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Assembly

Committee for Finance and Personnel

**OFFICIAL REPORT
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should not have been involved in any of the original decisions around the disciplinary action. I accept the point that you make about civil servants policing other civil servants, at whatever level. However, I suspect that that is the same in any large organisation that has an internal disciplinary process in place.

The Deputy Chairperson: I take your point, but the Civil Service is directly serving the public; it is not a private organisation. Perhaps there is a need for different, maybe higher, standards there.

Mr Baker: I agree entirely that there is a very strong need for high standards of probity in the Civil Service, and I think the standards of conduct chapter in the Civil Service handbook very clearly articulates those standards. In addition, we have a code of ethics, which is policed by the Civil Service Commissioners. I suggest that, together, the standards of conduct chapter and the code of ethics set extremely high standards against which civil servants' behaviours are measured. I do not think there is any question of low standards being set in the Civil Service. The standards are there, they are clearly articulated, and they are for all to see. Collectively, they form each and every civil servant's implied contract of employment. Adherence to those standards are part of their contract of employment.

The Deputy Chairperson: In my question, I used the term "public perception". It is very important that the public perception is that any behaviour in the Civil Service that is not acceptable is dealt with in an objective and independent way. Do you think that that public perception would be much clearer, if there was an external element to it?

Mr Baker: I would not argue with that point. I think you could add all kinds of layers to any kind of disciplinary process. You would be taking it to a different level. It stops being an internal disciplinary procedure. Once you introduce an external element, you have to create some kind of new external body to police that. The Civil Service, more than any other public organisation, is policed. The Civil Service Commissioners is unique to the Civil Service. No other public body is policed to the same extent in its recruitment. I am not too sure what disciplinary procedures you have in mind, but we are open to suggestions from the Committee. If you are proposing the creation of an external body —

The Deputy Chairperson: The Assembly, for example, like other legislatures, has established an independent Assembly Commissioner for Standards, with the statutory power to investigate complaints about the conduct of elected members and to report the outcome of such inquiries in a very public way. When you consider the highly influential role of civil servants in government, is there an argument for establishing a similar arrangement for independently investigating allegations of misconduct by senior civil servants?

Mr Baker: Of course, there is an argument for that. I would not suggest there is no argument; I suppose the issue will boil down to whether there is the political will to create an institution that would be required to do that. It seems to me that you are suggesting the establishment of some kind of external body or commission, I do not know which, but it is a question.

The Deputy Chairperson: Rather than setting up a new body, is there the option of extending the functions of an existing independent scrutiny or oversight body, such as the Assembly Ombudsman or the Assembly Commissioner for Standards?

Mr Baker: The Assembly Ombudsman doubles up as the Commissioner for Complaints, so as the Commissioner for Complaints, the Ombudsman clearly has a role in investigating maladministration in any public body including the Civil Service. The danger here is that, when you are dealing with disciplinary issues, you are very clearly in the territory of employment legislation. A lot of personnel issues are just day-to-day things that you do as part of the run-of-the-mill management of any organisation and they do not carry any major risks. However, when you are dealing with disciplinary matters, you start to step in very clearly to areas of employment legislation that carry legal risks.

People who are subject to disciplinary action may well end up taking grievance or taking legal action if, for example, the disciplinary action against them could be construed as constructive dismissal, unfair dismissal or unlawful deduction of earnings. If you bring in another decision maker into the process, then that decision maker needs to understand that he, she, or if it is an organisation, it, could find

itself directly in the firing line in defending those decisions and could find itself in an industrial tribunal or in a court or whatever defending those, and could find itself liable.

As a civil servant, I am an employee of the Department that I work for, which is the Department of Finance and Personnel. I am not an employee of the Northern Ireland Civil Service because that does not really have a legal personality. However, in any action that I would take against my employer if I was disgruntled about something, the Department of Finance and Personnel is the legal personality that would be liable. If you bring in an external group to pronounce on such matters, that group could well find itself liable as well, so you would need to consider all those issues. It is not just a matter of reporting on it; if it has a decision-making role, it becomes liable in those circumstances. That is not to say that it should not happen, but those are the kind of factors that would have to be brought in to play.

