

Chapter 54 – The role of the Special Adviser

54.1 Special Advisers ('SpAds') and the role played by them at significant points in the life of the NI RHI scheme have already featured in several parts of this Report. In this chapter the Inquiry examines the structures governing both the role of the SpAd, and their relationship with an appointing Minister, and then looks at some specific examples of SpAds' activity which came to the attention of the Inquiry in the course of its work.

The legal and employment framework

54.2 It appears that there are generally three types of SpAd: expert, political and both (expert and political) combined. In the Northern Ireland devolved administration, it seems that the most common type of SpAd appointment has been a political one, although such SpAds can of course, over time, develop some expertise in the work of the Department to which they have been appointed.

54.3 All three types of SpAd are paid from public funds and have the employment status of temporary civil servants. In spite of the fact they are paid from public funds, they are permissibly distinct from mainstream civil servants by the way they are appointed and by their exemption from, for example, the normal duty of civil servants to give impartial advice.

54.4 The convention in Northern Ireland's devolved administration has been for there to be one Special Adviser per Minister, except for the Office of First and deputy First Minister (now known as The Executive Office) where the First Minister and deputy First Minister each had four SpAds.

54.5 The legal and employment framework governing the role of SpAds in Northern Ireland is grounded in a number of different sources. As with all civil servants, SpAds are subject to the provisions of legislation such as the Official Secrets Act 1989, the Civil Service Commissioners (Northern Ireland) Order 1999 and the Civil Service (Northern Ireland) Order 1999. They are also bound by their contract of employment. Their contract of employment incorporates various codes, such as the NICS HR Policy, which itself contains the NICS Standards of Conduct and the NICS Code of Ethics.

54.6 For instance, and as mentioned earlier in this Report, where a conflict of interest arises, SpAds, as with other civil servants, must declare an interest to their Establishment/Personnel Division in accordance with the terms of paragraph 2.1g of the Standards of Conduct section of the NICS HR Policy. This declaration is required "so that a decision can be made as to the best way to proceed". The extent to which this requirement was observed in relation to matters relevant to the RHI scheme is addressed later in the chapter.

The 2013 Act

54.7 In addition, there is also specific legislation relating to Special Advisers in Northern Ireland, namely the Civil Service (Special Advisers) Act (Northern Ireland) 2013 ('the 2013 Act').²⁹⁰² The 2013 Act specifically addressed, amongst other things, the code of conduct for Special Advisers, albeit there was such a code in existence before the coming into force of the Act. A code of conduct for Special Advisers had been issued by DFP (now DoF), the Department

which has responsibility for the civil service, and it broadly reflected the procedures followed in Westminster.

- 54.8 However, the passage of the 2013 Act, a specific piece of legislation relating to SpAds, is significant. The 2013 Act was passed by the Assembly, the body described in Strand One of the Belfast Agreement of 1998 as “the prime source of authority in respect of all devolved responsibilities operating where appropriate on a cross-community basis.”
- 54.9 The 2013 Act began life as a private member’s bill, initiated by Jim Allister QC MLA. It reflected growing concerns at the time about the number of SpAds, their pay, the way they were appointed and the backgrounds of some appointees. The 2013 Act set out new provisions as to how SpAds were to be appointed. Section 7, as discussed further below, required DFP to issue a code of conduct for Special Advisers. The 2013 Act also provided for greater transparency in relation to SpAd numbers and their pay.
- 54.10 Section 1 of the 2013 Act defined a Special Adviser as a person who was appointed to a position in the Northern Ireland Civil Service by a Minister and who was appointed only in order to advise the Minister.²⁹⁰³ Section 1(4) provided that “The terms and conditions of the appointment provide that [the person] will cease to hold that position on or before the date the Minister ceases to hold office.”²⁹⁰⁴ Accordingly, a Special Adviser’s holding of office is linked to that of the relevant Minister.
- 54.11 Section 2 of the 2013 Act provided that a person was not eligible for appointment as a Special Adviser if that person had a serious criminal conviction, as defined by the Act.²⁹⁰⁵

The codes required by the 2013 Act

- 54.12 Section 7, as mentioned previously, and section 8 required DFP to issue codes for, respectively, the conduct and the appointment of Special Advisers within two months of the sections coming into operation.²⁹⁰⁶
- 54.13 Section 7 required that the code of conduct for Special Advisers had to provide that SpAds could not authorise the expenditure of public funds, exercise any power in relation to the management of any part of the NICS (save over another Special Adviser) or otherwise exercise any power conferred by or under any statutory provision, or any power under the prerogative. Section 7 also required the DFP Minister to lay the code before the Assembly and it would thereafter form part of the terms and conditions of appointment of Special Advisers.
- 54.14 With regard to appointments, section 8(2) specifically provided that “Where a Minister proposes to appoint a Special Adviser, such an appointment **shall be subject to the terms of the code**”, (the Inquiry’s emphasis)²⁹⁰⁷ that is the code governing the appointment of Special Advisers.

