



Northern Ireland
Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Civil Service (Special Advisers) Bill:
Equality Commission Briefing

5 December 2012

NORTHERN IRELAND ASSEMBLY

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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
Mr Leslie Cree
Mr Paul Girvan
Mr John McCallister
Mr David McIlveen
Mr Mitchel McLaughlin
Mr Peter Weir

Witnesses:

Ms Eileen Lavery	Equality Commission for Northern Ireland
Ms Jacqui McKee	Equality Commission for Northern Ireland

The Deputy Chairperson: I welcome Eileen Lavery, head of advice and compliance, and Jacqui McKee, who is the director of advice and compliance. You are very welcome, and I ask you to make an opening statement.

Ms Eileen Lavery (Equality Commission for Northern Ireland): Good morning, and thank you very much for the opportunity to speak to you about this. I apologise for having sent our submission just yesterday or the day before, but I hope that everyone has had an opportunity to read it.

Clearly, there are two things that we would like to focus on. One is the application of equality law to special adviser positions, and the second is how that process can become more open and transparent. The commission previously —

The Deputy Chairperson: May I just point out to members that it is paper 4M that is relevant to this evidence session. I am sorry about that.

Ms Lavery: Previously, we wrote to the review of arrangements for the appointment of special advisers, which was carried out by the Minister of Finance and Personnel. We wrote to him just last year, I think. In that, we tried to get across that equality legislation applies to all positions in Northern Ireland except those that have a special exemption. We know of no reason why these positions would be specially exempt. We understand, of course, that, given the nature of them, it may be necessary to argue that political opinion is an essential requirement of the job in some circumstances. However, that in itself does not take away from the requirement to apply all other aspects of equality duties. So, for example, it does not take away from the need to ensure that the appointment is not made without consideration of gender issues, age issues and those kinds of things. Even if the exemption in respect

of political opinion is invoked, there should still be proper arrangements whereby transparency can be taken into account in the prevailing equality legislation. In those circumstances, you need objective standards and measures. You need to know what the duties of the individual are, what they will do, and how we will assess their ability to do those things. We are very much of the view that there should be clarity on those matters. In 2011, we agreed with the proposal that there should be greater clarity on the pay received by those individuals. So, that was what we said in 2011.

We are looking specifically at the Bill that has now been introduced by Jim Allister and particularly at clause 2, which deals with someone being ineligible for appointment on the grounds of a serious criminal conviction. If equality legislation teaches us anything, it is that blanket exemptions generally are not to be used. The assumption that anyone with a serious — I understand that "serious" is defined as five years — criminal conviction could not be a candidate does not seem to make sense to us. In our submission, we have tried to use examples of blanket exemptions and how those have been problematic in the past. For example, we understand that those with a serious criminal conviction are much more likely to be men. Is that the intention and outcome, and could that be justified in any way? Say, for example, that a height requirement of at least 6 feet were introduced, you may say that that is not discriminatory, but, of course, it is much more likely to impact on women. We have seen case law on those sorts of matters in other countries, particularly in respect of police appointments in the USA.

One of the things we pointed out is that during the recruitment of special advisers in England in 2001, a discrimination complaint was made in the case of Coker, initially on gender issues, and Osamor, who later joined that case, in respect of race issues. So, there can be challenges to the appointment of special advisers.

We feel very strongly that an applicant could complain that the criterion of prohibiting anyone with a serious criminal conviction disproportionately excludes men, as I mentioned. Men would be disproportionately excluded, and it would then be for the employer to objectively justify why that criterion was used.

The other thing that the Committee has been much concerned with is the situation of people with conflict-related convictions after the Good Friday Agreement. I have, indeed, read the evidence provided by others. I know, for example, that you took evidence yesterday or the day before from Sir George Quigley and Sir Nigel Hamilton on the arrangements that have been in place for that. There is an exemption in the fair employment legislation, and that exemption has been there since 1976. Section 2(4) states that fair employment law does not protect anyone who approves or accepts the use of violence for political ends connected with the affairs of Northern Ireland. Anybody in this room who is as old as me, which is rarely the case anymore, will recall that in 1976, the fair employment legislation initially followed the Cameron review that looked at the disturbances in Northern Ireland and was then informed by the review commissioned by Sir William Van Straubenzee. At that time, there was concern about growing violence, and that exemption was made in 1976 for those reasons.

It seems that that exemption no longer makes sense, if I can put it as simply as that. The reason we say that is that, clearly, as part of the Good Friday Agreement, those in Northern Ireland with conflict-related convictions were released. I do not believe that anybody anticipated that they would be released to what I would loosely call "fester"; but that they would be released to become good citizens and to contribute to Northern Ireland. Exemptions in legislation that prevent those individuals from becoming good citizens and contributing to Northern Ireland do not seem to rest easy with the intention at the time.