The Deputy Chairperson: Arising from the Committee's previous representations, the Minister has suggested that the phrase "inappropriate behaviour deliberately designed to undermine the political process" could be added to the list of examples of behaviour that could lead to dismissal for gross misconduct. Given the seriousness of this type of misconduct and the fact that it directly affects the democratically elected institutions, what provision can be made for ensuring both the independence and objectivity of the decisions taken in individual cases involving alleged behaviour falling within this description?

Mr Baker: I think that question probably links back to your original point. It very much depends on whether the Committee or whoever is observing the disciplinary process has confidence in the ability of the decision-maker and any appeal hearer to take the right decision. However, that would apply as much to any offence committed against this particular provision as it would to anything else on the list of disciplinary actions that could lead to summary dismissal. I know that every effort is made when putting in place a disciplinary process to make it as objective, as independent and to have as much integrity as possible, but if the perception or view of the Committee is that the civil servants are not capable of taking such decisions, that should apply to this as much as it applies to any other aspect of the disciplinary code.

The Deputy Chairperson: What arrangements could be put in place to ensure that the views of the Assembly are sought and taken into account in such cases?

Mr Baker: The steps of a disciplinary process are fairly clearly mapped out. Normally, there is an investigation to establish the facts, a decision as to whether or not a disciplinary charge will be laid, a decision on whether the disciplinary charge is upheld and the possibility of an appeal. In the investigation phase, which would normally precede a disciplinary decision, it is entirely possible for the investigator, whomever that might be, to interview whoever they feel it is appropriate to interview. In respect of the case that prompted the Committee's interest, the investigator interviewed a number of Members, so there was no proscription on who an investigator could interview to gather facts and opinions on whether an offence had been committed. The Assembly, or individual Members, would clearly be included in that.

The Deputy Chairperson: Could be included in that?

Mr Baker: Or a Committee, for example, yes. There is absolutely no reason why not. It depends on the nature of the offence.

The Deputy Chairperson: Could that be written into the procedures?

Mr Baker: We are getting very specific. Written into the procedures in respect of what? Every case or just specific cases? Or, when an investigation is carried out? I would be loath to try to proscribe those whom an investigator should interview. As things stand, an investigator could interview anybody. You could say that that should include the Assembly, an Assembly Committee or Members of the Assembly", but there is not proscription or bar at present.

The Deputy Chairperson: I am talking specifically about people who were disciplined for inappropriate behaviour deliberately designed to undermine the political process.

Mr Baker: There is no reason why not. If such a charge was levelled at an individual and an investigation was carried out, and we are speaking speculatively, it would be highly likely that an investigator would want to interview Members of the Assembly or have a session with a Committee, depending on the nature of the circumstances.

The Deputy Chairperson: One more question before we go to members. Could there be provision for a third-party appeal procedure, whereby an appeal could be made to a higher authority by a third party, such as the Assembly, in order to provide safeguards in disciplinary proceedings at that level of seniority, particularly in cases where there have been controversial decisions?

Mr Baker: When you say "third-party appeal", do you mean someone outside the organisation appealing the decision of a decision-maker and the decision of an appeal hearer? Do you mean a challenge to a disciplinary decision?

The Deputy Chairperson: Could the Assembly act as a third party in that situation?

Mr Baker: Could the Assembly challenge a disciplinary decision? Sorry, I genuinely do not understand the question.

The Deputy Chairperson: Could provision be made for a third-party appeal procedure, whereby an appeal could be made to a higher authority by a third party, such as the Assembly?

Mr Baker: An appeal against what?

The Deputy Chairperson: In the case of the particular "offence" that we are talking about, undermining the political process.

