



## **The Civil Service (Special Advisers) Bill**

### **Briefing for the Committee for Finance and Personnel (5 December 2012)**

1. The Equality Commission for Northern Ireland (Commission) advises on those provisions of the Civil Service (Special Advisers) Bill which relate to its remit<sup>1</sup>. The Commission's remit has relevance to;
  - Clause 2, that is, the exclusion of any person with a serious criminal conviction;
  - and Clauses 4-6, that is, the placing on a statutory basis aspects relating to the remuneration, conduct and appointments of Special Advisers.
2. The Commission previously wrote to the Minister of Finance and Personnel, Mr Sammy Wilson MP MLA (September 2011) in the context of the Review of Arrangements for the Appointment of Ministers' Special Advisers.
3. The Commission's evidence includes the commentary provided for the Review of Arrangements for the Appointment of Ministers' Special Advisers and additional observations on The Civil Service (Special Advisers) Bill.

### **Review of Arrangements for the Appointment of Ministers' Special Advisers (September 2011)**

4. In 2011 the Commission considered the appointment of Special Advisers and the extent to which the mode of their appointment engaged equality legislation and the Commission's remit, in particular its responsibilities in respect of the Fair Employment and Treatment Order 1998, (as amended) and the other anti-discrimination statutes in respect of employment matters.
5. In summary, the Commission recognised the importance of Special Advisers, in terms of their role in shaping public policy in Northern Ireland. The Commission also noted that Special Advisers are privileged in the terms and conditions that apply to them. Accordingly the process by which these positions are filled is a matter of some public significance. The Commission also appreciated the unique nature of Special Advisers and the legal framework within which they are established in Northern Ireland and throughout the rest of the United Kingdom. It also noted that there is a current Code of Practice on the Appointment of Special Advisers in Northern Ireland.
6. The Commission has proposals in two areas to make to the Committee. Firstly the Commission would wish that the application of relevant equality and employment law be seen to clearly apply in these appointments. Secondly because of the expenditure of public moneys involved, there is a need for, and value in putting in place the most open and transparent arrangements possible.

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<sup>1</sup> Annex 1 The Equality Commission for Northern Ireland

7. The Commission welcomes the references to equality law and principles in the Code of Practice on the Appointment of Special Advisers that is current in Northern Ireland. It also recognises the particular circumstances that may remove some of these appointments from the requirement not to take account of the political views of candidates or of those being considered for appointment. The Commission previously drew to the attention of the Minister of Finance and Personnel, Mr Wilson MP MLA, a number of considerations that might be borne in mind, in the context of the Review of Arrangements for the Appointment of Ministers' Special Advisers.

8. Specifically the Commission drew attention to the following considerations:

- The exemption in respect of political opinion based on the “essential nature of the job”, as provided for in fair employment legislation, be invoked only after careful consideration<sup>2</sup>;
- Future practices in respect of the filling of Special Adviser posts where it is considered appropriate to invoke the exemption in respect of political opinion, should include some tangible measure, beyond good counsel, whereby the arrangements are otherwise transparently and publicly in accord with the prevailing equality legislation.
- All other appointments to posts of Special Adviser should be, and seen to be, made within the letter and spirit of the equality and employment legislation.
- Consideration should be given to introducing an arrangement whereby there is, within the Civil Service appointments process, some objective standard or measure against which the expertise, qualification and suitability of the person to be appointed can be independently evaluated.
- In the interests of transparency, greater clarity should be available as to the remuneration of the Special Advisers. The Commission considered that an approach such as that adopted by the Cabinet Office in this regard would be a useful guide.

9. The Commission is aware that the Review of Arrangements for the Appointment of Ministers' Special Advisers was completed in September 2011 and a Report on the Review was placed in the Assembly Library around the end of 20 October 2011<sup>3</sup>.

**The Civil Service (Special Advisers) Bill. Clause 2: Ineligibility for Appointment on the Grounds of a Serious Criminal Conviction**

10. The following comments relate to Clause 2 of the Civil Service (Special Advisers) Bill, that is, those provisions which prohibit a person with a serious criminal conviction from being appointed as a Special Adviser. In summary, our comments relate to the application of blanket exceptions in recruitment processes generally and specifically the recruitment of people with conflict related convictions, as they relate to the provisions of the Fair Employment and Treatment (NI) Order 1998.