2903 LEG-03694

2904 LEG-03694

2905 LEG-03694

2906 LEG-03697

2907 LEG-03697

The code governing appointment, the model contract and the code of conduct

- 54.15 Codes governing conduct and appointment were duly issued and laid before the Northern Ireland Assembly in accordance with sections 7(4) and 8(4) of the 2013 Act by DFP on 20 August 2013.²⁹⁰⁸
- 54.16 The ‘Code Governing the Appointment of Special Advisers’, which set out the appointment process for Ministers to follow, had an Appendix which contained a model contract for Special Advisers. The model contract itself, which was in the form of a letter of appointment, had three schedules: the first schedule set out the main terms and conditions for Special Advisers; the second schedule set out the code of conduct for Special Advisers; and the third schedule set out the system of remuneration.
- 54.17 The main terms and conditions for Special Advisers had a section on conduct at paragraphs 24 to 30.²⁹⁰⁹ This was in addition to the code of conduct for Special Advisers itself. The conduct provisions in the main terms and conditions corresponded almost exactly with paragraphs 14.1-14.7 of a previous version issued by DFP in March 2007,²⁹¹⁰ although that earlier code was not issued under statute.

The appointment process

- 54.18 Section 8 of the 2013 Act provided that the appointment of SpAds by Ministers shall be subject to the terms of the code governing the appointment of Special Advisers, which was therefore, and is, a mandatory code as far as an appointing Minister is concerned.²⁹¹¹ That code is designed to ensure that good practice is followed in the appointment process and that individual Ministers, as the “appointing authority”, provide equality of opportunity and avoid unlawful discrimination.²⁹¹² SpAds are public appointees with the status of temporary civil servants and are remunerated from public funds.²⁹¹³ Their remuneration is set within two different pay bands, with the relevant Permanent Secretary, Head of the Civil Service and the Minister jointly determining which grade (and the starting salary within the grade) should apply in accordance with the system for remuneration set out in schedule 3 to the model contract.
- 54.19 Ministers having a key role in the appointment and oversight of SpAds is only to be expected, since a SpAd works directly to a Minister and the role is to provide advice of a political nature that is beyond the permissible remit of the permanent civil service. In this regard the Inquiry notes that paragraph 2.13 of the 2000 Northern Ireland Ministerial Code (which was 76 pages long)²⁹¹⁴ made direct reference to SpAd appointments and provided that:

“Ministers are expected to observe the Code of Practice on the Appointment of Special Advisers. While Special Advisers are temporary civil servants they have a very different role from that of other civil servants and need to have a particularly close working relationship with their Ministers. The appointments of Special

2908 DOF-00592 to DOF-00631

2909 DOF-00612 to DOF-00613

2910 WIT-21862 to WIT-21863

2911 LEG-03697

2912 DOF-00593

2913 DOF-00593

2914 INQ-15805 to INQ-15880

Advisers are made personally by Ministers, and are not subject to the requirements of the normal civil service recruitment process. Consideration of the suitability of appointment of any individual special adviser is entirely the responsibility of the appointing Ministers. ***Each Minister should therefore be personally satisfied that any proposed appointee is in all respects suitable for appointment and has the ability, aptitudes and character needed for the duties of the post.*** (the Inquiry's emphasis)

- 54.20 The Ministerial Code of 2000 was, it appears, superseded by the shorter (14 page long) statutory Ministerial Code for the Northern Ireland Executive published in 2006 and approved by the Transitional Assembly on 20 March 2007.²⁹¹⁵ At its meeting on 10 May 2007 the NI Executive noted that the statutory Code had taken effect from 8 May 2007. This occurred after the Northern Ireland Act 1998 was amended in 2006 by the Northern Ireland (St Andrews Agreement) Act 2006. The latter Act amended the former by inserting a new section 28A into the Northern Ireland Act 1998. The new section 28A provided for a statutory ministerial code. The new, shorter, statutory ministerial code set out the rules and procedures to be followed by Ministers and junior Ministers of the Northern Assembly as specified in the Belfast Agreement, the Northern Ireland Act 1998, the St Andrews Agreement and the Northern Ireland (St Andrews Agreement) Act 2006 – particularly with regard to the obligation to refer to the Executive for discussion and agreement of certain matters which were significant or controversial, or which cut across the responsibilities of two or more Ministers.
- 54.21 The 2007 version of the Ministerial Code did not repeat the paragraph set out above relating to Special Advisers, which had been in the 2000 version. The Inquiry considers the 2000 Code to have been a much more detailed and comprehensive document than the Code of 2007. Schedule 1 to the 2006 Act paragraph 4(5) provided that in the event that a draft Ministerial Code had not been approved by the Transitional Assembly by 24 March 2007 the obligation would pass to the Secretary of State to prepare an appropriate draft. Paragraph 4(6) provided that such a draft was to include any parts which had been approved by the Transitional Assembly and, otherwise, be in the form of the former Ministerial Code. In the event, it seems that the residual elements of the 2000 Ministerial Code were intended to be reproduced in non-statutory guidance but, for various reasons, that does not seem to have occurred.
- 54.22 Returning to the 2013 Act, the code governing the appointment of Special Advisers issued under it emphasised, in paragraph 3, the personal nature of such appointments requiring “a high degree of rapport and trust between the parties involved to make them a success.”²⁹¹⁶
- 54.23 Paragraph 4, of the same appointment code says that:
- “Getting the balance right between the undoubted personal nature of the relationship with a Special Adviser and the concept of fairness required by the law should not be seen as an onerous task, but as one designed to provide the Minister with a candidate field which will ensure the selection of a candidate who fully meets the Minister's needs in terms of competence and attributes.”²⁹¹⁷
- 54.24 Paragraphs 5 to 13 of the appointment code established a framework for selection and appointment of Special Advisers providing that while, ultimately, it is for Ministers to decide