Mr Baker: My understanding of an appeal in the context of a disciplinary procedure is where the individual who is the subject of the disciplinary decision appeals the disciplinary penalty imposed on them.

The Deputy Chairperson: If the Assembly was unhappy with the outcome, would it be possible to make provision for the Assembly to appeal to a higher third-party authority?

Mr Baker: That would be an appeal by the Assembly against the disciplinary decision imposed on somebody?

The Deputy Chairperson: Yes.

Mr Baker: I think that that would be a matter for the Assembly. Again, it brings the Assembly into direct drive on disciplinary decisions, and that is a matter for the Assembly. However, the Assembly will then be the legal personality that is liable for any decisions or for any legal action arising from that by the individual whom is subject to the disciplinary penalty. The Assembly is not the employer, and that is clear. The legal personality that is the employer of the civil servant is the Department that the civil servant works for. So, if the Assembly then makes an appeal and takes a decision, it will make itself liable for any legal comeback on that, I suspect. We are starting to broaden the scope of this. I have not thought this through, and you can gather that from my response. It has taken us into completely new territory, and it seems somewhat unusual. However, all things are possible, and it depends on political will.

Mr Cree: Chair, you very kindly covered my question there, and 90% of it has been dealt with. Because of the natural pyramid structure of Departments, the problem occurs at the top end, especially in the classic situation of the head of the Civil Service. We are saying that the Home Civil Service then really kicks in in that case.

Mr Baker: That is the suggestion in the draft.

Mr Cree: It is probably as good as any, is it not?

Mr Baker: You are absolutely right. When dealing with disciplinary action at that level of seniority, you run out of headroom, because the normal convention is that someone more senior than the individual being disciplined takes the decision and, if possible, someone more senior again hears the appeal. However, you have run out of room on that. I trawled the disciplinary processes of other organisations and the Whitehall Civil Service, and it is totally silent on what it will do with the head of the Civil Service as well. That has been left sitting in the "too hard" box, and no one has tried to address it.

Mr McLaughlin: Do they not use the tower anymore, no?

Mr Cree: Maybe that is the answer.

Mr Baker: They might well do, and maybe that is the answer. It is down here as a proposal, and it is far from perfect, because the Home Civil Service is a separate organisation from the Northern Ireland Civil Service; we need to be clear about that. However, the suggestion is there because there is a relationship between the head of the Northern Ireland Civil Service and the head of the Home Civil Service. The head of the Northern Ireland Civil Service has regular meetings with his counterpart. He goes over once a week or every couple of weeks, and there is a line management responsibility that has been there historically. Maybe that needs to change. There is only one such person at head of the Civil Service rank in Northern Ireland, and, if there are any pay awards, the head of the Home Civil Service tends to be involved in some kind of performance management with the head of the Northern Ireland Civil Service, liaising as appropriate with the First Minister and the deputy First Minister. In the past, he had some contact with the permanent secretary of the Northern Ireland Office to gather information about performance. So, that is the proposal, and it is felt that there is some appropriateness to that because the head of the Home Civil Service has an understanding of how the Civil Service should work, the standards of conduct that should be applied and an understanding of the code of ethics and the various accountabilities and so forth. That is why the proposal exists.

Mr Cree: I want to flesh out a bit more the suggested board of inquiry for the permanent secretaries. Again, because of the nature of the structure here, you are talking about drawing that inquiry board, if I can call it that, from other permanent secretaries who are all very closely knit and well known to each other. Is that a healthy situation?

Mr Baker: Not necessarily. The board of inquiry will not necessarily be made up of other permanent secretaries. For example, a board of inquiry was established for Mr Priestly. Bruce Robinson invited three people who were not serving civil servants to be involved in that. One was a former head of the Civil Service some time ago, John Semple, another was a former Civil Service commissioner and practising lawyer, Margaret Elliott from Newry, and the other was a very senior figure in the private sector, Sir Patrick Harron, former chief executive of Northern Ireland electricity. They were not all current civil servants or in employment, and it was felt that they were far enough removed from Mr Priestly to consider the matter, yet had an understanding of the issues. Margaret Elliott was a commissioner and lawyer with employment law experience and John Semple is a former —

Mr Cree: That is the kind of board of inquiry we are talking about.

