CONTENT OF A CIVIL SERVICE ACT

Note by Sir Robin Mountfield

Both the main Parties are committed to a Civil Service Act. The last Conservative Government gave such a commitment before the 1997 Election, and the Labour party endorsed the principle at that time. The present Government has repeated its intention to introduce such an Act, and has re-affirmed that intention quite recently.

The intended content of an Act, however, has not been made clear by either Party. The general implication has been that both would seek to entrench the non-political status of the Civil Service.

The non-political status of the Civil Service is, of course, normally regarded as a piece of the unwritten but inviolable part of the Constitution – though both Parties have been guilty from time to time of greater or lesser infringements. Legally, the non-political status is not quite so unwritten as is often supposed: it is clearly provided for in the Civil Service Management Code (which in turn calls up the Civil Service Code), which is made under the Civil Service Order in Council, and thus has legislative status – even though not endorsed by Parliament and in practice amendable at will by the Government of the day.

Nevertheless, there is in principle general acceptance of the non-political status of the Civil Service: in principle – but in practice the temptation is for Governments in office to nibble at this acceptance. For instance, there is under the present Government – and was under its predecessor – clear dissatisfaction with some aspects of Civil Service performance ('delivery' in the present Government's jargon) which has led them to seek ways of over-laying external talent on the permanent machine. Use of Special Advisers is a well-recognised and generally justifiable example; but under both Governments, especially the present one, their role has increasingly tended to push at the boundaries of the provision in the Order in Council which restricts them (now with three specific exceptions) to 'advice only'. Some Ministers – again under both Parties – have sought to intervene in Civil Service appointments both internal and external. And despite Permanent Secretaries' vigilance, Ministers do sometimes ask Civil Servants to carry out tasks beyond the boundaries of neutrality. It should not be assumed, therefore, that politicians of either main Party are as deeply committed to a non-political Civil Service as their public protestations would suggest.

However, on the assumption that both Parties mean what they say, the essential feature of a Civil Service Act will be to entrench the non-political status of the Civil Service. How should this be done?

There is a danger that by the way an Act is written, it will create a statutory animal called a Civil Servant, subject to a body of special law. This could tend, at one level, to convince Civil Servants that they, unelected officials but with statutory standing, had obligations higher than those to the elected Government of the day – a seductive but dangerous proposition. At another level it could work against rather than for the proper employment protection of Civil Servants. For some years, employment practices for the Civil Service have been made to mirror, so far as possible, general employment practices. This is right both from the point of view of efficiency and from the point of view of the protections available to Civil Servants. If obligations are imposed by statute directly on Civil Servants, that will open the whole field to

public law litigation as well as private law, with the risk of at least complicating Civil Servants' access to the normal employment law protections.

Basic Provisions

It would therefore be far preferable to proceed by placing obligations not on Civil Servants but on Ministers. The basic provisions might include:

a) entrenching the present obligation in the Ministerial Code (which unlike the Civil Service Code has no legislative backing even in an Order in Council) to observe the non-political status of the Civil Service;
b) entrenching also the obligation in the Ministerial Code to 'give fair consideration and due weight to informed and impartial advice from civil servants';
c) entrenching the status of the Civil Service Commissioners, with the existing powers at present held by virtue of the Orders in Council including power to hear appeals from Civil Servants against improper conduct by Ministers or others;
d) empowering Ministers (through their Departments) to employ Civil Servants, in conformity with the recruitment rules of the Civil Service Commissioners, and to determine their conditions of service through a contract of employment;
e) requiring Ministers to include in that contract of employment the present Civil Service Code, which would thus become enforceable on the individual Civil Servant not directly under statute, but indirectly under general employment law as a result of the obligation on Ministers to include it in the contract of employment. The Code would be included in the Act as a Schedule; it would be amendable by affirmative resolution procedure, but its essential features would be in the body of the Act and not amendable;
f) requiring Ministers to impose in a similar way a Code of Conduct for Special Advisers, and to enforce it. This Code too would be in a Schedule. There is a strong case for limiting the number of Special Advisers in or under the Act.

