



Northern Ireland
Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Civil Service (Special Advisers) Bill:
DFP Briefing

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representatives from NIACRO to discuss their concerns, but that is something that we can take forward separately. I will leave it at that.

The Chairperson: You just covered my opening question. NIACRO raised concerns about the application of the risk-assessment grid, and the comments in the correspondence, regardless of your opinion, are quite concerning due to the number of examples of jobs being rescinded after people have been selected on merit. It also alleges that there are other examples in which the merit principle was ignored. It describes the process as being fundamentally flawed, discriminatory and exclusive and says that it does not take into account individual circumstances. That is quite a serious charge.

Mr Baker: Yes. I am concerned that some of the comments made by NIACRO in its letter are based on a misunderstanding of the processes that we apply. If there is any misunderstanding, obviously we are happy to engage with NIACRO on that. There are three areas of concern raised by NIACRO that I will draw attention to.

The first, which you mentioned, is that we in some way do not apply the merit principle. By way of context, it is worth noting that throughout the public sector here — and I mean every part of the public sector — the Civil Service is the only part that is subjected to external regulation by a statutory body in its recruitment. That body is the Civil Service Commission. The commission has almost a sole objective of ensuring that all recruitment to the Civil Service is done on merit and on the basis of fair and open competition. It audits us and publishes an annual report. That is the context within which we carry out all our recruitment.

Specifically in respect of character vetting, those who are involved in recruitment to the Civil Service have no information whatsoever about unspent criminal convictions. That plays no part in the decision-making process, whether that involves an assessment centre, a test or an interview. It is only after individuals have been deemed suitable for appointment that character vetting is carried out. So, it is only after the merit principle has been applied that decisions are taken.

The second point follows on from that. NIACRO expressed concern that the risk matrix may be applied in an arbitrary way. That is not the case. The risk matrix is there as a guide to decision-makers when people have been deemed suitable for appointment and when an unspent criminal conviction has been identified. Where concerns have been expressed and we have been given pause for thought in making an appointment, in each and every case we will write to the individual, explain the situation and invite the individual to submit a statement of disclosure.

In that statement of disclosure, the individual will be invited to explain the circumstances of the conviction, state any mitigating circumstances, provide any character references they wish to submit and provide evidence of any rehabilitation. Then, we will consider that statement and, very importantly, consider the conviction against the nature of the post for which the individual has applied. It is only after that process has been gone through that a decision will be taken. It could well be that all of that information will lead us to the conclusion that the individual should be appointed. When a decision has been reached, we will write to the individual and explain the decision that has been taken and why it has been taken. So, I refute any suggestion that we apply the risk matrix in an arbitrary way. We do not. In each and every case, where a decision has been taken to not accept someone, we give the person an opportunity to comment.

The third concern raised by NIACRO is that there is an absence of transparency in our arrangements. Again, I refute that. Our recruitment policy and procedures manual is on our website and explains in very great detail the process that we go through and the character-vetting process, including what will happen if an unspent criminal conviction is identified and the kind of criteria that we will take into account in reaching a decision. We will contact the individual. We will write back to them explaining our decision. I would say that that is a very transparent process. To ensure, or to attempt to ensure, consistency, all such decisions to exclude anybody from employment after they have been deemed suitable for appointment are made by my business unit, corporate HR, in DFP. Just to give you some numbers, since April of this financial year to date, over 1,000 people have gone through various competitions and been deemed suitable for appointment, and four people have been excluded from appointment on the basis of the disclosure of an unspent criminal conviction.

Those are the comments I make in response to the NIACRO concerns. However, as I said, I would be more than happy to meet NIACRO to talk those through. I do believe that some of the comments made by NIACRO were based on a misunderstanding of our policies and procedures.

The Chairperson: If an application is rejected on the basis of those criteria, is there any opportunity for appeal?

Mr Baker: No. There is no appeal.

The Chairperson: Is there any reason for that? Is that something that could be looked at? That was a concern that the Human Rights Commission raised.