Mr Baker: It is. I know that we have not specified the kind of individual here, because it might differ, but it leaves it open for whoever is convening the board to convene people of adequate seniority and experience at their discretion.

Mr McLaughlin: I think that the Minister's response indicates that careful consideration is being given. The difficulty that the Minister faces, as does the Assembly, is that we are dealing with a system that pre-existed the Assembly and we are trying to amend the process as we go along. That carries quite significant dangers. If you were designing it from the ground up perhaps you would end up with the same structure, but perhaps not.

I have a number of issues. We are talking about a specific case, but there is a danger in that as well, because there must be other examples. The Assembly has reviewed, particularly through the Public Accounts Committee, a number of projects that were managed by and reported on by permanent secretaries and, inevitably, they have come across examples of maladministration and mistakes made.

I do not think we can demand that you develop a situation in which you cannot make mistakes, but if you learn from the mistakes then the public interest is served in the long run.

We have also found examples where, quite clearly, guidance and procedures that were developed over many years of experience were set aside in a very cavalier fashion. One of the significant flaws of the system is that, in effect, the civil servants are policing themselves, because even triggering an investigation requires involvement at a senior level. If the instinct is not to do that then a lot of questions go unanswered, hence what I detect as a significant level of cynicism about accountability at that level of the Civil Service. It is all a bit mysterious as well, but the impression given is that people are very reluctant to even record that on an employment record, let alone take disciplinary action. I am talking about quite flagrant disregard for agreed procedures that were set down in advance for applying conditions to major grant-aided projects. The specific conditions were actually prescribed, but then someone along the road decided to set them aside, and had sufficient seniority to over-ride more junior civil servants who were involved in the project. It seems to me that there are flaws in the system, which then encourage people to develop a belief that they are bullet-proof when it comes to disciplinary processes, or that, in any event, there would be no significant consequence for their future career.

I suspect that what we really need to do is take a look at what has emerged over the past mandate. I do not want to go back too far. So, we are talking about a period of five years. My view is that you would see ample evidence to justify a more comprehensive look at this process. If we were starting over again, would we do it the same way, or are we just slipping into the groove in how we are taking a look at existing processes? I understand that the handbook with its guidance is not even a statutorily based document. There may be good reason for that, but I do not understand it.

If we were to take a look at the issues in relation to summary dismissal and then the range of sanctions that could be applied, it seems that there is no attempt to take account of people who tear up the rule books as they go along. That kind of behaviour is inexplicable at one level, but it is even more inexplicable that you can do that and not expect that anyone will step in and say that you have overstepped the mark and there is a direct consequence. The Minister has in this instance offered yet one more level of the Civil Service to take a look at, but I think that almost represents tunnel-vision. I give him credit and thank him for looking at it and for giving us a suggestion, but I wondered whether we could come up with something else if we stepped outside the box; perhaps a judicial figure.

We have to rebuild people's confidence that, if you interfere with the political process, that process will demand sanction. There should also be a consequence if the political process designs procedures around procurement contracts and programme delivery, and the senior civil servants believe that they can step outside that agreed guidance and those contractual obligations and set out their own response.

I am considering arguing this case at the Public Accounts Committee. If we were to map our reports in recent years, I would like to know whether we would come up with the names of individual senior civil servants who are managing people and projects funded out of public finance who have appeared in two or three of those critical reports. I would like to know whether we would discover that there had been any consequence as a result of the flaws, mistakes or breaking of guidance that they were responsible for, although I suspect we would not. I do not think the procedures are sufficient. They grew out of something else in an earlier phase, and my view is that this Assembly is capable of doing better.

