



Northern Ireland
Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Civil Service (Special Advisers) Bill:
DFP Briefing

19 September 2012

The third point, Chair, picks up on your opening question. I will not go through my letter in detail, but with regard to practicality — I am not commenting at all on the policy in the Bill or the appropriateness of the Bill; that is not my role — and the requirements that the Bill would place on the Department of Finance and Personnel in laying documents, reports, codes, and so forth, before the Assembly, from my perspective as an administrator, that does not appear to present any difficulties at all. As Mr Allister quite rightly said, it would place on a statutory footing documentation that exists on an administrative basis. There may be changes to those documents subject to Ministers' will, but they could easily be placed on a statutory footing. Please do not take that as any comment on the policy behind the Bill. That is all I will say at this stage, Chair.

The Chairperson: Thank you very much, Mr Baker. Do you foresee any significant cost to this Bill?

Mr Baker: I do not see any significant cost whatsoever, certainly no more cost than the current arrangements incur.

The Chairperson: You make reference to clause 4 of the Bill and the provision of an annual report on special advisers. Do you sense that there is no real need for that given that that is already published by each respective Department?

Mr Baker: No, that was not the intent behind the letter. I am not going to comment on the policy behind the Bill; that is not my job. All I was saying is that that information is available in various forms but it is not brought together. Bringing it together should not be a particular difficulty, and, as Mr Allister said, the Constitutional Reform and Governance Act 2010 made provision for the publication of that information in Great Britain. I am not saying whether there is a need for it or not.

Mr D Bradley: Morning.

Mr Baker: Good morning.

Mr D Bradley: While I was questioning Mr Allister, there were some semantics around the word "effect". The Department's paper said that the new arrangements introduced by the Minister were in effect from September 2011. I think what Mr Allister was saying, if I understood him, was that they may have been effective from then but they were not in effect. In any case, can you clarify the situation? Since the regulations have been introduced, has any new special adviser been employed?

Mr Baker: The Minister of Finance and Personnel issued a communication to his ministerial colleagues in September 2011 informing them that his new arrangements were taking immediate effect from that date and that he would expect compliance with those arrangements. There were no appointments, to the best of my knowledge, during that financial year — the year ended March 2012. However, I am aware that, during the current financial year, a number of special advisers have been appointed or are in the process of being appointed. The Minister's new arrangements will require me or my unit in the Department of Finance and Personnel to report to him on compliance with the new arrangements. I would not want to talk about any individual special advisers at this stage. Any special adviser appointment arrangements that have been completed — by that I mean run from a to z, right through from a vacancy being identified to the end of the process, which involves the salary being agreed in accordance with the current arrangements and the salary being paid — have been made in accordance with the Minister's new arrangements. However, I am aware of some appointments that have not completed that process.

I am aware of the public, political controversy around the issue, and Mr Allister alluded to that. I am not privy, however, to any engagement between Ministers, between politicians or, indeed, between special advisers on those issues. So, you are taking me into potentially difficult political territory that I, as a civil servant, would not wish to get into. That is really as much as I would say on that point at this stage.

Mr D Bradley: I can reassure you that I am not trying to take you into any potentially difficult political territory.

Mr Baker: I know.

Mr D Bradley: I am just trying to establish the facts of the matter. As I said in my questioning earlier, there seemed to be a lack of clarity around that. Basically, are you saying that no special adviser has been appointed under the new system to date?

Mr Baker: No, that is not what I am saying. Some special advisers have been appointed. The process has been completed, the salaries have been agreed and they are in post, and those appointments have been fully in compliance with the arrangements issued by the Minister last September. Some have not reached the end of that process, so I cannot comment on them.

Mr D Bradley: One of the other points that arose from Mr Allister's evidence was that he seemed to imply that there was not Executive agreement on the new arrangements introduced by the Minister. Does the Minister require Executive agreement for these changes to be effective?

