Committee for Finance and Personnel

# OFFICIAL REPORT
# (Hansard)

## Civil Service (Special Advisers) Bill:
## Human Rights Commission

21 November 2012

# NORTHERN IRELAND ASSEMBLY

# Committee for Finance and Personnel

## Civil Service (Special Advisers) Bill: Human Rights Commission

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**Members present for all or part of the proceedings:**
Mr Daithí McKay (Chairperson)
Mr Dominic Bradley (Deputy Chairperson)
Mrs Judith Cochrane
Ms Megan Fearon
Mr Paul Girvan
Mr John McCallister
Mr David McIlveen
Mr Mitchel McLaughlin
Mr Adrian McQuillan
Mr Peter Weir

**Witnesses:**

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|---|---|
| Mr Colin Caughey | Human Rights Commission |
| Professor Michael O'Flaherty | Human Rights Commission |
| Dr David Russell | Human Rights Commission |

**The Chairperson:** I welcome Professor Michael O'Flaherty, Dr David Russell and Colin Caughey from the commission. Michael will make an opening statement.

**Professor Michael O'Flaherty (Human Rights Commission):** Thank you very much, Chair. This is our first time before the Committee. I thank you warmly for inviting us. We speak as the Human Rights Commission; it has finally arrived.

**Mr Mitchel McLaughlin:** Yes. My apologies.

**Professor O'Flaherty:** I make that point because it is very important to understand that when we speak as the commission, it will only be on matters of law; on the application, as we see it, of international human rights law and related standards to the Bill that you are considering. That is the confines of our observations. When we talk of the application of human rights law, we are referring to the application of that law with regard to all categories of victim, and, in the first place, the victims of conflict-related crime.

We followed with great interest the words of the Victims' Commissioner to you yesterday. We would like to associate ourselves with the high importance that the Victims' Commissioner has given to the need for you to take account of the human rights of victims as you proceed with your deliberations. We applaud you for inviting the voice of victims to the Committee. We think that that is necessary; they have to be heard in the context of your review and in the application of whatever procedures might be adopted, be they procedures based on the Bill, or otherwise.

I turn now to the narrow areas of law. To some extent, we will cover ground that you have already addressed this morning. Let me preface anything we say by sharing our view that the law is rather grey on what is before you. It is very much a case of, "On the one hand; on the other hand", which means that, ultimately, to a large extent, the law is not going to be able to tell you what to do. We are going to have to ask you, the politicians, to make the determination based on a review of the varying perspectives of the law in the absence of clear court guidance across many of the questions that you are exploring. When I say court, I am referring, of course, to the European Court of Human Rights (ECHR), and, to a lesser extent, to the monitoring body for the relevant UN standards — the UN Human Rights Committee, of which I am a member.

We would like to take the issues distinctly. If we can disaggregate the issues, it will perhaps make it easier for us all to deal with them. The first issue has to do with what we might describe as the proposed blanket prohibition. There has been a lot of discussion around that this morning. We would like to flag a few dimensions of that blanket prohibition related to the European Convention on Human Rights. In the first place, we have to get over the question as to whether the court would ever deal with a case that might arise under the application of the Bill. It is not clear, albeit that we are inclined to think that it would consider that the blanket prohibition engages protections under the European Convention on Human Rights, particularly property rights in the context of people already in post, and privacy rights with regard to applicants not yet in post. We think that there is a likelihood, based on the jurisprudence, that the court would recognise that, at a minimum, those rights are engaged, but we cannot say for sure.

Secondly, if those rights are engaged and the European Court were to say that, at a minimum, there is a property issue here and a privacy issue here, that does not automatically mean that there is a violation of the convention. You would have had to demonstrate that there was a violation of the principle of proportionality. Again, I refer to what our expert colleagues just before us said, and we largely endorse the views that they expressed to you. We agree that the court does not like blanket prohibitions of anything, unless there is a compelling reason as to why the prohibition has to be blanket, such as the security sector example that you heard of this morning.