Mr Baker: If I can comment on that, Chair, I have one specific point. You said that the code or handbook is not statutorily based, and you are absolutely right that it is not, but I do not think it should be. The Civil Service handbook is a peculiar document. It is a very long compendium of all HR policies, but aspects of it are grounded in statute. For example, even within the disciplinary chapter, the fact that there is an appeals procedure built in is grounded in employment legislation, so where necessary, we have imported what the law requires of us with regards to employment legislation and put it into the handbook. However, there is lots of other stuff in the handbook, such as what kind of support staff can get if they are suffering from substance misuse or whatever, for which there is no statutory basis and nor would there be.

You have made a number of comments about the performance of the Civil Service. I am not here to defend the Civil Service; that is not my job. I might have said this to the Committee before, but I would

agree with you, or at least comment, that in survey after survey that we do, such as the staff attitudes survey or whatever, the one thing that civil servants say of themselves is that they are not good at managing poor performance. Maybe there is a bit of human nature here, and we point the finger at somebody else and say that it is somebody else's poor performance, it is not mine. We do not believe that we are good at managing poor performance. I suspect that if you looked at any organisation, you might get the same response. I do not know. People have a view of others around the organisation and, perhaps, think that they are not performing well, are making mistakes, or whatever. Their view is that the system, perhaps, tolerates or accommodates that, rather than confronting and dealing with it head on. That is a failing in the Civil Service which everybody recognises. It may be a failing in many big organisations and bureaucracies. I accept that point.

You are talking about disciplinary issues. However, you are also straying into, I suppose, the softer area of performance management. There is a bit of both. However, where there is consistent flouting of proper performance standards, you are getting into disciplinary action.

I also agree with you that a lot of the stuff that relates to the way in which we operate, our procedures and policies, has its roots in the mists of history. Those procedures and policies have grown up. Much of what we do and the relationship between the civil service and legislation is not grounded in any written constitution or grounded rules. It is based on convention. That is simply fact. Perhaps, if you were starting from scratch, you might do it differently. Therefore, I will not argue with that.

I will throw out an example. It is only an example; I have not researched it. In the Republic of Ireland, there may be specific legislation on the management of the civil service there that gives certain decision-making authority to Ministers in respect of civil servants above a certain rank. Therefore, that is a different model. It is backed up by legislation. Clearly, a conscious decision was taken at some point in the past to legislate and provide for that. That is a totally different model.

Mr McLaughlin: I want to come back on one issue. I know that an aspect of performance management is involved. However, without going into specifics at all or even naming projects, it is of far more concern to me that, if a decision is taken at Executive level to support a particular project or to offer to or invest significant funding in that project, conditions are attached to that, and, in the management of that project, a situation occurs in which those conditions are not being met, it does not seem to be referred back to the people who made the decision to impose those conditions in the first place. That happens in every circumstance. I want to be careful not to impugn people who do their jobs perfectly satisfactorily. They will remain anonymous because they will never come to the attention of the Public Accounts Committee. It should be acknowledged that, in fact, most members of the Civil Service perform an honourable job with complete integrity.

However, we have had example after example of where guidance that was developed on the basis of experience, including mistakes that had been made in the past, were set aside and mistakes repeated. It seems that the disciplinary process did not serve us well. It, probably, did not serve individuals well because, perhaps, there was no expectation on them. Even if they set aside the conditions that were attached to a project, there would be no consequence. It was a case of, "If you like the project, get it delivered". In other words, people were encouraged into a very dodgy area indeed and told that they needed to make a decision. They had to decide whether to withhold a grant and, possibly, collapse the project or go ahead and pay the grant despite non-delivery. Time and time again, we find that they chose the latter option. Therefore, perhaps, the guidance neither serves the Assembly well nor middle and senior management. I am keen to do something about that.

Mr Baker: The Minister has presented the issue to the Committee for its views, so, no doubt, the Committee will reflect those views in its response to the Minister.