Mr Baker: The Minister will take his own counsel on that. The Minister issued his report of his review of arrangements for appointing special advisers to all his ministerial colleagues in June 2011. To the best of my knowledge, he got no responses to that, certainly not in writing, or none that I have seen. So, the Minister presumably took silence as indicating consent and then, in September, issued another piece of correspondence to his ministerial colleagues saying that he was proceeding to implement these arrangements. I suppose, in doing so, the Minister was taking his authority from the Civil Service (Northern Ireland) Order 1999, which vests statutory power in the Department of Finance and Personnel for the general management of the Civil Service. It vests power in the Department to give directions on recruitment to posts in the Civil Service. Given that the Department of Finance and Personnel operates under the direction and control of the Minister, that was his authority for issuing his new arrangements in September. Now, whether the Minister should or should not have formally gone to the Executive is not a matter for me; it is a matter for the Minister.

Mr D Bradley: Yes, but you are a senior person in the Department with direct responsibility for this. I asked you a factual question: does the Minister require the agreement of the Executive in order to make effective the changes that he has brought about regarding special advisers? Your response was that the Minister will take his own counsel on that. Surely there is more clarity around the situation than "The Minister will take his own counsel"?

Mr Baker: No. Ministers make policy, and I implement policy determined by Ministers, so I —

Mr D Bradley: Yes, but the question I am asking you is whether the Minister has the power to do it without reference to the Executive.

Mr Baker: The Minister believes that he does, and what the Minister decides —

Mr D Bradley: Believing he has the power and having it might be two different things.

Mr Baker: I do not have an independent view on that. My view is the Minister's view.

Mr D Bradley: Surely the Department has taken legal advice on this?

Mr Baker: Actually it has not.

Mr D Bradley: So you do not know whether the Minister has the power?

Mr Baker: The Minister has done what the Minister has done, and I operate under the direction of the Minister. That is always the way. I have quoted the statutory power that vests authority —

Mr D Bradley: This is an important point in the Committee's deliberations. If there is a lack of clarity on that, members might decide that there is a need for Mr Allister's Bill. If the Minister has the power, some members might decide that, since the power is vested in the Minister, there is no need for Mr Allister's Bill. So it is an important point.

Mr Baker: The Minister is very, very clear that he has the power.

Mr D Bradley: He may be, but as a senior adviser to the Minister —

Mr Baker: I am quite content with the Minister's opinion on this.

Mr D Bradley: You do not seem to be. You suggested that the Minister could take his own counsel on it.

Mr Baker: The Minister always takes his own counsel. The Minister makes policy and he directs me to implement his policy.

Mr D Bradley: Yes, but surely he does so within a legal framework that gives him the power?

Mr Baker: Yes, and I have quoted the statutory framework within which the Minister operates. It is the Civil Service (Northern Ireland) Order 1999.

Mr D Bradley: Yes, but you cannot tell me definitively whether he needs Executive approval.

Mr Baker: I am sure that there are lots of things that Ministers do at their discretion and on the basis of the policy decisions that they make. It is not for me as a civil servant to gainsay anything that a Minister does or say that they do or do not have the power to do that. It would be quite wrong of me to do that.

Mr D Bradley: Even if you knew that he had not the power?

Mr Baker: I would never gainsay a Minister. As a civil servant, it is not for me to gainsay a Minister, and certainly not in front of a Committee. When I am at this Committee, I am representing my Minister.

Mr D Bradley: I am not asking you to gainsay him. I am trying to establish facts here, but it is proving very difficult.

Mr Baker: I have quoted the statutory authority under which the Department of Finance and Personnel can issue directions regarding recruitment to appointments in the Northern Ireland Civil Service. A special adviser is a civil servant; a very special civil servant, but a civil servant. In exercising those powers, every civil servant in DFP operates under the direction and control of the Minister. So, that is the statutory authority under which the Minister issued his guidance on the appointment of special advisers. I cannot be any more definitive than that.

Mr D Bradley: I take that as a yes then?