2915 DOF-00001 to DOF-00018

2916 DOF-00593

2917 DOF-00594

how they select their Special Advisers, there are a number of basic procedures which must be followed, including the provision of a job description and personal specification that is to be used by the Minister in deciding how wide the trawl of candidates should be, the key being that the pool of candidates *must* (the Inquiry’s emphasis) be broadly based.²⁹¹⁸

The purpose of, and requirements on, the Special Adviser

54.25 Schedule 2 to the model contract for Special Advisers contained the ‘Code of Conduct for Special Advisers’. The code of conduct defined the function of Special Advisers in the following terms:

“Special Advisers are employed to help Ministers on matters where the work of the Northern Ireland Administration and Minister’s party responsibilities overlap and it would be inappropriate for permanent civil servants to become involved. They are an additional resource for the Minister, providing advice from a standpoint that is more politically committed and more politically aware than would be available to a Minister from the Civil Service.”²⁹¹⁹

54.26 Paragraph 5 of the same Code of Conduct for Special Advisers provides that:

“Special Advisers should conduct themselves with integrity and honesty. They should not deceive or knowingly mislead the Assembly or the public. They should not misuse their official position or information acquired in the course of their official duties to further their private interests or the private interests of others. They should not receive benefits of any kind which others might reasonably see as compromising their personal judgement or integrity. They should not without authority disclose official information which has been communicated in confidence in the Administration or received in confidence from others.”²⁹²⁰

54.27 Paragraph 6 of the Code of Conduct for Special Advisers provides:

“Special Advisers should not use official resources for party political activity. They are employed to serve the objectives of the Administration and the Department in which they work. It is this which justifies their being paid from public funds and being able to use public resources, and explains why their participation in party politics is carefully limited. They should act in a way which upholds the political impartiality of civil servants. ***They should avoid anything which might reasonably lead to the criticism that people paid from public funds are being used for party political purposes.***”²⁹²¹ (the Inquiry’s emphasis)

54.28 Not only is it important to record that the appointment code and the code of conduct are statutory codes approved by the Assembly but it also needs to be emphasised that an important public interest is involved in that, according to the mandatory codes, while they have a very different role to ordinary civil servants, SpAds are public appointees, paid from public funds and not party employees.²⁹²² When dealing with relations with the appointing Minister’s party, paragraph 10 of the Code of Conduct provides:

2918 DOF-00594 to DOF-00597

2919 DOF-00616

2920 DOF-00618

2921 DOF-00618

2922 DOF-00593

“In providing a channel of communication in these areas of overlap, Special Advisers paid from public funds have a legitimate role in support of the Administration’s interest, which they can discharge with a degree of party political commitment and association which would not be permissible for a permanent civil servant. In all contacts with their party, Special Advisers must observe normal Civil Service rules on confidentiality unless specifically authorised, in a particular instance, by their Appointing Authority.”²⁹²³

- 54.29 Three particular areas of such legitimate activity are identified in paragraphs 8 and 9, namely:
- obtaining a full and accurate understanding of the Party’s policy analysis and advice;
 - ensuring that Party publicity is factually accurate and consistent with Administration policy; and
 - ensuring that Assembly Members and officials of the Minister’s Party are briefed on issues of the Administration policy.²⁹²⁴

The appointment practice as found by the Inquiry

54.30 Despite the guidance concerning the appointment of SpAds, repeated in successive codes on Special Advisers, and made mandatory following the 2013 Act, what happened in practice appears, at least in some cases during the period subject to the Inquiry’s investigation, to have been radically different. The Inquiry identified divergences concerning how appointments were made, the functions of SpAds and their relationship with Ministers.