Mr Girvan: Thank you, Derek. A lot of the problems go back to the historical aspect. Senior civil servants effectively felt that they were running Northern Ireland for 40 years and never put in place the mechanisms to ensure that they were ever going to be challenged on making a decision. The man who never made a mistake is the man who never did anything. On some occasions, when disciplinary matters are being dealt with, the people who are not being disciplined are those who have done nothing or who are doing nothing, because they never come above the parapet. That is where I think there is a need for some performance-based evaluation.

I wonder whether certain things relating to ensuring that criteria are followed could be put in the handbook. If they were included, it would be fairly black and white on, for instance, political interference. If it is not included as a key area, it is an understood fact that it is probably expected, and some people feel that they can drive a coach and horses through it. Unless it is stipulated in black and white, there will be those who will dance around on the head of a pin to work their way through things. If you try to be more prescriptive and put those sorts of things into the handbook in black and white, they will not be misconstrued, and, if there were a legal challenge, anybody, irrespective of where they came from, would be able to make a judgement. It would be there in black and white, and one could see where someone stepped outside their remit. There would be no need to go any further up the tree. It would be very plain for anybody in the Civil Service or, as happened previously, experts from the private sector or other people from outside the area who were making a decision. Has that approach ever been investigated? Have you tried to be more prescriptive in ensuring that the role to the political institution is taken account of?

Mr Baker: I need clarification. You talk about putting something more specific and explicit into the handbook. In relation to what, specifically?

Mr Girvan: I think we are dealing with senior civil servants. It is in relation to their role and how they carry out their function. Mention has been made of procurement. We have put in place a measure in legislation that ensures that procurement is a clear and transparent process. If something in procurement is challenged, there is an easy audit trail to see whether the proper procedures were followed in the tender process, the scoring and the appointment. Senior civil servants can step outside the box and go beyond their remit in some areas where there is not that clear audit trail. They feel that because they are a senior civil servant, they are able to make those decisions. They have been able to do so in the past.

I am not saying that what happened a year ago was unique. I reckon that it has happened in the Civil Service for years. The fact is that it has come to light now, and we are dealing with these matters. That is why we are at this stage today. We are trying to ensure that there is a mechanism in place to ensure that it does not happen again and that we do not get into the same mess again.

Mr Baker: The standards of conduct chapter in the handbook is very long; I do not know whether the Committee has seen it. I do not know how long it is, but there are a lot of appendices as well. It is possible to add and add and add to it. The standards of conduct chapter tends to deal with generic standards of conduct. Obviously, there are all kinds of other more detailed guidance in respect of procurement, for example, and, perhaps, the things that Mr McLaughlin was talking about, such as project management, decisions about grant aid, etc, and regularity of expenditure. I suppose that there is lots of guidance all over the place with which staff are expected to comply. I think that the current standards of conduct are an attempt to capture the essence of as much of that as possible. Staff know that they are expected to comply with all proper instructions, but to include all that explicitly in the handbook would not be possible. I am afraid that we could go on forever, because where would you draw the line? However, I take the point that the standards of conduct should make it very clear to all civil servants that they are expected to comply with guidance, whatever its nature, in respect of procurement, project management and so on, and that deliberately, negligently or whatever stepping outside of that or setting it aside is potentially a disciplinary offence. I am more than happy to go and look at the standards of conduct chapter to make sure that cross-references to the other guidance with which people have to comply are highlighted adequately there. It is an awfully long chapter and covers everything from political activities to fraudulent activity to theft, drug misuse, harassment, bullying and all of that. The issue is about making people aware of the fact that they need to comply with the guidance that exists to protect the public purse.

The Deputy Chairperson: I know that we have gone over time on this issue, but it is important. I have one or two other questions.

In the case of disciplinary action being taken against a permanent secretary or equivalent head of Department, revised paragraph 2.7 states:

"the normal practice, after consultation with the Minister of the Department concerned, will be for the Head of the Northern Ireland Civil Service to set up a board of inquiry."