Mr Baker: A yes to what? *[Laughter.]*

Mr D Bradley: That is how I feel in relation to some of the stuff you have said to me. In any case —

Mr Baker: Sorry; let me be very clear. The Minister issued guidance on the appointment of special advisers. The power to issue directions regarding the appointment of any civil servant is vested in DFP by dint of the legislation to which I have made reference. There is no question about that in my view; I am crystal clear about that. Therefore, that is the statutory authority under which the Minister issued that guidance. I am crystal clear that there is a statutory authority for the Minister to do that. Beyond that, what goes on at the Executive, what goes to the Executive or what does not go on at the Executive is not my territory at all. That is what I meant when I said that the Minister will take his own counsel on that.

Mr D Bradley: Yes, but I was not asking you about what goes on or does not go on at the Executive. I asked whether the Minister needed the agreement of the Executive to introduce these reforms. I take it now, from what you have said, that he does not need agreement for them because he has the legal power to do it.

Mr Baker: I am satisfied that he does.

Mr D Bradley: OK. That is clearer than it was previously. I thank you for that.

Mr Baker: Thank you.

Mr Cree: I am certainly reminded of 'Yes Prime Minister'. It is getting more and more like that.

Mr Baker: I know; I apologise for that, Chair. *[Laughter.]*

Mr Cree: I take it that it is all good training, Chair.

I have two points. First, the letter to which we are, hopefully, all referring is that dated 13 September. I think that you have partially answered my question, and you touched on this already, but, where clause 4 is concerned, the letter says that there is no "central collation of information". That can be done without significant cost. Is that true?

Mr Baker: That is correct. That should not be difficult at all. There are only 18 or 19 special advisers, and that information is readily available.

Mr Cree: My second question was prompted by Dominic's inquisition. For a while, I have been interested in the fact that some Departments say about their organisational structures that they are headed by a permanent secretary; they use that phrase. Others are headed by a Minister. Which do you think is correct?

Mr Baker: I do not want a rerun of the previous engagement, Chair. *[Laughter.]*

Mr Cree: Perhaps you could come back to me on that.

Mr Baker: Maybe you would need to take legal advice on that. I know that you are taking evidence from the Attorney General. He might be able to shed more light on that than I could. In layperson's terms, I would say that the permanent secretary is the administrative and managerial head of a Department. Obviously, he is the accounting officer for the management of resources in the Department. Everything that a permanent secretary does — indeed, this is the case for every other civil servant in that Department — is under the direction and control of the Minister for that Department. So, the Minister is the political head. Ultimately, the Minister makes policy, and civil servants have to operate in accordance with the Minister's policy. That is a bit of a long-winded answer, but that is how I understand it.

Mr Cree: Thank you for that.

Mr Beggs: Thanks for coming along today. You indicated in your evidence that statutory authority rests with the Finance Minister. Certainly, the current Finance Minister believes that he has the statutory authority to introduce the new regulation. Might that change if there were a different Finance Minister? Might a new Finance Minister adopt a different interpretation, meaning that, therefore, a different set of regulations might apply or that we might revert to the previous regulation?

Mr Baker: You are asking me to speculate and predict what stance a new Minister might take on any particular issue. I suppose that the answer is yes: any new Minister who comes in could adopt a new policy on any issue whatsoever. As a consequence, new directions could be issued under the authority of the legislation to which I referred. So, the answer is yes; quite possibly. Ministers come and go, and they have different policy approaches. That is what happens.

Mr Beggs: In my mind, that points to why legislation would make everything much clearer.

My second issue relates to special advisers and annual reports. Earlier in the summer, the issue of the salaries that are paid to special advisers was in the media. Civil servants have had their salaries frozen. Some lower-paid members of the Civil Service have received minimal increases. There is a lack of clarity on how wages are determined and on reporting how significant increases were awarded to, as I understand it, two special advisers. What reporting mechanism is there in the current system for accounting for those very significant increases? Does that not point towards a need for the type of reporting mechanism that is indicated in the proposed legislation?

Mr Baker: I cannot inform the Committee of either the salaries or increases received by any particular special advisers quite simply because I do not know them. However, I know that that is not what you are asking.

Mr Beggs: Can you advise us of the process for determining those advisers' salaries?