There have been a few cases where the court has made it abundantly clear that blanket prohibitions are a crude tool that fails to do justice at the individualised level. So, if this thing were to get to the European Court on a matter of law, there is a fair probability that a blanket ban would be deemed to constitute a violation, but would it even get that far? Again, we have to take account of the fact that the European Court does not like dealing with Civil Service recruitment matters. It feels that it is properly a matter that should be left to the state. The technical term for that approach of the court, as you heard this morning, is the so-called margin of appreciation. Again, we cannot say for sure that the court would invoke that margin of appreciation. That is why we are left with an ambiguity, all the more so in the context of a post-conflict society, because the court has been willing to look at some public service matters, but when they have been presented to the court, they have been argued in the particular circumstances of a transitional society.

We draw to your attention the manner in which the matter was handled when a Latvian case came before the court. It had nothing to do with employment; it was about gaining access to candidacy for election, but the court laid out a number of rules with regard to when it may or may not be permissible to prohibit somebody from participating in an election because of their association with unsavoury practices in the past. This is what is called the principle of lustration, but that is just the technical term for it. What is very interesting is that the court provided a helpful checklist of elements that need to be taken account of in impeding access, in the Latvian case, to the electoral process, and in our case, to recruitment in the context of a transitional society.

First, the court said that the law that embodies the prohibition should be accessible to the subject, and it should be foreseeable as to its effects. The Bill would pass that test. Secondly, the law should not exclusively serve the process of retribution or revenge. You will determine whether the Bill falls into that category. Thirdly, the law must be precise enough to allow for the individualisation of the responsibility of each person affected thereby and must contain adequate procedural safeguards. As has already been discussed this morning, the Bill would not pass that test. Fourthly, and interestingly, the court said that national authorities must keep in mind that lustration measures for prohibitions such as this must be temporary and, therefore, their necessity diminishes with time. In other words, if you were going to rely on that post-conflict lustration context, you would need to ask yourself whether it is too late to invoke them and whether the temporary space has already closed. That is a political reflection, not a legal one, I would suggest.

I will turn to the issue of the blanket prohibition and the application of the International Covenant on Civil and Political Rights, which also binds the United Kingdom. It ratified the treaty in 1976. The approach of the monitoring body for that treaty, the Human Rights Committee, would be more or less the same as that of the European Court of Human Rights.

Staying with the International Covenant on Civil and Political Rights, there is a separate provision — it may have been addressed; we came in late this morning, so forgive me if you have heard reference to it — that raises different issues to the blanket prohibition in the covenant. It is contained in article 25 and is a guarantee of non-discriminatory access to public service. You do not find a provision like that in the European Convention; you find it in the international covenant, which remains binding under international law for this jurisdiction. I have heard it suggested that article 25 might apply here. There is no jurisprudence on the matter, and I have to say that any reflections of that type are speculative. Although the monitoring body, the UN Human Rights Committee, does not apply the European margin of appreciation approach, it does approach public service recruitment matters with great discretion and has identified that not every distinction is a discrimination. I would venture to suggest — I, too, am being speculative — that, in this case, the distinction that the Bill is seeking to impose would be considered by the Human Rights Committee to be a non-discriminatory distinction. As I say, we all have to speculate on that.

I will turn to an issue that you are very familiar with, which is whether we have a retroactive penalty here that would trigger violations of article 7 of the European Convention on Human Rights and article 15 of the International Covenant on Civil and Political Rights. As you know, the key question is this: is the prohibition a penalty? If it is a penalty, we have a problem; there is a clear violation. Is the primary purpose or a prominent purpose of the prohibition punitive? If the answer is yes, articles 7 and 15 are engaged. If the answer is no, they are not. You have to make that determination based on all the circumstances and all the facts before you, including the origins of the Bill, its stated purpose, its application, and so forth. Again, I would suggest that that is not for us to call on.

The only thing I would say is that in making the determination on whether the Bill is punitive and constitutes a penalty, it would be helpful to distinguish between people already in post and candidates for special adviser positions. Let us take the second group first: the candidates. I find it hard to see that the Bill would constitute a penalty in the context of candidates; they are not in post and there is no immediate victimisation of them to the extent that it is punitive. For them, it has a rather abstract quality. However, with regard to those in post, there is arguably a closer fit, but the provision in the Bill for compensation somehow diminishes the punitive quality. It is all the harder to argue that that is intended as punishment if you will give people a financial reward if they are removed from office. So, again, we cannot give you an answer on that; we can simply point out some of the elements.