Ministers' Powers over their Departments

One of the most difficult issues relates to Ministers' management of their Departments. There is an ambiguity in the present position. Formally, Ministers are responsible for all aspects of their Departments including management; they employ the staff, and staff management and appointments, promotions etc are made in their name. Yet the clear convention, supporting the non-political status of the Civil Service, is that they delegate these matters in full to their Permanent Secretary and do not intervene in personnel matters. In practice exceptions are generally understood in the case of the Permanent Secretary him or herself (where the Prime Minister makes the appointment, if an internal one, from a short list provided by the Head of the Service, but taking account of any views of the Minister), and of the Private Secretary and, increasingly, of the chief press officer. In the case of external appointments, Ministers are precluded by the Civil Service Commissioners' rules from influencing the choice (even within a short list). The straightforward way of dealing with this would be to provide directly in the Act for these matters to be dealt with solely by or under the authority of the Permanent Secretary; but this would go well beyond the present position in creating a statutory status for the Permanent Secretary, which would require some acceptable form of accountability. A better way might be to prepare a Code of Practice under the authority of the Civil Service Commissioners to preclude improper political intervention in these matters beyond the present conventions. This might seem self-serving protection of the Civil Service; but intervention of this kind by Ministers is one of the most threatening forms of potential politicisation (or personalisation) of the Civil Service, and some provision in the Act is

essential. A further point requiring attention relates to decisions to hold open competitions for particular posts; widening access to senior posts is in principle and in general a desirable policy, but it is abused if Ministers insist on job specifications which effectively require an external appointment to the exclusion of well-qualified internal candidates.

Special Advisers and Others

There is, of course, a wider debate about whether Special Advisers should continue to be appointed solely on the decision of an individual without due process. But two other groups deserve attention. The first is secondees from other organisations (in general something to be much encouraged); in principle these appointments are made within guidelines laid down by the Civil Service Commissioners, but in practice they are often recruited without the normal protections and obligations, and this needs attention. The second group is unpaid advisers, appointed with varying degrees of informality, who are given special access to the advice process with little in the way of accountability or sanction; again, the proper status and authority of these advisers needs formalising.

The position of Special Advisers and these other groups is becoming increasingly complicated and potentially dangerous. Recent developments at the centre of Government underline the need to codify the ways in which they can operate in relation to the Civil Service. The danger that appears to be growing is not so much interference by these groups in Civil Servants'impartiality as the effective marginalisation of orthodox Civil Service advice. This might need to be covered by an extension of the Ministerial Code duty referred to in (b) above, to ensure that Civil Service input is adequately engaged: no-one now envisages a Civil Service monopoly of advice, but the present danger is the reverse – its effective exclusion.

More widely, there is a danger that 'advice' merges into something like executive authority, often presented as the conveying of Ministers' (or the Prime Minister's) wishes, though perhaps more accurately an interpretation of what Ministers' wishes would be if they were asked. Conveying (as distinct from presuming) the decisions of Ministers is conventionally the role of accountable civil servants. If the government wishes to give anything approaching executive authority to politically-appointed individuals, the constitutional way of doing so is to make them accountable by appointing them as Ministers. As advisers, they are effectively unaccountable; although nominally under the disciplinary control of the Permanent Secretary, in practice it is almost impossible for the Permanent Secretary to exercise any real sanction over people who hold their position by personal appointment of the Minister. And that is for paid advisers and secondees: the position with unpaid advisers is even more blurred.

The question of pay of Special Advisers is becoming more troublesome. Originally they were paid by reference to the fixed pay of comparable Civil Service grades. With the fragmentation of the central Civil Service pay system and the introduction of performance-driven bands, this has long since become inoperable; and pay of Special Advisers then moved to the concept of an individual being paid (within an overall pay band for Special Advisers) what he or she could demonstrate was actually being paid in immediately previous employment. (That occasionally became vulnerable to evidence of highly paid "job offers" of dubious veracity.) More recently, the concept of performance pay and a degree of external comparability appear to have been introduced, with a result that Special Advisers, appointed solely on the Minister's (or the Prime Minister's) personal wish without any due process, are paid from public funds at levels which cause understandable resentment to permanent officials of broadly comparable status who are paid substantially less. If accusations of patronage and jobbery are not to re-emerge a century and a half after Northcote-Trevelyan,

some external scrutiny and accountability of this subject is urgently needed, whether sanctioned by the Civil Service Act or not.

A final Special Adviser issue requiring attention relates to individuals transferring, by due process, to the permanent Civil Service. In a small number of cases, Special Advisers have been given permanent status after a competitive process, or otherwise with the Civil Service Commissioners' approval. These have been made on the basis of genuine merit, and it might be argued that is enough. But the requirements of permanent appointment should not be merit alone, but also demonstrable ability to serve loyally, and be accepted by, a successor Government of different political views. The Commissioners should be required to satisfy themselves that this is the case. Otherwise, people of undoubted personal excellence may acquire permanent status for which their political commitment unfits them for the politically-neutral Civil Service.

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