Mr Baker: Anything can be looked at. There is no particular reason why we could not consider an appeal mechanism. Currently, there is no appeal, and that is the position. The reason for that probably goes back into the mists of time, before I was in post. However, it is of course possible to look at the option of an appeal. In that context, and given the issue that is before the Committee, the Finance Minister, in his review of the arrangements for appointing special advisers, did build into that arrangement an appeal against a decision that might be made by my business area. That is unique, in that, currently, the only appeal that exists is in respect of the appointment of special advisers but not in respect of the appointment of any other individual to the Civil Service.

The Chairperson: In your correspondence you have provided a table with four areas of convictions. That seems very broad to me. Look at section 3, for example. It states that the Civil Service should "generally reject", subject to other criteria obviously, "convictions demonstrating dishonesty". How broad is that?

Mr Weir: It includes all the politicians.

Mr Baker: The point I would make is that it is only a guide. The predisposition would be to reject someone who has an unspent criminal conviction in respect of evidence of dishonesty. I do not think that that is an unreasonable position to take. However, as I explained earlier, we do build in the facility for the individual to then give us a statement of disclosure, the context, any mitigating circumstances, any character references and so forth. If we did not have that kind of barrier in place when bringing people into the Civil Service, I might well be back in front of the Committee answering questions as to why we allowed people in who have got unspent criminal convictions for issues in that area and the potential damage that that might create to the organisation. However, this is simply a guide. It simply raises a flag. We then investigate further and allow the individual to make representations. I think that that is a fair and proportionate approach to the issue.

The Chairperson: Is a rough guide appropriate for this particular issue? Do we not need further detail on specific kinds of convictions? You could go from the most extreme to the most mundane, for want of a better word, of convictions.

Mr Baker: Bear in mind that these will, by definition, be unspent criminal convictions. In those terms, that will be a criminal conviction with a custodial sentence of two and a half years. So, they will be serious issues by definition. It would not be a very minor offence. We are talking only about serious issues. I know that the Bill the Committee is considering has a different definition, but we have a very specific definition. So, all of these are serious issues. Anyone who has received a custodial sentence has been convicted of a very serious offence; it is not a trivial matter.

The Chairperson: We received evidence on the Office of the First Minister and deputy First Minister (OFMDFM) guidance, which, I think, was issued in 2007. I think it was Nigel Hamilton who said at that evidence session that that particular guidance regarding the employment of ex-prisoners applied when he was in post and that it was signed off by David Hanson and Peter Hain, the Secretary of State at the time. When did that stop applying in the Civil Service?

Mr Baker: That never applied to the Civil Service. The then Finance Minister, who is currently the First Minister —

The Chairperson: Was it taken into consideration by the Civil Service in any way?

Mr Baker: It was. The decision was a policy decision for Ministers, so the issue was put to the then Finance Minister, and the then Finance Minister took a policy decision that that guidance should not apply to Civil Service recruitment. The rationale for his decision was that the arrangements in place, which I have described to you, were appropriate, adequate and dealt with all convictions, including

conflict-related convictions. I think he stated his position in response to an Assembly question back in, probably, 2007. That position has not changed. So, it never applied to the Civil Service.

The Chairperson: In the period between the date on which this was signed off and when the Finance Minister of that time took his position, would it be fair to say that the Civil Service was taking that seriously and, although not acting in absolute accordance, certainly taking it into account in its workings?

Mr Baker: I am afraid that I am unsighted exactly on when the voluntary guidance was signed off. I was under the impression, probably mistakenly, that it was not concluded until 2007 and that it was around that time that the Finance Minister decided that it should not apply to the Civil Service. If I am wrong in that, it is still the case that, prior to that, the broad arrangements with regard to character vetting, which I have described to you, applied in the Civil Service, with all of those checks and balances built in. That is what pertained in the Civil Service at that time.

The Chairperson: Could you give us more detail on that?

Mr Baker: I am more than happy to.