Mr Baker: I can. The general process for determining a special adviser's salary is based on a three-way decision between the permanent secretary of the Department involved, the Minister involved, and the head of the Northern Ireland Civil Service, who tends to operate in a sort of moderating role to make sure that there is some consistency across all Departments. When a Minister is going through the process of appointing a special adviser, they will make what is, perhaps, slightly grandly called "a business case" for which of two salary bands a special adviser should be on and where that special adviser should be placed on a particular salary band. That will depend very much on the nature of the job and on a person's experience and expertise, and if they were previously in employment, their previous salary. That is agreed on a tripartite basis among all the parties, and any change to that will have to be agreed on a tripartite basis as well.

Special advisers' salaries are reported in each Department's annual resource accounts. However, only the total salary band is included. The resource account will indicate on which of the two salary bands an adviser or advisers in that Department are paid. Those salary bands are quite broad, and an individual could be at the bottom or the top, but it is reported in the context of salary bands. For other senior staff in a Department, the same resource account will report salaries. For example, my salary is available for all to see in the DFP resource account. That is in bands of £5,000, which is a somewhat narrower band. That is a common accounting convention in most public bodies and maybe even in private bodies. The reporting arrangements for special advisers are different, in that the whole band is reported, because, to the best of my recollection, that is what Ministers decided.

Mr Beggs: My very particular question was about significant salary increases for special advisers since their original appointment. Under clause 4, a very significant explanation would be justified if that occurs. What is the process for when there have been very significant increases, particularly at a time when there is a freeze on other civil servants' pay?

Mr Baker: I will revert to Sir Humphrey mode again. When is a freeze not a freeze? The vast majority of civil servants are on what are called pay scales, and even though those pay scales might be frozen, they move up incrementally during the year. It is not as though everybody is paid the same today as they were last year; they might have moved up. However, that is just context.

A decision on an individual special adviser's remuneration is taken by the relevant Minister and permanent secretary, with the involvement of the head of the Northern Ireland Civil Service. It does not come my way.

Mr Beggs: A 10% increase was reported earlier this year. Are you saying that that has not caused discontent in your Department among other civil servants?

Mr Baker: Civil servants are always a discontented bunch, but, most of the time, there is no justification for such discontent. You are asking me to comment on a very personal issue, and I do not think that it is fair for me to comment on that.

Mr Beggs: I think that, when everyone else's salary has largely been pegged, there should have been an explanation for such a significant increase. That is why a reporting mechanism as per clause 4 would be justified.

Mr Baker: As I said at the start, it is not for me to comment on the policy in the Bill. That is for politicians, particularly as it is a private Member's Bill. So, I will not comment on that point.

Mr Beggs: In your experience, is there a danger of senior civil servants having over-cosy relationships with Ministers, in the sense that everybody can have a nice cosy relationship if you agree to give their special adviser an above average increase?

Mr Baker: No, I do not think so.

Mr Beggs: Are you telling me that the person who works for the Minister — his permanent secretary — has a significant input into deciding significant salary increases for his special adviser?

Mr Baker: Correct, and moderated by the head of the Northern Ireland Civil Service. The Executive agreed the arrangements for remunerating special advisers back in May 1997. Whether those were the right arrangements is definitely a matter for the Executive to consider and change if they feel that they should be changed. They are what they are, and they have been signed off by the Executive. That is how they operate. I know that I appear to be defensive, but it is not for me to gainsay an Executive decision. I remember that there was much debate about the point. It was when devolution was returning in early 1997, and a lot of paperwork was done on arrangements for remunerating special advisers. It culminated in a paper to the Executive in, I think, May 1997. The reason that I recall that is that I was drafting all of it. The Executive signed off on a policy for remunerating advisers.

Mr Beggs: I have a final question: who moderates the situation for OFMDFM when the permanent secretary is the head of the Civil Service?

Mr Baker: That is a very good question. Nobody moderates it; the head of the Civil Service has nowhere further to go on that point, so it is just the permanent secretary in that Department.