Certainly, from the commission's perspective, we have been involved with the Office of the First Minister and deputy First Minister (OFMDFM), the voluntary guidance and the working group, which, as you know, comprises the Confederation of British industry (CBI), the trade unions and some of the ex-prisoners. We have been looking at how ex-prisoners with conflict-related convictions can be reintegrated into the workplace. We know that, ultimately, access to work is very much a door to contributing to society. It seems that the recent review of how that work was going said that the exclusion in the fair employment legislation is a real impediment and barrier that prevents that guidance from working as it should in the voluntary arrangement.

Two proposals, as you know, have been brought forward. One is that either section 2(4) of the Fair Employment and Treatment (Northern Ireland) Order 1998 is removed entirely, or that it remains but a caveat is inserted that it would not apply to those who have conflict-related convictions that predate 1998. Given that all that discussion is alive and very vibrant at present, the proposal within the Bill,

which is that anyone with a serious criminal conviction could not be considered for such a position, does seem to shout at one another, if I can use that phrase

In conclusion, we appreciate the importance of and the sensitivity around these positions. We think that arrangements for recruitment, conduct and remuneration should be open and transparent, but, for the reasons that I have set out, we caution against the use of a blanket exception where it cannot be objectively justified.

We remind the Committee that the test of objective justification means that an employer must be able to show that what is done is a proportionate means of achieving a legitimate aim. Those are rather legalistic words, but I think they are words that make sense to us all. The tests are whether that is proportionate and whether the aim was a legitimate one. The commission welcomes the voluntary guidance that Sir George Quigley and Sir Nigel Hamilton spoke to you about yesterday, and we have worked with the Office of the First Minister and deputy First Minister. As recommended by that guidance, we therefore agree that employers should take an individualised approach. Each person should be assessed on their own merits, and employers should consider the material relevance of any conflict conviction to the post to be filled, rather than rely on a blanket exception.

The Deputy Chairperson: You mentioned that you wrote to the Minister of Finance and Personnel in the context of the review of arrangements for the appointment of Ministers' special advisers. Are those new arrangements that the Minister has formulated within the equality legislation?

Ms Lavery: The arrangements certainly brought the appointments procedure much closer because they introduced such matters as criteria and openness and transparency, but I still think that more could be done with those arrangements to bring them clearly within the equality provisions.

The Deputy Chairperson: What aspects in particular?

Ms Lavery: If you go back to paragraph 8 of our submission, you will see some of the bullet points that we specifically made. We are not sure exactly which objective standards and measures have been introduced. We have looked at the issue very much in respect of those with convictions, for example.

(The Chairperson [Mr McKay] in the Chair)

Mr D McIlveen: Thank you for your presentation.

You made a point about not allowing former terrorists or criminals to fester. That is a fair point. I do not think that anyone, in any of the evidence sessions, implied that any of us would want that. The problem with this particular role is that it fell between two stools, in that it carried all of the political influence of an elected representative but it did not have the mandate of an elected representative. It had not gone through the rigorous vetting processes of a Senior Civil Service post. I think that is why this Bill has been brought forward. The role does not, unfortunately, sit comfortably within either of those two brackets.

You mentioned the issue of blanket exception. What do you view as an alternative to blanket exception? We cannot ignore the fact that the appointment that caused the Bill to be brought forward created a political problem that, ultimately, none of us around this table or in the Assembly could ignore. The subject of victims has been mentioned in a lot of the evidence sessions. I notice that in this session the word "victim" was not used once. That issue is what has brought this problem to the fore. We had somebody like Ann Travers, who was so vocal and so obviously offended by this particular appointment.

Similarly, if you did not go down the road of a blanket exception and you just relied on the discontent of a victim, you could have a situation in which there are no relatives alive to make representations on behalf of someone who was murdered in the Troubles, such as an only child. In that instance, there would not be an issue. Besides a blanket exception, how can we deal with that? What, in the Equality Commission's view, is the alternative to that? The obvious alternative is just to bury our heads in the sand and hope that nobody else ever raises an objection to one of these appointments again.

Ms Lavery: We are trying to say that, in the absence of a blanket exemption, each individual should be considered on their own merits. We are not suggesting that there should not be vetting. We have said that, where someone has a conviction, the material relevance of that conviction to the post in

question should be considered. We have used an example in our submission. Of course, there will always be cases in which someone has a past conviction that is materially relevant to the post in question. In such circumstances, I think it would be legitimate for any court or tribunal to agree that it is not appropriate to take that person on. We have used the example of child protection, when someone who has a conviction in that area applies for a job. It is that individualised consideration and the relevance of the conviction to the position that we are trying to get across.