Mr D Bradley: I want to ask you one or two questions about the new arrangements for the appointment of special advisers since September 2011. You said that they differ from other arrangements in the Civil Service, in so far as there is an appeal mechanism. I want to ask you about the criteria of the appeal mechanism. I think there are six criteria: the absence of a pattern of repeat offending; the relevance of the conviction to the post to be filled; the nature of the offence; the severity of the sentence; evidence of rehabilitation; and third party references. It seems to me that numbers two to six are quite objective and can be measured fairly objectively. The first criterion, which is on the expression of remorse or regret might be a bit more difficult to measure. Let us consider the nature of the people to whom the Bill applies and the type of offence that they may have committed. Quite often, they may have changed their view of the offence, but that is not always equal to an expression of remorse or regret, if you gather what I am saying. Is there not a danger that the first criterion is setting up the appeal mechanism to fail in these cases?

Mr Baker: I understand the point that you are making. We have not gone through an appeal, so we do not have case law, precedent or example. I imagine that an appeal would be a very difficult thing to deal with. It is difficult to lay down hard, fast and objective criteria that you could apply in every situation. If you try to be too prescriptive or precise, the danger is that you will be accused — NIACRO expressed a concern about this — of being too arbitrary and taking a tick-box approach.

This may not be particularly helpful to the Committee, but the only point that I could make in response to your comment is that I do not think that it is the case that all of the criteria have to be met; these are just all of the issues that would be taken into account in the round during the course of an appeal. We have not attempted to give more weight to one criterion than to another. Generally, an appeal hearer would have to consider all of the issues. That is difficult; I understand that. However, I am afraid that, on the issue of personnel, we are always taking difficult decisions. It often boils down to a matter of judgement rather than a totally objective hard and precise fact in these matters. I cannot answer the question any better than that. It is not that the first criterion has to be met and then it is a barrier before you can go on to the next one, if that offers you any comfort.

Mr D Bradley: So, possibly, we are talking about the general impression of the individual that is created under those six criteria.

Mr Baker: Yes.

Mr D Bradley: The appeals panel will be made up of independent members. Does that set it apart from the Department, to some extent?

Mr Baker: Yes. Obviously, some consideration has been given to the kind of people who would be invited to hear an appeal if a certain situation arose. You are right: the Minister's intention clearly was that it should be outside of the Department of Finance and Personnel. It should not be civil servants or anybody connected with the Department; it should be totally independent. You can speculate on who such people might be. They may be from a trade union background or a private sector

background; they may even be from a background like NIACRO. I do not know. I do not want to identify any individuals. It is in that kind of territory rather than political or Civil Service decisions.

Mr Mitchel McLaughlin: Could we return to the response to the OFMDFM guidance?

Mr Baker: Yes.

Mr Mitchel McLaughlin: You explained that, as a result of a policy decision, it did not apply to the Civil Service.

Mr Baker: Yes.

Mr Mitchel McLaughlin: Did it apply to special advisers?

Mr Baker: Well, to the extent that special advisers are civil servants, it did not.

Mr Mitchel McLaughlin: Has that been considered in the context of Good Friday Agreement obligations towards ex-prisoners?

Mr Baker: It has not been considered specifically in that context. The point about special advisers, quite simply, is that they have never hitherto been subjected to any kind of character vetting whatsoever as part of their recruitment. They were outside the normal Civil Service arrangements.

Mr Mitchel McLaughlin: Are special advisers legally, in the fullest sense, regarded as civil servants, or are they deemed to be the equivalent of civil servants?

Mr Baker: I think that they are civil servants.

Mr Mitchel McLaughlin: So, it is more than just the fact that the Finance Minister may have a responsibility in terms of Civil Service salaries, wages and entitlements? You would say that it was a wider remit that the then Finance Minister, and, possibly, the current Finance Minister, was addressing?

Mr Baker: Sorry; I am not quite sure about what that wider remit might be.

Mr Mitchel McLaughlin: It appears from your answer that individuals appointed as special advisers are automatically accorded the full status of civil servants. Is that it?

Mr Baker: Yes.

Mr Mitchel McLaughlin: OK. You are unable to say whether that has been tested against the Good Friday Agreement?

Mr Baker: No, to the best of my knowledge it has not been tested specifically.

Mr Mitchel McLaughlin: OK. I want to ask about the risk assessment matrix. It was useful to have that paper. Is there any supplementary commentary or guidance to what are fairly succinct lines of consideration? There are four here.