The final point that the commission wishes to put to you has to do with what is accepted as a matter of international law, be it ECHR or UN treaty law. There is a generally accepted responsibility on the state to support the rehabilitation of prisoners. The United Nations standards, which are distilled from the treaties, particularly the International Covenant on Civil and Political Rights, are found in a UN document called 'Standard Minimum Rules for the Treatment of Prisoners'. I will quote one brief paragraph:

> *"The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him [or her] and towards his [or her] social rehabilitation."*

So, you need to ask whether the Bill is consistent with the UN standard minimum rules, and there are equivalent, more recent Council of Europe standards.

As you ask that question, you may also want to consider the application of those standards for the rehabilitation of prisoners in the context of post-conflict societies. Here, too, the United Nations delivers specific guidance in the form of the UN guidance on the standards for the disarmament, demobilisation and reintegration (DDR) of ex-combatants. Many of you will know the acronym. The United Nations standards have less compelling authority than the minimum standards with regard to prisoners, because it is an emerging area. Nevertheless, the standards are indicative of the direction in which the UN monitoring bodies are going. They state:

> *"DDR supports and encourages peace-building and prevents future conflicts by reducing violence and improving security conditions, demobilizing members of armed forces and groups, and*

*providing other ways of making a living to encourage the long-term reintegration of ex-combatants into civilian life."*

I suggest that the standards do not provide a specific answer for the Bill but they indicate the direction of international discourse around such matters. I think, at a minimum, it has relevance for your considerations. Thank you.

**The Chairperson:** Thank you very much, particularly for your comprehensive submission to the Committee. It flags up risk — to be interpreted, obviously, by different members of the Committee — in regard to the European Convention on Human Rights and the International Covenant on Civil and Political Rights, to which the Executive and Assembly are, of course, subject. In the course of your work on this area to date, have you been asked for or offered any advice on this, for example, by the Bill's sponsor?

**Dr David Russell (Human Rights Commission):** No, not to date.

**Professor O'Flaherty:** I saw, though, that the sponsor of the Bill mentioned that the commission was invited to give information over a year ago. That was before I took up office. Notwithstanding what we have just said to you, I would like to check that with our colleagues to make sure that we are not misleading you.

**The Chairperson:** OK; will you get back to us on that?

**Professor O'Flaherty:** Yes.

**The Chairperson:** You referred to the convention and the covenant. Will you comment further on the Supreme Court's previous findings of disproportionality, which you highlight in point 12 of your submission? It says that the restrictions:

*"represent an interference with the right to private life ... where there is no provision for an independent review".*

Obviously, the legislation is blanket in its application. Do you agree that there needs to be flexibility in any legislation that relates to penalties for prisoners or ex-prisoners? The Bill does not have that. In your opinion, how would the Supreme Court view the legislation?

**Professor O'Flaherty:** The question of proportionality is engaged only if human rights are at issue. We have to keep that in mind throughout. We believe that the direction of jurisprudence suggests that human rights, particularly privacy rights, are at issue in the context that you are dealing with in the Bill, but that remains an ambiguous matter. Let us assume that it does apply — and we think that the preponderance of evidence suggests that it does — it is then and only then that we engage with the matter of proportionality. The Supreme Court would be required to follow the clear line of jurisprudence emanating from Strasbourg. Strasbourg has made it clear that blanket prohibitions will always be suspect and will normally be inappropriate, and that unless there is some overwhelmingly compelling argument to be made on particular facts that an individualised approach is impossible and that a right of appeal is inconceivable, the blanket prohibition would be in trouble.

**The Chairperson:** In regard to the Welch case, there is reference to the factors that may be taken into account as relevant. Included in that is the nature and purpose of the measure in question. Clearly, there are different views regarding the nature and purpose of this. What view would the European Court or the Supreme Court take if they viewed this legislation as stemming from one particular case? If they viewed it as being punitive and as "revenge", would they take a less than favourable view of it?