11. The Commission advises employers to exercise particular caution with criteria which might directly or disproportionately exclude persons who have certain characteristics, or which might discourage such persons from applying for work that they are actually

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<sup>2</sup> Article 70(4) of the Fair Employment and Treatment (NI) Order 1998

<sup>3</sup> AQW 240/11-15

suitably qualified to do<sup>4</sup>. Such criteria may relate to, for example, prescribing that applicants must be a certain height. This criteria, although applied equally to all candidates may have the impact of disproportionately excluding women. An employment decision that is indirectly discriminatory will normally be unlawful unless the decision (e.g. the job criterion in question) can be objectively justified. The test of objective justification is where an employer is able to demonstrate that the criterion is a proportionate means of achieving a legitimate aim in the full context being considered.

12. The Commission recognises that there are particular occupations where it may be legitimate to exclude people from employment based on specific criminal convictions. For example, where the aim is to protect children and vulnerable adults it would be considered proportionate (and necessary) to exclude from employment an applicant with a criminal conviction where there is a direct relevance of the crimes committed to the job in question.
13. In relation to recruitment for Special Advisers, it is noteworthy that in 2001 a discrimination complaint has been made in relation to a Special Adviser appointment in England.<sup>5</sup> In the case of Coker and Osamor – v- the Lord Chancellor and the Lord Chancellor’s Department, the EAT ruled that the arrangements for the appointment were not indirectly discriminatory. The fact that the arrangements were challenged on the grounds of sex and race is however of relevance.
14. In the scenario of the Civil Service (Special Advisers) Bill, a potential applicant could, for example, complain that the criterion of prohibiting all persons with a serious criminal conviction disproportionately excludes men. If this scenario were correct (that is, that men (or another protected equality ground) were disproportionately excluded by the application of the criterion), it would be for the employer to objectively justify that the criterion was a proportionate means of achieving a legitimate aim, taking into account relevant factors in any such complaint.
15. In terms of the recruitment of people with conflict related convictions, the Commission is mindful of the new era post the Good Friday Agreement. Currently Section 2(4) of the Fair Employment and Treatment (NI) Order 1998 excludes from protection those whose political opinion supported the use of violence<sup>6</sup>. The Commission, in the context of a proposed Single Equality Act in 2002<sup>7</sup>, considered that the legislature should use the Single Equality Act to clarify the position in relation to this, given the passage of time and the new political environment.
16. The fair employment case of McConkey & Marks v The Simon Community clarified the position in terms of current fair employment provisions. In summary, the Fair Employment Tribunal (December 2006) handed down a decision relating to a case

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<sup>4</sup> Equality Commission Guidance, ‘A Unified Guide to Promoting Equal Opportunities in Employment’ Section 10B.3

<sup>5</sup> [2002] IRLR 80, England and Wales Court of Appeal

<sup>6</sup> Section 2(4) of the Fair Employment and Treatment (NI) Order 1998 which states that, *‘In this Order any reference to a person’s political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.’*

<sup>7</sup> Position paper: Update on the Single Equality Act: Autumn 2002

involving two individuals with conflict related convictions. The Tribunal found that, subject to Article 2(4) of the Fair Employment and Treatment (NI) Order 1998, the applicants' claims of political discrimination must fall and their cases were dismissed. The Tribunal considered that Article 2(4) applied to political opinions held in the past, as well as those held in the present<sup>8</sup>. The Tribunal suggested that the case highlighted the need for the legislation to be reviewed in light of more recent political developments. McConkey and Marks subsequently appealed the decision of the Fair Employment Tribunal to the Court of Appeal. The Court of Appeal dismissed their appeals. McConkey and Marks then appealed the Court of Appeal decision to the House of Lords. The House of Lords subsequently upheld the Court of Appeal decision and dismissed McConkey and Marks appeals.

17. In relation to assisting individuals with conflict related convictions to re engage in society and in particular to reenter the labour market, in May 2007 the Office of the First Minister and deputy First Minister issued guidance on the recruitment of people with conflict – related convictions. The guidance was developed by the Ex-Prisoners Working Group comprising representatives of Government Departments, the Confederation of British Industry, the Irish Congress of Trade Unions, and a representative group of ex-prisoners<sup>9</sup>.
18. The voluntary guidance for employers is aimed at reducing barriers to employment and enhancing the reintegration of ex-prisoners with conflict-related convictions. The guidance advises employers to disregard any conflict related conviction unless it is materially relevant to the post to be filled. The overarching principle upon which the guidance is based is, 'that any conviction for a conflict-related offence that pre-dates the Good Friday Agreement (April 1998) should not be taken into account unless it is materially relevant to the employment being sought'<sup>10</sup>.
19. As part of the Employers' Guidance a tripartite review panel was formed. This panel comprised one representative from each of the parties involved in developing the guidance, i.e. OFMdfM, ICTU, CBI, as well as an Independent Chair. In its terms of reference, the Panel was tasked with considering individual cases, building up evidence regarding the acceptance and adoption of the Guidance, and producing a progress report on the impact of the Employers' Guidance after an 18 month period. The Review Panel published an interim report in June 2011 and its final Report was issued in March 2012<sup>11</sup>.