54.31 Ms Foster told the Inquiry in oral evidence that, in her experience, the then First Minister and the DUP Party Officers had selected Dr Crawford to act as her SpAd when she became DETI Minister, although she had no complaints about that selection.²⁹²⁵

54.32 According to Mr Ó Muilleoir the 2013 Act, in prohibiting the appointment of Special Advisers with serious criminal convictions, was seen by Sinn Féin as:

“...an attack on the peace process, as undermining the inclusion which is the foundation of the peace process, and it was not our intention to discriminate against former political prisoners who had helped build the peace.”²⁹²⁶

54.33 As a result, Sinn Féin set up a centralised system under which Aidan McAteer, who did have a proscribed conviction and who was now to be neither appointed nor paid as a civil servant, was engaged to “manage and co-ordinate” on a day-to-day basis the work of all Sinn Féin Special Advisers.²⁹²⁷

54.34 It seems that all of the Sinn Féin SpAds were aware that Aidan McAteer was acting as the senior Sinn Féin adviser with the direct authority of the deputy First Minister, the late Martin McGuinness. In his evidence to the Inquiry Sir Malcom McKibbin accepted that when he was first introduced to Aidan McAteer, he was told by the then deputy First Minister that he would be working underneath his (Mr McGuinness’s) direction and authority.²⁹²⁸ As such, according to Mr Ó Muilleoir, he was seen as occupying an elevated position with more authority than any

2923 DOF-00620

2924 DOF-00619

2925 TRA-13604

2926 TRA-16250

2927 WIT-161024

2928 TRA-16724

of the other SpAds.²⁹²⁹ In effect, an individual who could not legally have been appointed as a SpAd and who was not subject to the mandatory code, or other relevant codes, managed and co-ordinated those who were employed and paid from public funds as temporary civil servants and who were subject to the relevant legal structure and codes.

- 54.35 Such a practice may not, in itself, involve any breach of the 2013 Act but it did have the potential to inhibit or undermine the personal relationship between the relevant Minister and his or her SpAd which was intended to be established by the 2013 Act and associated codes, which had been democratically approved by the Assembly.
- 54.36 Timothy Cairns, who worked as a SpAd for Minister Bell, told the Inquiry that he did not believe anyone would be appointed as a Special Adviser within the DUP without the assent of Timothy Johnston, who was one of the First Minister’s SpAds.²⁹³⁰ He said that he received a telephone call from Mr Johnston in October 2015, during a period when Mr Cairns had taken up alternative employment as a consequence of the policy of ‘in/out’ Ministers adopted by the DUP after speculation that the murder of Kevin McGuigan had been the work of members of the IRA.²⁹³¹ By way of protest the DUP adopted a policy of resigning from government and then returning to office before the expiry of seven days after which their ministerial portfolios would have been reassigned. Mr Cairns was told that if he returned to be a SpAd for Minister Bell he would be retained in the “core DUP SpAd team.”²⁹³²
- 54.37 Mr Cairns also told the Inquiry that, at the time of his appointment as a SpAd, he had been aware of the appointment code and the official procedure contained therein; but he indicated that the DUP exercised an “unofficial procedure” which took precedence.²⁹³³ His evidence to the Inquiry was that “whilst there is an official procedure, the Democratic Unionist Party exercise an unofficial procedure.”²⁹³⁴ He accepted that the “unofficial procedure” conflicted with the mandatory appointment code in many respects.²⁹³⁵ According to Mr Cairns, the decision as to the appointment of a SpAd was taken by a combination of then First Minister Robinson and two of his SpAds, Mr Johnston and Mr Bullick, constituting:
- “The triumvirate that would be making those decisions and those calls.”²⁹³⁶
- 54.38 The term ‘*realpolitik*’ was used by a number of the witnesses and appears to have referred to what took place in reality as opposed to what was required by the relevant public and transparent codes and statute.
- 54.39 For his part, Mr Johnston did not disagree with this evidence, conceding that the process had “evolved” since 2007 when his appointing Minister, the late Dr Paisley, had been very much involved in it.²⁹³⁷ He told the Inquiry that he had never seen one of the letters of confirmation of a SpAd’s appointment sent by the appointing Minister to the relevant Department Permanent Secretary and suspected that “they were a tick-box exercise by the system.”²⁹³⁸

2929 TRA-16248

2930 TRA-12576

2931 TRA-12577, <https://www.belfasttelegraph.co.uk/news/northern-ireland/widow-of-murdered-kevin-mcguigan-100-believes-shooting-was-sanctioned-by-leadership-of-the-ira-36039720.html>