Mr Baker: No, there is not. There is nothing more than that. The totality of our policy and procedures on character vetting is contained in our recruitment and policy procedures manual. There is some more narrative around the Access NI process, but what you have before you is the totality of the material that is specific to the risk matrix.

Mr Mitchel McLaughlin: I will take this, not necessarily as the threshold but as an example. The particular case that has sparked this private Member's Bill dates from the 1980s. If we were to take that as a classification of people who have conflict-related offences, we are talking about people who were sentenced a minimum of 20 years ago and, in some cases, considerably further back than that, perhaps 30 years, because people were being sentenced in the early- and mid-1970s. Is there a point

at which the timeline on some of these issues that are headlined in the matrix would also have to be considered? Would that not be a vulnerability were there to be an appeal or a challenge?

Mr Baker: I appreciate that you are not asking me to give an opinion on whether any individual —

Mr Mitchel McLaughlin: No, I have not mentioned any individual cases.

Mr Baker: I could not. I suppose that I can best answer that question by saying that it is not necessarily the case that any individual with an unspent criminal conviction which correlates to any of the four areas identified in the risk matrix would automatically be excluded. A decision would be taken in light of the individual circumstances, which is the case for all civil servants.

Mr Mitchel McLaughlin: Would that decision be taken by the corporate HR team?

Mr Baker: Yes. It may be the case that an individual or individuals with a conviction for a very serious offence may be currently serving in the Civil Service. We destroy the records of criminal convictions after a decision has been taken because we do not want those hanging about anywhere. We believe that it is very personal data —

Mr Mitchel McLaughlin: Whether they are successful or unsuccessful?

Mr Baker: Yes. We currently do not hold that information. Anecdotally, we would know, and those who have taken decisions over recent years may know. All those factors would be taken into account, including the time period that would have elapsed. I anticipate that an individual making a statement of disclosure would address any time period in that statement. That is an opportunity for an individual to make his or her case.

Mr Mitchel McLaughlin: Is that a written submission or —

Mr Baker: It is; sorry —

Mr Mitchel McLaughlin: Is it an iterative process where follow-up or supplementary questions would be submitted for answer as well, or do they just get one shot at it?

Mr Baker: No, it is not necessarily one shot, but we do write to individuals to ask them to make a written submission. If there is any ambiguity there, or if we need clarification, we may write back, and it could become an iterative process. I would not like to say that it is one shot; not necessarily.

Mr Mitchel McLaughlin: OK. Finally, I want to ask about the records, because that is what I was leading towards. The records are destroyed; that is a policy issue. How rapidly does that happen? Are they kept for a period in case there is a challenge?

Mr Baker: I do not know how quickly that happens. All the disclosures from Access NI are destroyed. I do not know how quickly they are destroyed after we might take a decision not to accept someone. I can find that out for you and let the Committee know.

Mr Mitchel McLaughlin: I am sorry; I was not paying attention there. You mentioned Access NI. Who gets the disclosure? Is it the corporate HR team or is it Access NI?

Mr Baker: The process is that, every individual deemed suitable for appointment has to go through a check by Access NI. The individual actually has to fill in a form themselves for data protection purposes. The disclosure from Access NI, if there is one, comes to corporate HR in each case, and then we take the decision, although we will engage with the individual about that. In the vast majority of cases, there is no unspent conviction identified, but, where there is, in many cases it is not an issue for us and we allow the person to be appointed. We would then immediately destroy the Access NI record. Your question might relate to a decision to exclude someone. I do not know how long we keep that record. I can find out for you and get back to the Committee.

Mr Mitchel McLaughlin: Yes. You can be quite certain that the process is conducted in an absolutely objective and professional manner in the vast majority of cases, but we are talking about demonstrating a propensity over an issue that may have occurred at a particular time that, hopefully,

has been consigned to history. That can be an interesting phrase. You could drive a horse and cart through it. A very clever barrister that we all know could make that mean anything or demonstrate dishonesty. It appears that, in terms of transparency, there may be issues there that are worth some careful consideration, given the implications of a Bill like this, should it succeed.