**Professor O'Flaherty:** Let me first note, for the sake of colleagues, that we are moving to a separate point. This is no longer about the blanket prohibition; this is about whether the prohibition would constitute a penalty for the purposes of the treaties, which is a separate ground of concern. How can one speculate? It would all turn on how the matter was argued before the judges on any given day. They have erected the criteria, and that is very helpful. I suggest that the Committee needs to assess the Bill in light of the criteria set out by the court. Frankly, your conclusion as to whether the court would go one way or the other is as good as mine. We are just speculating.

As for the practice of the United Nations, the International Covenant on Civil and Political Rights and the work of the UN Human Rights Committee: I have been a member of that committee for eight years and we have never had to deal with this issue in those eight years. So, we would struggle with this. I have discussed the matter informally with committee members, and there is a general view that they would love this case to come before them because they need to clarify their practice, but nobody would be able to anticipate the outcome before the discussion and the debate.

**The Chairperson:** I have one final question. In your opinion, are any aspects of the European Convention on Human Rights and the covenant engaged in regard to the issuing of guidance from the Office of the First Minister and deputy First Minister (OFMDFM)? If that guidance were to be made into legislation, would anything in those two ratifications be engaged?

**Professor O'Flaherty:** It is our considered view that the OFMDFM guidance and the current vetting procedures are compliant with the international standards. They could be improved by better introducing the voice of victims into the application of the procedures, but the absence of that element now does not render them in non-compliance with the treaties. However, I do think that they would be better human rights tools if we could create a space within them where the voice of the victim is heard in some appropriate fashion.

**Mr Weir:** Thank you, Michael, for your evidence. I listened carefully to what you said about evidence, and you have been very honest with us in trying to scope out the issues. It has become very clear to me that there is a lack of direct jurisprudence on the issue. To some extent, there can be informed speculation on the way forward, but in predicting how courts would deal with it, while they could draw out general principles, there seems to be a lack of certainty in that regard. Would that be a reasonable summation of what you have said?

**Professor O'Flaherty:** There is a big space between a lack of certainly and just speculation —

**Mr Weir:** To be fair, I did say that it was informed speculation. I will give you credit for that. I must confess that when you mentioned DDR, I thought for a moment that you were talking about the East German Republic. Obviously, your informed speculation may be better than my informed speculation. The point that seemed to come across fairly clearly from your evidence was that, on a range of issues, there were certain balances of probability, and you could say what was a potentially likely outcome in some respects, but that was perhaps countered by a different aspect where the outcomes were likely to be of a different nature. You seemed to be very heavily in the realm of speculation as regards a lot of this.

**Professor O'Flaherty:** No; not very heavily in the realm of speculation but certainly in the realm of interpreting law in the absence of absolutely to-the-point, clear judicial guidance on the specific matter before us. However, that does not preclude us from drawing a general conclusion that the absence of individualisation in the Bill is undoubtedly problematic and might lead to trouble down the road in the ECHR context. There is also the conclusion that the direction of the Bill is inconsistent with the discourse and emerging standards at the United Nations level.

**Mr Weir:** OK. You mentioned — maybe differing at least in tone from the previous evidence we got from some of the experts — what a court will look at in blanket prohibition. I suppose, again, there are two sides to this: there is blanket prohibition on the basis of a complete blanket ban on people having particular jobs and whether that counts as blanket prohibition, or there is the fact that the amount of jobs that we are talking about is very limited in scope. The previous examples of case law that were given, for example in Lithuania and Italy, seemed to draw in a very wide range of employment law and a very wide prohibition in the sense that there was a large section of the employment sector that people were banned from. Where do you see the issue of blanket prohibition in that context? That could be interpreted in one of two ways.

**Professor O'Flaherty:** It certainly could be interpreted in that way. I would not buy the interpretation myself because the basis on which the blanket prohibition will be tested is probably going to be that of privacy. I cannot see how the size of the pool or employment area could be relevant to the issue of privacy. I see your argument, but let me put it this way: if I were a judge with the European Court, I would not be won over by it.

**Mr Weir:** Fortunately enough, I am not being hired as a lawyer to argue the case in connection with that. Would you accept, though, that there are a lot of examples of where high levels of criminal

conviction can lead to complete prohibition as regards a particular job and maybe particular relevant circumstances? That has been the case in quite a lot of cases. Would that be correct?