Mr D McIlveen: You talk about child protection, but would you be supportive of a mechanism that took into account the protection of victims?

Ms Lavery: I am struggling to understand how that relates to the job. We are talking about assessing someone's suitability for the post. If the post is for a special adviser in the Department of Enterprise, Trade and Investment (DETI), I do not know how you can assess the suitability issue, including the relevance or appropriateness of a past conviction, from the eyes of a victim.

Mr D McIlveen: Again, to use the specific example that led to this Bill being brought forward, clearly, the insensitivity of that particular appointment caused incredible anguish and upset to the point where, although I am not from a medical background, there appears to have been medical ramifications. How do we protect the victim?

Ms Lavery: In considering the evidence previously given to the Committee, I believe that I have read comments saying not that such a person could never come back in but that the victim would have to be considered and advised. Individual victims will have their own stories. I have looked in particular at the evidence that was brought to you by the Commissioner for Victims and Survivors, which says that, among the victims' groups, there is a range of views on how we should move forward. Given that I have not been involved with victims and their representatives in a detailed way, I do not want to sit here and be a voice for them.

The Chairperson: There is some mention in the report of section 75 and the disproportionate effect on men. The presentation from the ex-prisoners' groups last week stated that the effect would mostly be on older men, those aged 50 and above, I think. NIACRO has said this legislation is potentially incompatible with section 75. Do you agree with that?

Ms Lavery: The evidence that we have provided to you today is primarily from the perspective of anti-discrimination legislation, and, as you know, our anti-discrimination legislation is much older. It is much longer in the tooth, and we have a lot more case law, legal history and that kind of thing. Concepts such as "disproportionate" and "objectively justified" are the lenses that have come to us through anti-discrimination case law. Section 75 places very specific duties on public authorities, and, in bringing forward policies, they have to consider the grounds that are identified in section 75. They have to consider the equality impact of them and those kinds of things. As you know, that has been a slightly different lens. Interestingly, as you will remember, in the Northern Ireland Act 1998 — I do not think that it is section 75 per se — there is a specific requirement that all legislation that is brought forward has to be considered for its equality ramifications, and it is more that requirement that will apply to this.

The Chairperson: OK, but do you have a particular view on the impacts on gender, age and even political opinion?

Ms Lavery: If you were to look at this through that equality lens and describe it as a policy — that is unlikely, as it is much more likely that it will be viewed through the legislative lens in the Northern Ireland Act — clearly, there would be differential impacts, and you would then have to consider whether there was any way in which those differential impacts could be mitigated if you were to go forward.

Ms Jacqui McKee (Equality Commission for Northern Ireland): Basically, we have picked out the issue of anti-discrimination legislation in relation to indirect discrimination provisions, because that is where the case law is around that.

The Chairperson: Last week, the Committee discussed at length the guidance from 2007. Do you have a view on whether it would be useful to legislate for that? Is it your view that that guidance currently applies to the Civil Service?

Ms Lavery: The guidance is voluntary guidance, and it has no legislative basis at present. It made sense to try to run that in a voluntary way initially to check out its effectiveness, and also because, when the guidance was first pulled together, there was very good support from the Northern Ireland Committee, Irish Congress of Trade Unions (NICICTU), the Confederation of British Industry (CBI) and others for that. As you know, the recent review has been conducted by academics, and they have said that, where the exemption in the fair employment legislation exists, this guidance will always be working on a prayer and a promise, essentially. If the guidance is to be totally effective, you really need legislative change. If I can remember correctly, my understanding is that the review says that there are two ways: either get rid of section 2(4) altogether or limit it. As I have tried to point out to you, we have brought forward recommendations for change. When we first started to talk about a single equality Bill back in 2002, we said, even at that stage, that we would like that reviewed.

The Chairperson: When the guidance was first introduced, did you have any sense that there were parts of the Civil Service that took it as being policy and sought to act in accordance with it?

Ms Lavery: I do not have any knowledge of whether parts of the Civil Service did that, so I cannot answer that.

Mr Cree: In answer to Mr McIlveen, you made a point about jobs and job placement and fitness for purpose, really. Do you accept, though, that the Bill is rather special in that it deals not with a normal recruitment process, which would be based on skills and experience, but with jobs that are based on patronage and which, therefore, are not the same as other jobs?

Ms Lavery: We recognise that these appointments are, essentially, for political advisers and that, in that sense, a political perspective is a requirement of the job. However, I do not accept that all other equality grounds that are protected in legislation should be discounted and ignored simply because of the political requirement of the job. Is that what you were asking me?

Mr Cree: I am trying to draw the distinction between normal recruitment practices and the employment of a special adviser, which is really a matter of patronage.