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<sup>8</sup> Section 2(4) of the Fair Employment and Treatment (NI) Order 1998 states that, '*In this Order any reference to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.*'

<sup>9</sup> The Equality Commission and other organisations, such as the Federation of Small Businesses joined the Ex-Prisoners Working Group in 2009.

<sup>10</sup> Employers' Guidance on Recruiting People with Conflict-Related Convictions: Office of the First Minister and deputy First Minister 2007

<sup>11</sup> Report of the Review Panel: Employers' Guidance on Recruiting People with Conflict-Related Convictions March 2012

20. The Report of the Review Panel is quite extensive with a number of conclusions. As part of the Report it is noted that 'a range of impediments and legal barriers have prevented the Guidance from working as a voluntary arrangement', and that 'Given this, the view of the Review Panel is that the Employers' Guidance should be implemented by legislative change'. The Review Panel therefore 'recommends removing Section 2(4) of the Fair Employment and Treatment (Northern Ireland) Order 1998 or alternatively allowing Article 2(4) to remain but placing a caveat that it would not apply to those conflict-related convictions that pre-date 1998'.
21. The work of the Review Panel and its Report are a testament to the present difficulties faced by ex prisoners in re entering the labour market. The Assembly may therefore consider that arrangements for recruiting positions of Special Advisor should as recommended by the Review Panel, also adopt the perspective that a conflict related offence that pre dates 1998 should not be taken into account unless it is materially relevant to the position being filled.

#### **Clauses 4-6 Statutory Requirements**

22. As noted above, the Commission is in agreement, in principle, with those Clauses of the Bill which relate to transparency with regard to the conduct, recruitment and selection and remuneration of Special Advisers. It is for the legislature to decide whether these aspects should be on a statutory or voluntary basis.
23. It is noted that Clause 6: Code of Appointments includes a provision that appointment must be subject to the same vetting procedures as apply when appointing senior civil servants to the Northern Ireland Civil Service. The Commission would again note the necessity of ensuring that any vetting procedures are as far as possible transparent, are relevant to the specific position being appointed and are in accordance with rehabilitation of offenders' principles.

#### **Conclusion**

24. In conclusion, the Commission appreciates the importance and also the sensitivity around the appointment of Special Advisers and is in agreement that the arrangements for the recruitment, conduct and remuneration should be the most open and transparent.
25. For the reasons set out above, the Commission cautions against the use of blanket exemptions unless they can be objectively justified. The test of objective justification means that an employer is able to show that what is done is a proportionate means of achieving a legitimate aim in the particularities, and full context, of the criterion being challenged.
26. The Commission welcomed (in 2007) the development of the Employer Guidance on Recruiting People with Conflict Related Convictions by the Office of the First Minister and deputy First Minister. As recommended by that guidance, the Commission therefore agrees that employers should take an individualised approach and consider the material relevance of any conflict related conviction to the post to be filled rather than rely on blanket exemptions<sup>12</sup>.

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<sup>12</sup> A conflict related conviction that pre-dates the Good Friday Agreement

## **Annex 1**

### **The Equality Commission for Northern Ireland**

1. The Equality Commission for Northern Ireland (“the Commission”) is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the anti-discrimination legislation on fair employment, sex discrimination and equal pay, race relations, sexual orientation, disability and age.
2. The Commission’s remit also includes overseeing the statutory duties equality duties on public authorities in Section 75 of the Northern Ireland Act 1998: to pay due regard to the need to promote equality of opportunity and pay regard to the desirability of promoting good relations, as well as the duties in Section 49A of the Disability Discrimination Act 1995 (as amended).
3. The Commission, along with the NIHRC, has also been designated as the “independent mechanism” in Northern Ireland, tasked with promoting, protecting and monitoring implementation of the United Nation Convention on the Rights of Persons with Disabilities (UNCRPD).