**Professor O'Flaherty:** There is no doubt that criminal convictions will be relevant to recruitment to any manner of employment. What is important is that the individualised criminal conviction is taken account of in light of the specific job in question. The issue of individualisation or of taking a more subjective approach is the issue that we and those who have gone before us have been speaking to.

**Mr Weir:** Finally, Michael, you gave the case law example of qualification for election. I can appreciate that some useful general principles came out of that that are maybe worth bringing forward. Do you think, however, that that is an entirely fair analogy to draw, given that the courts are likely to take a different stance — a lot less restrictive stance — on restrictions on who can run for election than they would take on restrictions on who can specifically be employed? There is a qualitative standard that is different, and the courts would be extremely reluctant to impose a larger level of restriction on people standing for election. That would be a clear potential restriction of democracy, and a safeguard is already built into an election in that the people can ultimately decide. There is a qualitative difference between that and a restriction in employment law.

**Professor O'Flaherty:** There I would agree with you. There is a qualitative difference, and I brought it to your attention more as an interesting, indicative set of guidelines from a different context that you may choose to apply in this. I do not know what the court would do if it were seized with that matter, but I entirely take your point.

**Mr Weir:** On that rare note of agreement between the Human Rights Commission and myself, I will leave it there. *[Laughter.]*

**Mr D Bradley:** Good morning. I was interested in what you said about the vetting process. You said that that could be strengthened by giving a stronger voice to victims. Can you indicate to us the ways in which that might be done?

**Professor O'Flaherty:** The Victims' Commissioner, I understand, raised this issue with you yesterday and, in fact, offered to give you some thoughts on this herself. In operating as various commissions, we feel it is very important not to trip over each other's toes unnecessarily. We think it is better that the Victims' Commissioner takes the first stab at suggesting guidance on that, and then we will come in in support of her as best we can. I would be pre-empting her inappropriately if I were to try to speculate on that today.

**Mr D Bradley:** Can I just clarify with you that, in your view, the vetting procedures that the Department has introduced are compliant with human rights obligations and laws?

**Professor O'Flaherty:** Yes, that is our view, certainly as applied to the specific context in which we have reviewed them, which is, of course, this Bill. We have not done a comprehensive analysis of vetting for full human rights compliance, but, in the context of our discussion today, we think the vetting procedures are fine.

**Mr Girvan:** Thank you for your presentation. I appreciate that an awful lot of the emphasis has been in relation to the employment and potential employment of someone. First, in your submission, what emphasis did you put on the victim and on ensuring that the victim is considered in all cases? Secondly, is there not a ban — I am not talking about a blanket ban — in many areas of employment in the public sector for people with convictions? Take the Ministry of Defence (MOD), in particular, where you will be excluded from taking a position, even should that be as a mere private in the army, if you have any conviction. There are other areas as well. It is the tariff that has been set aside. A five-year tariff would indicate a fairly severe issue; somebody who commits a fairly serious crime will get a tariff of five years or more. On the basis of that, are there not sufficient grounds?

I appreciate that you mentioned blanket bans. I would like to widen that out. We are dealing with a specific sector within the Civil Service, but the same rules seem to apply in many areas of the Civil Service, as it stands. We are not trying to include it for the private sector, as was included in the previous evidence session, at which there was evidence that people who had a conviction were being denied the opportunity of employment in both public and private sector. We are not looking at that; we are looking at one sector within the public sector. There are a number of points there.

**The Chairperson:** Michael, before you answer that, there is interference from someone's mobile phone. It is interfering with the recording equipment for Hansard. Please check your phones, because we want to get an accurate report of the session.

**Professor O'Flaherty:** First, I entirely agree that victims have a vital, central role to play, and that is why I began by making reference to them.