Ms Lavery: My view is that normal recruitment arrangements should not be entirely discounted because there is a requirement —

Mr Cree: You make the qualification of "entirely discounted", but —

Ms Lavery: I accept that there is —

Mr Cree: It is a different exercise.

Ms Lavery: I accept that there is a requirement to have the same political perspective as the Minister. That is essential because of the nature of the job. I accept that, but that in itself does not and should not mean that no other equality consideration should be applied.

Mr Cree: Yes, but, for example, essential criteria such as skills and experience are not necessarily seen to be applicable either.

Ms Lavery: At present, they are not seen to be applicable. I think that they should be applicable.

Mr Cree: So, it is a special case.

Ms McKee: At the minute, there is a code of practice in relation to the recruitment of special advisers. It is guidance — that is the point; it is guidance — so it is about how far you can push that towards making it more mandatory to ensure that there is transparency around the process. We are saying — this is what the Coker case looked at — that there can be challenges under the anti-discrimination legislation. They will not relate to political opinion, but they may relate to race, sex or one of the other protected grounds.

Mr Cree: Yes, but I hope that you agree that guidance is only that.

Ms McKee: That is right.

Mr Cree: The legislation is designed to go considerably further than that.

Ms McKee: Yes. Certainly, when we responded to Sammy Wilson, we said that the commission feels that there should be transparency regarding those appointments so that it is clear, internally and externally, how people are appointed and so that it is not patronage.

Mr Cree: Mr McIlveen made the point that victims are not really an issue in this at all. The fact that somebody was murdered in such a dastardly fashion does not factor at all.

Ms McKee: I think that Eileen answered that earlier when she spoke about an individualised approach and looking at the material relevance of any conviction to each individual post.

Mr Cree: Do you not agree that it was insensitive, at least?

Ms McKee: I understand why we are here.

Mr Mitchel McLaughlin: Thank you very much. Apologies for being delayed; it was a long and difficult drive from Derry this morning.

People will disagree about why there was a conflict in the first place, but nobody can deny that we are in a post-conflict scenario. That will constantly challenge us; there will be contradictions and difficulties. Certainly, the issue of victims will be before us for a long time. The events of the other night over the flags debate in Belfast City Council, while not related to this case at all, give you some indication of just how deeply divisions and opinions will diverge in this region.

By using the title "special advisers", we are describing people who are identified for appointment on the basis of the assistance, guidance and contribution that they can make to individual Ministers across all of the parties. Political opinion clearly is a factor. I take the point that you are making: there could well be an internal challenge. Someone with the same political qualification, if I could put it that way, could well feel aggrieved that they could equally have competed for the post. Of course, that is not what the Bill is about, and it is not what the controversy was about.

The issue of the peace process and the manner in which it was mandated in the referendum, etc, presents a duty on politicians to respect and reflect that. We have been through the discussion about the early release scheme and the judgement that was made that the people released did not represent a threat to society. But, of course, there is the issue of people who were affected by the Troubles, and the victim community, which is a very, very sizeable community. That will always be an issue.

Is it your view that the materially relevant issue can be described or presented in the context of case law that we can visit or depend on?

Ms Lavery: I am not sure that I understand the question, but I will have a rattle at it.

In the limited case law in England, it was agreed that coherence with the political view of the person whom the special adviser was going to advise was a requirement of the job, but, as I said, the cases then came on such issues as gender and race. To go back to your point about agreement on political opinion: someone else may share the political opinion of the person who got the job as adviser, but they will say that they did not get the job because of their age or gender, for instance. Those are cases that can be brought forward, and we know that from the English scenario.

Mr Mitchel McLaughlin: That is exactly as I understood it. The question that I have put is more to do with how we respond to what I think is a mandated responsibility to help society deal with the conflict and the consequences of the conflict. We have set up the victims' service, and a considerable number of people have been released from prison on the basis that they no longer represent a threat to society. I think that that is an acceptance of the post-conflict nature of our society. I made brief reference to the distressing scenes on the streets of Belfast the other evening. They indicate that those divisions still run deep and that we have a long way to go. I was trying to bring it back to this issue and the fact that, undoubtedly, the potential for re-traumatising or hurting people over again will remain with us. If we were to consider the criteria by which special advisers, including former prisoners, could be appointed, is there anything in case law that we can depend on in terms of using material relevance as a criterion that could be addressed? Does that help?

Ms Lavery: I do not think that there is any case law that has specifically considered that issue. We are trying to get across that there should be an objective standard against which a political adviser is assessed, and skills and abilities should be considered. That would very much strengthen the ability to respond to any challenge that is brought forward by someone who says that they were unlawfully discriminated against. At present, quite a lot could still be done in the development of those objective standards.

Mr Mitchel McLaughlin: Thank you.

The Chairperson: Eileen and Jacqui, thank you very much.