be addressed and resolved.

**The Convener:** If a minister had concerns about an individual member of staff, how would they be progressed?

**John Swinney:** If a minister has concerns about the quality of a member of staff, they are clearly encouraged to raise those with the civil service contacts that ministers all have so that those questions can be considered.

There is a very clear, well-exercised delineation between, on one hand, the engagement between ministers and civil servants on policy matters and the business of government and, on the other, the employment status or performance of civil servants. If a minister has concerns about the conduct or performance of a member of staff, those need to be raised appropriately with the minister's civil service contacts, who will have line management responsibility for addressing those issues.

**The Convener:** One issue that has not come up at the meeting but is in the implementation plan and is important is the information management review and the need to improve the quality of digital storage and retrieval processes. That is perhaps not the most exciting issue that has been raised but it is critical. The Government's response has five bullet points that list the steps that should be taken on it. Will you talk to us about the philosophy behind why that is important to the process?

**John Swinney:** I will do, convener, and I will draw on Lesley Fraser's expertise as the Government's senior information risk owner.

Data handling and management are at the centre of Government. Every year—we heard this in the past few weeks—the National Archives release all sorts of documents from eras that are now ancient history but that you and I can remember at first hand, unfortunately. They contain the judgments and comments of ministers. I often think about them when I feed back on submissions from civil servants and consider what, in 30 years' time, I want my children to hear that I was saying.

Information retention and handling are crucial to the record of the conduct of policy and actions. I use that example to highlight the necessity of information handling. Of course, the world is completely different now. Whereas, 30 years ago, ministers wrote handwritten manuscripts, digital transactions now generate significantly greater volumes of information, which has to be handled appropriately. If we add on to that data protection legislation and the GDPR, we have significant obligations and duties to ensure that we not only record information properly but handle it properly.

**Lesley Fraser:** That is precisely the environment in which we work. The previous permanent secretary instigated a review of our information management arrangements in summer 2020, I think. We had that review and have now published our information management and governance strategy as a result. It seeks to ensure that we operate on absolutely best practice.

We have strengthened our governance arrangements and I now oversee an information management and governance board within the Scottish Government, on which we also have our non-executive directors. We have created new roles with each of our policy areas to advance a programme of improvement. It is partly to do with the electronic systems that underpin information management but is also to do with everyday business practice. That is about ensuring that colleagues are absolutely clear what they should and should not do with information and that it always goes first time into the correct regulated space for its proper management.

That programme of work is under way and we are already seeing some good outcomes from it. We will keep that work under regular review and ensure that, as the technology moves on, the approach that we take in Government is appropriate and enables us to fulfil all the obligations that we have to this Parliament and more widely under records management legislation.

**The Convener:** Electronic data storage has been a huge boon. When I left Glasgow city chambers in 1999, I was asked politely to take home the contents of six filing cabinets and mountains of other sundry possessions that were piled up. I do not think that I was popular when 13,000 constituency cases turned up in my garage subsequent to that. Therefore, I realise how important records management is. It is important to have adequate storage and ensure that records are kept robustly and confidentially.

**Michelle Thomson:** Have you given any active consideration to recording specific interviews throughout the process? Traditionally, we have note takers but, to go back to my point about hierarchy, a more junior member of staff tends to take the notes, which cannot reflect the nuance that a recording would do. Obviously, permissions would need to be sought but would you consider that? In other processes, every word is documented verbatim. It strikes me that note taking is still a potential gap.

**John Swinney:** Ian Mitchell might want to comment on that point but, in the investigation process, we neither prescribe nor prohibit that. That it is the best way to say it. We will give the issue further consideration and, perhaps, discuss with individuals who have had experience of such processes to gauge their reaction.

**Ian Mitchell:** That is exactly it. We will consider recording. It is important that notes are taken at various stages of the process. We have to beware of what might be termed a chill factor in the process as a whole and ensure that people who make a complaint—and, indeed, those who are on the receiving end of one—do not feel intimidated but feel that they can go through the process. That is the balance to be struck, but we will certainly consider the suggestion.

**The Convener:** I thank the Deputy First Minister and his officials, Lesley Fraser and Ian Mitchell, for their evidence. That concludes the public part of our meeting.

11:28

*Meeting continued in private until 11:56.*



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