Mr Baker: Yes, and as I said before in response to a question from Mr Bradley, this is difficult territory and taking those decisions is very difficult. There are no absolutes. One reaches judgements, and one hopes that they are sensible judgments that are defensible, but, of course, everything is open to challenge these days.

Mr Cree: I have two points to make about NIACRO's comments, which are worth clarifying. One is that, in the application of the risk assessment grid, it makes the point that it is really designed to exclude rather than include. I thought that was an interesting point, because, if it is designed to include everyone, there is no point in having it. Of necessity, it must exclude. Is that right, or too simplistic?

Mr Baker: I agree with you on that. I did not quite understand that point. The risk assessment is exactly that; it flags up risk. If we were going to include everybody, you would not have a risk assessment. It is just about waving a red flag, which will give us some cause for concern, and then we will go and investigate further through the statement-of-disclosure process. I believe that the statement-of-disclosure process is inclusive, but I think it would be wrong not to have some kind of risk assessment matrix that would give us the basis on which to pause for thought. If we did not have it, then it would be totally arbitrary and potentially very inconsistent. How would the poor official who is faced with the decision have any frame of reference on which to take a decision? I know that it is not perfect — none of those things is perfect — but we looked at it a couple of years ago, and it is the best we have got. I am sure that all of those things could be refined, but I reject the assertion that it is, by definition, exclusive.

Mr Cree: The other point that I am concerned about is that NIACRO referred to a temporary post and the requirement for character there. It gives the example of a person who had been performing well in a particular role of a temporary nature and, when the post came up for applications — this always confuses me — the character element then kicked in. Surely it would have kicked in at the temporary level?

Mr Baker: I would have thought so too. I cannot comment on the individual cases.

Mr Cree: No.

Mr Baker: I do not actually know what they are, but I agree with you.

Mr Cree: It applies to temporary posts as well?

Mr Baker: Yes, the same exclusion should apply. As you know, different arrangements apply to people in temporary posts, and they tend to be for a period of less than 12 months. Nevertheless, an individual in a temporary post could have access to all of the same kind of information and could potentially do the same damage as anybody in a permanent post, so it should apply equally across the board.

Mr Weir: Thank you, Derek. On Leslie's latter point about NIACRO, given the grid that you indicated applies once someone has passed the test and is deemed appointable, I am not sure how that could not act as some filter mechanism. I am not quite sure how the idea of inclusiveness could include people who had not been deemed to be appointable in the first place. It remains to be seen whether there has been a degree of misunderstanding by NIACRO, and maybe that will be clarified.

I have questions on a couple of points. The point has been made that many years may have passed since a previous conviction. Does the assessment of spent convictions currently used in the grid take account of the gravity of the offence, the duration of sentence, whether the conviction is spent and the length of time since sentencing?

Mr Baker: We would not have any regard, obviously, to spent convictions.

Mr Weir: We appreciate that.

Mr Baker: So, it is only unspent convictions, and I suppose that the answer to all of your questions is yes; we would take all of those factors into account, just the seriousness of the conviction. The important point, particularly in respect of NIACRO's concerns and the evidence presented to the Committee by Sir Nigel Hamilton, is that we will also take into account the relevance of the conviction to the post that the individual is being appointed to. Obviously, we will take into consideration someone with a lot of driving convictions applying for a driving post. That is probably a bit of a caricature, but it is an obvious example. We would not make someone convicted of serious fraud the financial director of a Department, put them in charge of the accounts or whatever.

Mr Cree: A Minister, perhaps?

Mr Weir: I think, Derek, that you may be tempting us here at this point.

Mr Baker: I will keep my counsel at this point. *[Laughter.]*

Mr Weir: Although these points may seem obvious, it is useful to clarify them for the record. Some folks have tried to make the case that those convicted of Troubles-related offences should be in some way be rehabilitated or treated differently from other offenders. At least on the face of it, the grid system, as applied so far, makes no such differentiation between terrorist or Troubles-related convictions and others. Assessment is based on what has occurred.

Mr Baker: That is correct. That policy decision, reached by the then Minister of Finance, was that our arrangements should cover every kind of conviction and not differentiate between conflict-related convictions and non-conflict-related convictions.