**Mr Girvan:** No, but —

**Professor O'Flaherty:** I have not even begun to answer you yet. We think that there is space for a better capacity to listen to victims in the vetting procedure. We think that the Victims' Commission should come to you first with suggestions as to how that might be done. We would like to see ways in which recruitment in the private sector could take better account of the situation of victims, perhaps through some special convening of the victims' forum, for instance. In light of private sector recruitment, that would be very important. We recognise that if this Bill were not adopted, that might cause grave offence to victims and the relatives of victims. We recognise that, and we acknowledge, with the deepest respect, the pain that those individuals must, and would, feel. However, we can only reflect back to you today international human rights law as we know it. Ultimately, you will have to decide whether to proceed. You are the policymakers; you are the decision-makers. The international human rights standards cannot provide an answer for everything. All I can do is present it to you as best I can, with all its gaps, and then you, sir, and the Committee, will have to make the decision yourselves.

I move now to the blanket prohibitions and their existence in other forms of law. You will recall that you raised that matter with the Attorney General. He gave a large part of the answer, which was that a number of the blanket prohibitions are in old statutes that pre-date the Human Rights Act 1998 and that he was not, therefore, willing to make an assessment of their human rights compatibility. I give you the same answer. There is a lot of law on our statute books that needs to be improved. We speak of blanket prohibitions; I cannot do a blanket sweep of all old law. Nevertheless, I associate myself with what the Attorney General said to you.

With regard to more recent blanket prohibitions, one has always to take account of the particular function to which the prohibition is being applied. For example, the prohibition on people with criminal convictions being able to run as candidates for police commissioners in Great Britain — that would probably pass the test if it ever found its way to Strasbourg, because there is such an obvious relationship between combating crime and there being a criminal conviction. That nexus is very intimate. I see no such intimate nexus in a blanket prohibition on the function of special adviser in any Ministry on the basis of having previously had a conviction; there is not the intimacy of relationship.

**Mr McQuillan:** What about justice?

**Professor O'Flaherty:** You could find that intimacy of relationship only if you individuated the process. The member mentioned justice. I do not argue with that at all, but at least allow for a vetting procedure by which the particular individual with the particular record is vetted in light of the particular functions at issue, such as justice. It may be that that person will not succeed. Introducing an individuated vetting procedure is not introducing a guaranteed open door for everybody who wants to be a special adviser; there would still be vetting, but it would be fair vetting that was based on individual circumstances.

**The Chairperson:** OK, Paul?

**Mr Girvan:** No, I am somewhat confused about what is deemed to be fair vetting. We are dealing with a political appointment, so it is up to the political party to do the vetting for those appointments. It was the insensitivity of how this case was dealt with that brought about this whole issue. We would not be here today had common sense prevailed and sensitivities been taken into account in the way in which it was brought forward. We are legislating because it was abused; that created the problem. That is why the Bill is being brought forward.

We are trying to establish whether what we are bringing forward breaches or contravenes any European law or, as some people have suggested, UN conventions. I do not believe that it does, but you have alluded to some areas that we have to focus on. Are there any other cases that you can cite in which those have been implemented? Maybe I am not talking about Northern Ireland; maybe other areas where there are bans on people who have a criminal conviction — I am not saying politically or

otherwise — and so cannot take jobs. By that, I mean senior posts in government which are paid by the public. I disagree with you that we are legislating for the private sector. It is not the public purse that is paying their wages; it is where you are dealing with people who are being paid from the public purse. That is all that this legislation is covering.

**Professor O'Flaherty:** I have a few points. A number of the issues that were raised actually cover ground that I have already spoken to, and I have nothing further to add to them. With regard to the suggestion that the appointment of a special adviser is a political matter that should not be subject to a regulatory framework, we have to disagree. Our understanding is that special advisers are civil servants, technically, so they have to be subject to the Civil Service regulatory framework. More generally, as a matter of the international practice at the United Nations level and the European court in the light of the Latvian case that I mentioned to you, it is clear that, in a post-conflict context, account has to be taken on an individual basis of the story of any person who is seeking, as it was put, high office, be it in government or in the Civil Service.

I suppose it is not quite the point of today's discussion, Chair, but as to the private sector dimension, let me just clarify. I only raised the matter of the private sector because there is a gap in delivering justice for victims if people reach high places in the private sector. If you have the head of a private company appearing on television every day, and that person has done some dreadful acts in the past, that is no less distressing for a victim than if we are talking about a special adviser. So, I was simply alluding to the utility of the Victims' Commission and the victims' forum leading us in reflection on how the private sector could address this area in a more fruitful way. It was no more than that.