2932 TRA-12577

2933 TRA-12592 to TRA-12593

2934 TRA-12593

2935 TRA-12593

2936 TRA-12602

2937 TRA-14115

2938 TRA-14118 to TRA-14120

- 54.40 When trying to account for the degree of “evolution” or “drift” away from the stipulations of the appointment code, Mr Johnston accepted that there was “an element of centralisation” and a “sense of trying to mirror what was a very centralised operation for a number of the parties.”²⁹³⁹ He accepted that this was not satisfactory from the point of view of transparency and democracy but said that “as time went on things became very comfortable in the sense of how our party and other parties appointed these positions.”²⁹⁴⁰
- 54.41 Evidence of this drift or evolution can perhaps be seen in the immediate aftermath of the confrontations between Minister Bell and Mr Cairns in London in June 2015 (mentioned earlier in this Report), when Mr Johnston telephoned Minister Bell to tell him that he had no power to dismiss Mr Cairns and then later played the major role in mediating the attempt to restore their relationship.²⁹⁴¹
- 54.42 In relation to his role in the original appointment of Mr Cairns as SpAd to Minister Bell when he was a Junior Minister in OFMDFM, Minister Bell signed a letter, dated 6 June 2012, to the then Head of the Northern Ireland Civil Service confirming the initial appointment of Mr Cairns as his SpAd and containing the following passage:
- “Having considered a number of potential candidates I have concluded that on the basis of Tim’s considerable experience, qualifications and knowledge of the political environment in which I work that he is the most suited candidate to fulfil the post.”²⁹⁴²
- 54.43 When Mr Cairns was again appointed as Minister Bell’s SpAd in late November/early December 2014, Minister Bell signed a similar letter to the relevant Permanent Secretary repeating, in the third paragraph, that he had: “assessed a range of potential candidates as well as considering both the job description and person specification” and concluding that, at the end of the process, Mr Cairns was “by far the most qualified candidate available.”²⁹⁴³ In fact, it does not appear that any other candidates were considered or that a formal selection process took place.²⁹⁴⁴
- 54.44 When questioned about the content of the two letters of appointment Mr Bell accepted that they were not accurate but described them as simply “standard form.”²⁹⁴⁵ He said that he was given a pre-written letter that he neither wrote nor authorised, but he did agree to sign it and accept the appointment of Mr Cairns as “my party had instructed me to do so.”²⁹⁴⁶
- 54.45 As already noted above, in the course of his oral evidence to the Inquiry Mr Johnston, who was seen by a number of witnesses as being at the head of the SpAd ‘hierarchy’ within the DUP described these letters as “tick-box” exercises.²⁹⁴⁷ He confirmed that his view was that the Senior Civil Service were aware of the reality as to how SpAds were appointed. Mr Johnston also said that the Senior Civil Service simply wanted to get the appointment process over and

2939 TRA-14123

2940 TRA-14124

2941 TRA-14121; TRA-14158 to TRA-14159; TRA-12686

2942 DOF-82182 to DOF-82183

2943 DOF-82057

2944 TRA-12600 to TRA-12601

2945 TRA-12280

2946 TRA-12279 to TRA-12280

2947 TRA-14118 to TRA-14119

done with quickly for the functioning of each Department.²⁹⁴⁸ Sean Kerr, Minister Bell's Private Secretary in DETI confirmed in written evidence relating to this topic that he had been supplied with a skeleton draft letter by DETI HR to which he had added some biographical information that he obtained from Mr Cairns.²⁹⁴⁹

- 54.46 Minister Bell also told the Inquiry that the DUP Party Officers appointed SpAds for DUP Ministers.²⁹⁵⁰ He said that when he was contacted in 2015 by First Minister Robinson over the weekend to discuss his appointment as DETI Minister, he was told that Mr Cairns would be his SpAd because "all the other SpAds had been taken."²⁹⁵¹ When asked if he were happy with Mr Cairns as his SpAd Mr Bell said that he was "content".²⁹⁵² Mr Bell confirmed to the Inquiry that, at the material time, he was not aware of the existence of the mandatory code relating to the appointment of SpAds nor was he given any relevant guidance either by the DUP or the Department.²⁹⁵³
- 54.47 In a written statement of evidence former DUP First Minister Mr Robinson said: "Frankly, our abiding priority was to work the new, historic, yet difficult arrangements of forming and operating an Executive with age-old adversaries" and that 'delivery' was of critical importance.²⁹⁵⁴ He doubted whether any of the three Executive parties "spent any time reflecting on protocols when making SpAd appointments" but denied that there had been any malign motive in circumventing the 'protocols' such as the appointment code for Special Advisers.²⁹⁵⁵
- 54.48 Mr Robinson's attitude is probably succinctly captured in his observation that "We plied our trade on the front-line of Northern Ireland politics; we functioned in a rough and inauspicious climate and we did not live our lives consulting a rule book at every moment."²⁹⁵⁶ The "rule book" would appear to have included the provisions of the 2013 Act, the mandatory appointment code issued under the provisions of the 2013 Act, the Northern Ireland Ministerial Code and other relevant codes and practices.
- 54.49 In written representations made to the Inquiry, Mr Robinson again emphasised the difficulties in which politicians in Northern Ireland operated under the arrangements for the devolved administration that required mandatory coalition government. He noted that:
- "The nature of the devolved government in Northern Ireland led to the provisions of the code of conduct for Special Advisers being stretched to, and beyond, their limits to make the system of government work in the peculiar structures that prevailed at the time."
- 54.50 Mr Robinson accepted that "certain SpAd appointments did not follow the provisions of the Code, and that on occasions the actions of certain Special Advisers fell outside the code"; but made the entirely fair point that this was not the case in all instances or for every Special Adviser.