Mr Weir: To follow up on Mitchel's point concerning the standing of a special adviser; the one distinction in the process is that such an appointment is, in many ways, at the grace and favour of the Minister. However, once appointed, do all the rights, obligations etc — including restrictions on activities, for instance — that are placed on a civil servant apply equally to a special adviser?

Mr Baker: Yes. There is a code of conduct for special advisers, which is publicly available on our website. The Committee probably has a copy of that. With one exception, all of the contractual standards of conduct obligations of a civil servant apply equally to a special adviser. That exception relates to political activity and the exemption is obviously because of the nature of the individual, but all other standards of conduct apply.

Mr Weir: Otherwise, the position is on a par with that of other civil servants?

Mr Baker: Yes, it is, and we try to draw that out in the code of conduct specifically for special advisers, which cross-refers to our handbook's more general standards of conduct for civil servants and which is also available for public inspection.

Mr Weir: Finally, you may not want or be in a position to comment on the range of suggestion for technical changes from the Office of the Legislative Counsel (OLC). It may be more appropriate for the proposer of the private Member's Bill to address. Does the Department have any comment on those technical aspects, or is it happy to leave them that way?

Mr Baker: OLC sent those to me, unsolicited. I was quite surprised to get them, and I did not know what to do with them, so I passed them on to your Committee Clerk, perhaps rather unhelpfully. I would have to defer to the expertise of the OLC on those technical points.

Mr Weir: I was clarifying that to make sure that there was no particular —

Mr Baker: The only comment that I would make on the legalities of the Bill is one that I raised when I was here previously. I suppose that a little knowledge is a dangerous thing, and I caveat my comments by that. I am not legally qualified. Clause 7 contains a reference to the Civil Service Commissioners (Northern Ireland) Order 1999. I have a lot of dealings with the Civil Service Commissioners, and my understanding is that that order is still in the reserved field. I do not know whether that raises an issue, but that is for advice by the Assembly's legal advisers. I will park that issue.

Mr Weir: That is maybe an issue that we can raise with the sponsor of the Bill.

Mr Baker: I would not like to offer a definitive view.

The Chairperson: The Equality Commission was before the Committee recently. Does the Department have any view on how the Bill affects the Department's ability to meet its section 75 duties? Has it carried out an assessment in that regard?

Mr Baker: No, it does not.

The Chairperson: Is it something that you have considered?

Mr Baker: Not at this stage. I regard that as part of the policy consideration of the Bill. As with any legislation, normally some kind of equality impact assessment is undertaken, but that is not for the Department to do at this stage. So we do not have a view on it.

The Chairperson: Do you have a view on any equality aspect of the Bill?

Mr Baker: No.

Mr D Bradley: I want to go back to the Minister's review of arrangements. That was as a result of the appointment of Ms McArdle and the subsequent discussions that took place. How do the Minister's new arrangements help to ensure that the feelings of victims are protected by the new procedure and process that he is implementing?

Mr Baker: That is a very difficult question for me to answer. Obviously, there is nothing in the existing Civil Service arrangements for recruitment, nor, indeed, is there any specific mention in the Minister's arrangements in respect of victims per se. It may not be appropriate to introduce the concept of victims into our recruitment policies. It would probably be better for the Minister to answer that question. The best way I can answer it is to simply suggest that part of the thinking behind the Minister's new arrangements is that any civil servant, including special advisers, should be subject to the same level of character vetting as every other civil servant, so that the public will have confidence that people with appropriate character, if I may use that very judgmental term, will be appointed to publicly funded positions in the Civil Service. I suppose that that is a very vague concept, but, in that respect, he was trying to build up public confidence with respect to all of those who hold public positions in the Civil Service.

The Chairperson: OK, Derek. Thank you very much.

Mr Baker: This is probably the last time that I will give evidence to the Committee in the foreseeable future. I will be off to a new Department after Christmas. I have given evidence on lots of occasions, on lots of issues, some of them tricky. On each and every occasion that I have been here, I have been treated with the utmost courtesy and fairness. I wanted to express my appreciation for that. Thank you.

The Chairperson: Thank you, Derek.