Rather than simply normal practice, why is there not a specific requirement for the head of the Civil Service to set up a board of inquiry for disciplinary proceedings?

Mr Baker: The only reason why that caveat is there is that the head of the Civil Service might decide to go straight to decision-making mode. The head of the Civil Service, as per this draft, will be the decision-maker in respect of disciplinary action against a permanent secretary. That paragraph gives the head of the Civil Service the option, if he or she wants, to set up a board of inquiry to assist him in reaching a decision. However, the issue may be —

The Deputy Chairperson: Or to take disciplinary action himself?

Mr Baker: Yes; the head of the Civil Service will always be the individual who imposes disciplinary action on a permanent secretary. All this does is give the head of the Civil Service the option of setting aside a board of inquiry. Maybe the issue is so blatant —

The Deputy Chairperson: In relation to that, paragraph 2.7 also states:

"The final decision on whether to impose a disciplinary penalty or penalties and what penalty or penalties should be imposed will rest with the Head of the Northern Ireland Civil Service."

Why is the individual making the decision about whether to impose penalties? Why is that not bound by the recommendations of the board of inquiry? Would it not provide for greater independence and transparency in disciplinary proceedings if the latter were the case?

Mr Baker: The whole structure of the disciplinary process is based on someone — a decision-maker — exercising disciplinary authority. The proposal in respect of permanent secretaries is that the head of the Civil Service will always be the decision-maker. A board of inquiry will not be the decision-maker. The board of inquiry is not part of the organisation.

In the case of Mr Priestly's disciplinary action, the board of inquiry was outside the Civil Service. If that board of inquiry were the decision-maker, the three individuals concerned would have been personally liable for any legal challenges against them. So the head of the Civil Service is the individual responsible. The board of inquiry made a recommendation, and in the event, the head of the Civil Service stuck to that recommendation. I think that a decision-maker would need very good cause not to adhere to a recommendation.

The Deputy Chairperson: What happens in cases where the head of the Civil Service does not abide by a decision of the board of inquiry?

How are we to know that that was the correct and proper thing to do, since that process is shrouded in confidentiality?

Mr Baker: If a head of the Civil Service were not to accept the recommendation of a board of inquiry, that would be part of his role as the decision maker and would be his prerogative. He will always be the decision maker and will always be responsible for that. He has to carry the can for that decision and will be the subject of any legal challenge. The board of inquiry's remit is no different from that of a decision that is taken at any level of the organisation. It states elsewhere in the disciplinary chapter that a person who exercises disciplinary authority, including at a fairly junior or middle-ranking grade, can exercise the right to delegate someone else to come up with a recommendation on whether disciplinary action should be taken and, if so, what the penalty should be. That does not remove from the decision maker their responsibility to take the decision.

Your question is on transparency around the board of inquiry's recommendation. In the case of a permanent secretary, the disciplinary penalty will always be disclosed. You asked whether the board of inquiry's recommendation should also be disclosed. I have not thought about that. There is an issue about confidentiality of disciplinary processes. If there were totally disclosed, no one would participate in them, so confidentiality maintains their integrity. You seemed to raise the specific example of

disciplinary action of permanent secretary level if there is a difference between the final decision and a recommendation from a board of inquiry. Personally, I do not see any difficulty in any difference being disclosed. I have not reflected on that. A head of the Civil Service would need to have very strong grounds to depart from a recommendation by a board of inquiry and take a different decision, and he would probably leave himself or herself quite exposed to challenge to that decision. Nevertheless, it is their prerogative to do so.

Mr McLaughlin: Not to return to the earlier discussion, but you talked about pyramid structure of employment and who, in effect, the Civil Service works for. You also indicated that the Assembly does not have a legal personality.

Mr Baker: No, I was referring to the position regarding employment. I am employed by DFP, not the Civil Service.

Mr McLaughlin: That is the point that I am coming to. You are employed by DFP. Who is the head of the Civil Service employed by?