2948 TRA-14126

2949 WIT-25845

2950 WIT-22513

2951 TRA-12276

2952 TRA-12278

2953 TRA-12281 to TRA-12282

2954 WIT-156020

2955 WIT-156021

2956 WIT-156022

54.51 The divergence from the appointment code, and appointment being the responsibility of the Minister, may in turn have caused, or certainly had the potential to cause, misunderstandings about where authority rested, an issue which has been touched upon earlier in this Report on a number of occasions as regards the relationship between Minister Bell and Mr Cairns, including as it related to the RHI scheme. For instance, Mr Stewart was asked in his oral evidence to the Inquiry about the relationship between Mr Cairns and Mr Bell and where authority rested. Mr Stewart said:

“Jonathan took the very clear view that authority rested in him and in him alone. Timothy took rather more of a *realpolitik* view that the Minister may, in law, be the head of the Department and the person who controls and directs the Department – that’s absolutely correct – but the Minister owes his or her position to the nominating officer, usually the party leader, and the *realpolitik* consequences of that are that there is a degree of central control from Minister to party leader. Sorry, the other way round: party leader to Minister.”

54.52 In a written statement of evidence, Mr Stewart referred to the relationship between Mr Cairns and Minister Bell as “tense” and went on to say:

“The tension in the relationship did not appear to stem from any fundamental difference on policy, nor to any lack of personal chemistry. The root cause appeared to be resentment on the part of Minister Bell to Mr Cairns’ *party liaison*’ role and how it was exercised.”²⁹⁵⁷

The role exercised by SpAds in practice

54.53 The evidence presented to the Inquiry contained a number of examples of the power and control exercised by SpAds. On occasion, such exercises of power may have been legitimate, where the SpAd was acting with the knowledge and authority of their Minister in relation to a matter where the Minister could appropriately exercise direction and control. In other instances, questions have been raised as to whether SpAds were acting without the knowledge of their Minister, on their own authority or outside of their legitimate functions. One consequence of this Inquiry may well be, and ought in the Inquiry’s view to be, much more transparency as to how Special Advisers work and a greater delineation between their functions and obligations as temporary civil servants and any additional responsibilities they exercise on behalf of their political party.

54.54 Mr Stewart told the Inquiry that; “Policy work, I think works best when there’s trust and confidence between Ministers, officials and spads. I have to say, in the summer of 2015, at times, it felt more as if we were being treated as the opposition.” When asked by whom officials were being so treated he replied “Ministers and spads.”²⁹⁵⁸

54.55 Minister Bell considered, with some justification, that his confrontation with Mr Cairns (discussed in detail earlier in this Report) constituted a challenge to his authority. However, he was told by Mr Johnston that he could not sack Mr Cairns, and both Mr Cairns and Dr Crawford considered they had authority to remove material from important documents without reference to their respective Ministers (described in more detail in chapters 39 and 40 of this Report).

2957 WIT-27526

2958 TRA-11641

- 54.56 Mr Johnston appears to have had more influence in the appointment of Mr Cairns than Minister Bell and it was he, not Minister Bell, who directed Mr Cairns to liaise with Dr Crawford in relation to energy matters. In his email to Minister Bell’s Private Secretary of 4 February 2016, with regard to the submission on closing the NI RHI scheme, Mr Cairns wrote: “Have the Minister read it, I have cleared it and he should and then I await the voice on high to tell me when it can be issued.”²⁹⁵⁹ Mr Cairns clarified during his oral evidence that he believed the “voice on high” was a reference by him to Mr Johnston.²⁹⁶⁰
- 54.57 A further example of the power and control exercised by some SpAds was the agreement by Mr Sterling with regard to Dr Crawford’s removal of the reference to Moy Park from the January 2016 submission (considered earlier in the Report) in the interests of finalising a decision stating “...frankly, I didn’t think it was worth having a major set-to with Dr Crawford about it.”²⁹⁶¹
- 54.58 Sir Malcolm McKibbin, former Head of the NICS (but in post at the time when several of the SpAd appointments the Inquiry has considered took place), told the Inquiry that he had been unaware of the practice adopted by the DUP with regard to the appointment of SpAds and that he was both surprised and disappointed by the evidence that emerged in the course of the Inquiry with regard to the letters that he had received as Head of the NICS relating to the appointment of OFMDFM SpAds. He had regarded such letters as “written assurance that the relevant procedures had been followed.” He accepted that what now appears to have been the “camouflaging function” of those documents was “unsatisfactory”.²⁹⁶²
- 54.59 Sir Malcolm was also asked about the system established by Sinn Féin in accordance with which an individual who could not be appointed as a SpAd because of a relevant conviction exercised weekly management and co-ordination of the Sinn Féin SpAds under the direct authority of the deputy First Minister. Sir Malcolm described Mr McAteer as being quite similar to Mr Johnston as both were “fixers” and they worked together very well whenever there was a high profile issue.²⁹⁶³ In the interests of fairness, the Inquiry records that Timothy Johnston informed Sir Malcolm that Mr McAteer was regarded as a constructive pragmatist who helped to resolve issues.
- 54.60 Sir Malcolm observed in oral evidence that even before he became Head of the Civil Service, both the First Minister and deputy First Minister held passes for two or three additional ‘unofficial’ advisers to gain access to Stormont Castle. He said that he had been told of the existence of that arrangement between his predecessor and the First Minister and deputy First Minister and that it ‘mirrored’ the situation in 10 Downing Street. Sir Malcolm used a word employed by other witnesses, including Mr Johnston, describing the situation as one of *realpolitik*.²⁹⁶⁴
- 54.61 As mentioned previously, the type of work which might be undertaken by the Special Adviser is defined in paragraph 3 of their Code of Conduct and includes reviewing papers going to the Minister and “devilling” for the Minister, as well as checking facts and research findings from a party-political viewpoint.²⁹⁶⁵ However the evidence established that, in the case of Minister