Mr Humphrey: Thank you for your evidence this morning. In your answers to Mr Bradley, you said that some special adviser appointments have not yet completed the process. Can you advise us when that process will be completed and whether you believe it will be compliant?

Mr Baker: Quite honestly, I cannot advise you on that because I do not know when they will be complete. That is outwith my control and knowledge. Whether they will be compliant is also outwith my knowledge and control; it will depend on the actions of others.

Mr Humphrey: How many are we talking about?

Mr Baker: I would be very loath to talk about actual numbers, because when you are talking about a very small number of appointments, such as those that have been made this financial year, it would start to be easy to identify individuals. We are talking about very small numbers. The total number of special adviser appointments that I am aware of this financial year is five, although it is a number smaller than five.

Mr Humphrey: During his evidence, Mr Allister talked about a six-week consultation process. He got advice from the Bill Office. Do you believe that that is consistent with advice that would have come from the Bill Office? Would that be legal and correct?

Mr Baker: I honestly have no idea what kind of advice the Bill Office gives or what the normal protocols are for consultation on a private Member's Bill, so I really could not comment on that. All I know is that if we, as a Department, were going to consult on an issue, we would probably be looking at a 12-week period as a minimum if that could be accommodated within the timescale for taking action. However, there may be entirely different arrangements for —

Mr Humphrey: You are not aware of it?

Mr Baker: I am not aware of it.

Mr Humphrey: Obviously, if the advice came from the Bill Office, it would be right?

Mr Baker: I assume that any advice from the Bill Office is right. Why would I question it in any way? I am sure that the advice is good.

Mr McQuillan: Derek, can I ask you about the retrospective dimension of the Bill? Would the two months' notice and the three months' payment after that cause the Department any problems? What normally happens?

Mr Baker: No. As Mr Allister said, the schedule to the Bill, which sets out the proposed severance arrangements, is pretty much in line with the current arrangements for special advisers. I see no difficulty with that whatsoever.

Mr Girvan: Thank you, Derek. The second paragraph of the letter dated 13 September states:

"for the appointment of Special Advisers similar to that which is applied to all other civil servants."

It does not say "the same"; it just says "similar". On that basis, I am wondering about employer guidance. We know that the word "guidance" can be used and set aside, as happens on many occasions. It can be applied where they want to use it, and we know how many occasions that happens. I wonder why the term "similar" is used as opposed to "the same as", which, I understand, would be a slightly firmer way of putting it. By using the term "similar", it gives the impression that wriggle room is coming somewhere.

Mr Baker: You are absolutely right: there is a small difference. So far as the initial vetting process is concerned, the arrangements introduced by the Minister in September 2011 for special advisers were identical to those that would apply to any other civil servant. The one difference is that, in his proposals, the Minister included the possibility of appeal should a Minister or, indeed, a special adviser, not be satisfied with the outcome of the initial vetting process. They could then appeal against that to a third party, who we would have to identify to deal with the appeal. That appeal mechanism does not exist in the current recruitment policy and procedures manual, which applies to all other civil servants. So, if you like, the Minister's new arrangements for special advisers offer a bit more latitude, in that there is a built-in appeal mechanism.

Mr Girvan: The issue is with the application of the current guidance. How effective has that been? Am I to understand that, under the current Civil Service code, no one with a serious conviction is employed?

Mr Baker: I am sorry; I cannot answer that question. I just do not know.

Mr Girvan: I appreciate that you cannot answer that. That is why I am leaving it hanging in the air. I have concerns that, on a lot of occasions, the guidance has not been properly applied, and that leads me to ask whether it is firm enough to ensure that that situation does not happen.

Mr Baker: It would be very difficult for us to find out. Part of my unit carries out the vetting process and takes the decisions on allowing someone's recruitment to proceed. Occasionally, it takes a yes decision, and, occasionally, it takes a no decision. After that process is completed, we destroy all the records relating to criminal convictions that are received from Access NI. We do not keep records of the criminal convictions. I take your point, but I cannot tell you how many such people have got into the Civil Service.