Mr Baker: He is an employee of OFMDFM. He is not employed by the Home Civil Service, and, as I said to Mr Cree, it is not an entirely satisfactory arrangement that someone outside the Civil Service is involved. OFMDFM is his employer.

Mr McLaughlin: Given that the head of the Civil Service is employed by OFMDFM, is there no conflict in employment law in pronouncing on disciplinary sanction in relation to someone who is employed by another Department?

Mr Baker: That is a bit of discomfort that the Civil Service accommodates. We appreciate that. I should not return to Mr Priestly's case or any specific case. In the case of any permanent secretary, who else will be the decision maker? In the Northern Ireland Civil Service, there is a clear line-management relationship between a permanent secretary and the head of the Civil Service, or at least you can map that relationship very clearly. There is legitimacy in the head of the Civil Service being the decision maker in respect of a permanent secretary. You are right: a permanent secretary is employed by the Department that he or she works in. The legal personality is the employer.

Mr McLaughlin: So we could have 12 employers for the range of permanent secretaries that we have.

Mr Baker: We have 12 employers. If I, as a permanent secretary, take legal action against my employer because I am disgruntled about something, I will take it against the Department that I work in. Often, DFP tends to get joined in some actions, because we are held responsible for HR policies.

Mr McLaughlin: It was my assumption that the tree emanated from DFP, but that is not the case.

Mr Baker: No, it is not the case.

Mr McLaughlin: OK. In order to illustrate what I see as a certain conflict, I will pose a hypothetical question, because there are no implications whatsoever for the incumbent. What if we had a situation in which the head of the Civil Service was the subject of a disciplinary process? Who would conduct that?

Mr Baker: That is a very difficult question, which I have agonised over. I do not have a neat answer for you, I am afraid. I have trawled other organisations and I have not found an answer. Obviously, it would be a highly unusual situation, but it could happen. I would imagine that the permanent secretary in the Department of Finance and Personnel, as the policy owner for accountability, probity and regularity policies, might have to initiate the action by contacting the head of the Home Civil Service in Great Britain. Alternatively, depending on the nature of the allegation, one might imagine a situation in which the First Minister and/or the deputy First Minister would get involved and contact the head of the Home Civil Service, asking him or her to take action. If it ever were written down in our handbook that, in cases involving the head of the Civil Service, the head of the Home Civil Service would be the decision-making authority, it might be that the First Minister or the deputy First Minister would have to initiate the action in some way. It is a difficult one, and you have reached the very pinnacle of the

pyramid in the Northern Ireland Civil Service at an administrative level. That is why the proposal is that we have to step outside the jurisdiction a wee bit and go to the head of the Home Civil Service.

Mr McLaughlin: We are nearly out of time, but let me make this point.

The Deputy Chairperson: We certainly are.

Mr McLaughlin: I understand, and you have been very indulgent, but this is critical. Part of our processes in the Assembly involve going back and looking at projects to determine how they are being managed, and, sometimes, we find irregularities and difficulties. There is no question that, given the way in which people are promoted or transferred across and end up in different Departments, we could certainly find ourselves in a situation in which the head of the Civil Service is being criticised because of a project in which he or she was involved in an earlier life. What you are describing to me seems to be a complete anomaly when it comes to satisfying public opinion. It might be very damaging if it were to emerge that a report reflected critically on the incumbent head of the Civil Service.

I do not understand why you would go to an even higher civil servant, if I could put it that way, in Westminster, when, in fact, accountability should rest here. Surely, at that stage, we should be considering some kind of independent process in which people could have a bit of confidence. People do not know the head of the Home Civil Service is, nor do they see that person as being separate from the establishment. In fact, if there was ever a device for increasing people's paranoia, that is the mechanism for doing it. There are issues that you have touched on today, and, because you have been so patient, I will leave it at that, but there are more questions than answers today.

The Deputy Chairperson: OK. Thank you very much for your answers, Mr Baker. We may be in touch with you for further information. We will appreciate that if we ask for it.