2959 DFE-293218

2960 TRA-12950

2961 TRA-16538

2962 TRA-16710 to TRA-16718

2963 TRA-16725 to TRA-16726

2964 TRA-16723 to TRA-16733

2965 DOF-00616

Foster and her SpAd, Dr Crawford, there was a complete misunderstanding as to his duties with regard to reading technical reports. In a written statement of evidence Minister Foster said:

“My usual practice was that my Special Adviser would read the detail of technical reports before they were provided to me and draw particularly significant parts to my specific attention. He also would have advised me generally on the content...”.²⁹⁶⁶

54.62 In fact, according to the evidence, he did not read such documents and told the Inquiry that he did not believe that he was expected to do so.²⁹⁶⁷ Nonetheless, Minister Foster believed that he did and she could not recall having read any technical reports relating to energy herself. It seems that there was no clear agreement as to Dr Crawford’s ‘devilling’ duties with regard to such reports. As discussed previously in this Report, in the context of the initial non-introduction of tiering to the NI RHI scheme, the Inquiry found that the level of communication between Minister Foster and her SpAd was apparently so weak that he did not tell her he had not read the reports and she continued in her unspoken reliance on him, not asking him whether he had, even though it was her clear expectation that this was part of his job. The Inquiry considers this gap in their working relationship to have been a significant and obvious failure. There is no indication that the manner of appointment of Dr Crawford gave rise, or contributed, to this misunderstanding; but it is an important example of why a high level of communication and rapport between the Minister and his or her SpAd was essential.

Conflicts of interest

54.63 As mentioned earlier in the Report, the Northern Ireland Civil Service HR Policy, in the chapter on Standards of Conduct at paragraph 2.1.g,²⁹⁶⁸ which was referenced in the SpAd’s model contract, requires conflicts of interest to be declared to the individual’s Establishment/Personnel Division. Neither Dr Crawford nor Mr Brimstone, a SpAd in the First Minister’s office in late 2015 and early 2016 when the NI RHI was being discussed, made such a declaration of interest in circumstances that required them to do so.

54.64 As is also discussed elsewhere in the Report, Dr Crawford had a brother and two cousins who received RHI payments for their installations accredited on to the NI RHI scheme. One cousin was a poultry farmer who was considering installing biomass boilers and Dr Crawford sent him a confidential draft of the 2013 NI RHI consultation document three weeks before it was released to the public. Dr Crawford’s disclosure took place without the knowledge of Minister Foster. Dr Crawford accepted in oral evidence that he had been wrong to do this.²⁹⁶⁹ That disclosure would have been potentially contrary to paragraph 2.1.2 of the Northern Ireland Civil Service Code of Ethics²⁹⁷⁰ (the NICS Code of Ethics is Annex 1 to the Standards of Conduct chapter of the NICS HR Policy).

54.65 Paragraph 2.1.2 of the NICS Code of Ethics provides at (a) that as a civil servant “You must not misuse your official position, for example by using information acquired in the course of your official duties to further your private interests or those of others” and at (b) prohibits disclosure of official information without authority.

2966 WIT-20569 to WIT-20570

2967 TRA-07547 to TRA-07552

2968 DOF-00026

2969 TRA-08172 to TRA-08182

2970 DOF-00050

- 54.66 Dr Crawford told the Inquiry that when RHI “became a live issue in DFP” in 2015 he wanted to put on record that he had family members involved in the NI RHI scheme. He said that he did so in a verbal conversation with Mr Sterling, Mr Brennan and, possibly, the relevant DFP Minister, about budgetary issues to do with the RHI scheme at Clare House in October/November 2015. Dr Crawford said that he had a “vague recollection” that Mr Sterling told him that it was not necessary to put the information in writing.²⁹⁷¹
- 54.67 Mr Sterling maintained, in both written and oral evidence to the Inquiry, that he was unable to recall any such conversation.²⁹⁷² In oral evidence Mr Sterling said that he would have recalled such a conversation had it occurred. Mr Sterling accepted that, at the time, there was no distinct formal system for recording SpAds’ conflicts of interest but such a system had been under consideration during the Assembly talks process in 2017.²⁹⁷³
- 54.68 Mr Brimstone became a beneficiary of the non-domestic RHI subsidy, by applying to the scheme in respect of his agriculturally rated shed and utilising the heat for his domestic premises. The Inquiry has dealt earlier in this Report with how the poorly drafted 2012 NI RHI regulations led to an interpretation that facilitated such mixed use arrangements on the NI RHI scheme. Mr Brimstone had become committed to installing a biomass boiler in June 2015 and the installation and subsequent application to the RHI scheme took place later that year. However, Mr Brimstone did not formally declare that interest when Mr Cairns sent him a copy of the 8 July 2015 submission for Minister Bell either on receipt of the document or when replying to Mr Cairns (albeit his reply was to the effect that it was hard to argue with the submission). He also did not formally declare his interest when the NI RHI scheme became an issue involving OFMDFM in early 2016. Mr Brimstone said that he had verbally notified Minister Foster of his interest in the scheme in January 2016, although she had no specific recollection of being so informed.²⁹⁷⁴
- 54.69 Nevertheless, despite the potential conflict of interest, Mr Brimstone remained present during the meeting between the Head of the NICS and the First Minister and deputy First Minister on 9 February 2016, where the NI RHI scheme was one of the issues being discussed.²⁹⁷⁵ He accepted in oral evidence to the Inquiry that he should have made an appropriate declaration and withdrawn from any interchanges on the scheme.²⁹⁷⁶