Mr Girvan: You mentioned Access NI, and we are all aware of the delays that can happen in getting those reports back. That has been a big issue until now. I have known that people have been in post but the report has still not been received. Ultimately, the Civil Service is waiting on Access NI and is relying on the person's word that they have no skeletons in their cupboard.

Mr Baker: There are two issues there. Sometimes, the issue of delay has come up. On occasions, we can, to use the vernacular, pull a few strings with Access NI to get a very quick referral done should we need to. We work closely with it to try to speed things up because, when we do a big-volume competition, a lot of people go through the process.

Secondly, if we have to make an appointment before we get the report from Access NI, we can make an appointment at risk. In the appointment letter, we can make it crystal clear to the individual that the appointment is subject to the full vetting procedure's being completed so that it can be written into their contract of employment. I have never been aware of a case where that has happened, but if something were to show up that was of very serious concern, we could invoke that clause in the contract of employment.

Mr Girvan: Is the tariff mentioned in the 1999 Act?

Mr Baker: No, those kinds of issues are not mentioned in the Civil Service Commissioners (Northern Ireland) Order 1999.

That reference reminds me of one other point that I meant to make at the start. The issue of competence is outwith my competence, because I am not a legally qualified person. I am sure that the Attorney General will be able to offer help to the Committee. Simply because of my job, I have a fair amount of contact with the Civil Service Commissioners, who regulate what we do in recruitment. I have some familiarity with the Civil Service Commissioners (Northern Ireland) Order 1999, which clause 7, I think, of the Bill would amend. I have a wee question mark over that, in that my recollection of that order is that it is a weird and wonderful piece of legislation that goes under the name of a prerogative order made by the Secretary of State under a letter of patent from Her Majesty. That obviously goes way back in the mists of time. The order is, I think, made by the Secretary of State for Northern Ireland. So, given that the Bill would amend the order, the Secretary of State's approval would perhaps be needed to give effect to that clause. I do not know; that is an issue of legislative competence that others will investigate. From looking at the order in the past, I know that it transpired that it is very peculiar legislation in that it does not go through any legislature. It does not go through Parliament or the Assembly but sits outside that kind of process. That is just a little technical quirk.

Mr Girvan: My understanding is that the issue that we are dealing with is totally devolved, so we should be able to —

Mr Baker: Fine; that is OK. I am not a legally qualified person.

Mr Mitchel McLaughlin: Hello, Derek, or is it Sir Humphrey? I do not know which is the most appropriate.

Mr Baker: I would like his salary.

Mr Mitchel McLaughlin: Did the review that your Minister conducted and in which you were involved examine individual Ministers' competency and authority to identify and appoint their own special advisers?

Mr Baker: No, it did not touch on that.

Mr Mitchel McLaughlin: OK. I would just like a second piece of information. In the past year, the Committee has discussed an issue of some significance: the Senior Civil Service disciplinary process and demotion. That led us to a considerably confused and grey area with the role of the head of the Civil Service and who they are appointed to. You referred to the Minister's statutory authority. Has he ever considered what his relationship is with the Senior Civil Service, given that the salaries for these posts are akin to Senior Civil Service salaries?

Mr Baker: Are you talking about Ministers' ability to exercise discipline?

Mr Mitchel McLaughlin: No; I am talking about your Minister's responsibility for the Civil Service, specifically senior civil servants.

Mr Baker: I do not think that that issue has arisen.

Mr Mitchel McLaughlin: You did not think that that was relevant?

Mr Baker: The statutory authorities to which I referred also cover the determining of standards of conduct for civil servants. I think that that is mentioned explicitly in the Civil Service Commissioners (Northern Ireland) Order 1999. I think that the answer to your question is no. I do not think that, in our deliberations, we brought into play the specific role of the Minister of Finance and Personnel where disciplinary action against an individual civil servant is concerned, if that is what you are asking me.

Mr Mitchel McLaughlin: That is exactly what I am asking.

Mr Baker: My answer is no, then.

Mr Mitchel McLaughlin: OK. Thank you.

The Chairperson: OK. You are free to go.

Mr Baker: Thanks.