**Mr Mitchel McLaughlin:** Do you regard the post of the special adviser as being akin to the rank-and-file Civil Service or to the Senior Civil Service?

**Professor O'Flaherty:** I am going to turn to my colleagues. That is a technical question.

**Mr Colin Caughey (Human Rights Commission):** From reading the review that was carried out, we understand that they are considered similar to the Civil Service. The same vetting procedures that apply to the general Civil Service are applied to the special advisers, as we understand it from reading the review document.

**Mr Mitchel McLaughlin:** Is that the report that was prepared on behalf of OFMDFM or the Department of Finance and Personnel?

**Mr Caughey:** No, it was the Department of Finance and Personnel guidance.

**Mr Mitchel McLaughlin:** That guidance was not accepted at the Executive. So, the one that —

**Mr Caughey:** Returning to Michael's point on the political issues, that is not something that we comment on.

**Mr Mitchel McLaughlin:** OK, but that is the authority on which you would view that special advisers should be regarded as ordinary rank-and-file civil servants and subject to the same vetting procedures.

**Professor O'Flaherty:** I am not familiar with the category of ordinary rank-and-file. There are civil servants —

**Mr Mitchel McLaughlin:** I suspected as much, but you might be surprised to find that there are no vetting procedures to be a member of the Senior Civil Service. You could have a conviction and be a senior civil servant.

**Mr Caughey:** Presumably, you enter into the Civil Service before you get into the Senior Civil Service.

**Mr Mitchel McLaughlin:** Yes, or you could be appointed. That may well inform deliberations and discussions. I was particularly interested in the very valid point, which I strongly endorse, that we should take account of the views of victims at all times, and we should find a way of reflecting that. I have made that point to previous witnesses. There are many victims in our community, right across the various political opinions and community spectrums. Some of them have had the experience

where people have been before the courts, convicted, released under the terms of the Good Friday Agreement and covered by the provisions developed in the subsequent negotiations at St Andrews, etc. Some, maybe many, have not had that particular experience, in that the people that they would regard as responsible never appeared before the courts, either because they evaded arrest or because there was no particular attempt to pursue them or apprehend them. Particular people who might have been involved in infamous circumstances such as Bloody Sunday, the Ballymurphy massacre, the murder of human rights lawyer Pat Finucane, where there were court proceedings; there were very dubious arrangements in respect of British state agents who were involved in the commissioning of that particular murder.

When it comes to the appointment of special advisers and the issues around re-traumatising victims, do you see a need to reflect the views of the spectrum of victims — those who have had the experience of court proceedings and early release mechanisms, and those who never got that far?

**Professor O'Flaherty:** You ask me to go well beyond the framework of the law on which the commission works. I am not competent to answer your question in the way that you put it, sir.

**Mr Mitchel McLaughlin:** I am trying to establish whether there is a hierarchy of victims' voices that you would consider, or do you think that the conflict has created for all of us this legacy of victims and people who have been terribly traumatised?

**Professor O'Flaherty:** The Human Rights Commission can only, and will only, speak to matters of international human rights law as it applies in the United Kingdom. You raise issues more generally around how Northern Ireland deals with its past — what is commonly referred to as transitional justice. It raises any number of human rights issues. Right now, the commission is seeking to find an appropriate rule- and law-based role to contribute to the process of Northern Ireland dealing with its past. However, beyond telling you about that process, I am not confident of going any further in responding to you today.

**Mr Mitchel McLaughlin:** I perfectly understand that. For the benefit of the Committee, its deliberations and the advice that it will subsequently offer, I am illustrating that there will be issues. It is likely — as I think you mentioned — that some of the aspects of the Bill will be examined by the Supreme Court and/or the European Court of Human Rights.

The Bill clearly addresses the issue of people who had convictions for conflict-related actions and were subsequently appointed as special advisers to a Minister. Of course, the Bill cannot and does not deal with those who will never appear before a court, but who could, in theory, be appointed as special advisers. I accept that it is an undeveloped issue and that there may not be the necessary jurisprudence. However, that jurisprudence may be there before this issue is formally concluded. I just want to draw that to your attention.

**The Chairperson:** Michael, thank you very much for your presentation. It was quite useful.