2971 TRA-13219 to TRA-13221

2972 WIT-05187; TRA-16503

2973 TRA-16504 to TRA-16506

2974 TRA-13728 to TRA-13729

2975 TEO-00191

2976 TRA-14010 to TRA-14036

Findings

305. It is clear from the evidence received by the Inquiry that both of the two main parties in the Executive, the DUP and Sinn Féin, breached the spirit and/or provisions of the 2013 Act passed by the Assembly and the mandatory codes issued by DFP in accordance with sections 7 and 8 of that Act in one way or another.
306. At the time of Mr Cairns' appointment as SpAd to Minister Bell in DETI in 2015, some two years after the passage of the 2013 Act and the mandatory appointment code, the procedure was not, as required by the appointment code, by way of a competitive selection from a candidate pool set up after a trawl by Minister Bell, but was instead conducted by the DUP through its then leader, and the then First Minister, Mr Robinson.
307. Minister Bell accepted that the practice adopted in signing the letter of appointment effectively "camouflaged" the complete failure to comply with the appointment code. Those letters were apparently drafted by civil servants who may have been aware of the lack of conformity between the provisions of the appointment code and what happened in practice. The Inquiry has no difficulty in sympathising with civil service officials, given the onerous workload and the lack of resources they faced. Moreover, in the unique political context of devolution in Northern Ireland, they were trying to deliver in the highly charged atmosphere of an enforced coalition between two major parties with radically conflicting political ideologies.
308. A key purpose of the mandatory codes made under the 2013 Act (the code of appointment for Special Advisers and the code of conduct for Special Advisers), was to ensure that a high degree of rapport and trust existed between the people involved in order to make the personal nature of the appointment of a SpAd by the relevant Minister and the subsequent personal relationship a success. The Inquiry finds that the practices adopted by the DUP and Sinn Féin in centralising the appointment, control, and management of SpAds effectively frustrated that purpose of the democratically enacted legislation. As a consequence, some SpAds wielded very significant power and were encouraged to see themselves as more directly responsible to the central authority or OFMDFM and their political parties, than to their individual Ministers.
309. Several indications of the outworking of this approach have arisen in the course of the evidence provided to the Inquiry. Most of these are dealt with in detail elsewhere in this Report, in discussion of the appropriate evidence. Some notable examples have been referred to above.
310. Neither Dr Crawford nor Mr Brimstone formally recorded potential conflicts of interest in 2015 and 2016 when they ought to have done so and, notwithstanding such conflicts, both appear to have taken part in meetings relating to the NI RHI scheme which they should not, in fact, have attended. While declarations of conflicts of interest were required, in accordance with the Standards of Conduct contained within the NICS HR Policy referred to above, the Inquiry finds that there should have been a system in existence for the periodic registration of interests and potential conflicts, in

writing, which was clearly communicated to all relevant officials and which served as an objective and transparent record. Even without such a system, officials, including SpAds, with a potential conflict of interest should not have taken part in meetings where an actual conflict might arise.

311. Sir Malcolm McKibbin confirmed to the Inquiry that he regarded a Minister's letter confirming appointment of his or her SpAd to constitute a written assurance that there had been compliance with the code and the Inquiry heard no evidence to indicate that other Permanent Secretaries held a different view. The *realpolitik* observed by some Ministers in these circumstances appears to have produced a number of advisers with wide powers and influence who were appointed and operated in practice outside the code of conduct for Special Advisers.
312. Nevertheless, it is important to bear in mind that SpAds were civil servants, albeit of a special type, and, as such, there is a public interest in ensuring that the appointment process was operated, and was seen to operate, in accordance with the relevant codes. Section 6 of the 2013 Act provides that DFP must issue a report about Special Advisers employed at any time during the previous financial year, which must then be laid before the Assembly. The Inquiry notes that such reports simply provided the mandatory information required by section 6, namely details of numbers and earnings.

