



## Special advisers

Standard Note: SN/PC/03813

Last updated: 28 July 2009

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The topic of special advisers in Government has been the focus of attention for several years. Much of the history of their use in Whitehall has been described in Library Research Paper 00/42 *Advisers to Ministers*, but this Standard Note summarises developments since then, specifically the introduction of a Code of Conduct for Special Advisers in 2001, and the decision to amend the Order in Council which governs their role as temporary civil servants in the summer of 2005. The new Prime Minister, Gordon Brown, made the amendment of that Order one of his first actions in office, symbolising the importance attached to the relationship between special advisers and the civil service. The Note also looks at trends in numbers of special advisers, based on data from parliamentary questions. The *Constitutional Reform and Governance Bill 2008-09* is designed to create statutory regulation of special advisers by requiring a code to be in force.

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# 1 Background

The role of special and unpaid advisers has been the subject of intense scrutiny following the election of the Labour Government in May 1997. Library Research Paper 00/42 *Advisers to Ministers* discusses much of the background to the question of special advisers and in particular the report from the (Neill) Committee on Standards in Public Life *Reinforcing Standards* in 2000 which made a series of recommendations on this issue. There is a good, if detailed overview of the subject in Andrew Blick's *People who live in the dark: the history of the special adviser in British politics*.<sup>1</sup> The draft *Constitutional Renewal Bill*, published in March 2008 as part of the white paper *The Governance of Britain: Constitutional Renewal*.<sup>2</sup>, set out proposals to place the employment of special advisers on a statutory basis, as part of new civil service legislation.

Currently, special advisers are appointed in accordance with Article 3(2) of the *Civil Service Order in Council 1995* (as amended) for "the purpose of providing assistance to Ministers".<sup>3</sup> They are temporary civil servants and their employment ends at the end of the administration which appointed them. In common with all civil servants they are bound by the *Civil Service Code* (except sections one and five which relate to the impartiality and objectivity of the Civil Service and civil servants and the aspects of paragraph nine which relate to future administrations and potential future Ministers). However, they also differ from the majority of permanent civil servants because they "are exempt from the general requirement that civil servants should be appointed on merit and behave with political impartiality and objectivity".<sup>4</sup>

The responsibilities of, and limits on the activities of special advisers are contained in five separate documents. These documents collectively set the framework within which special advisers operate. The documents are: the *Civil Service Order in Council*; the *Code of Conduct for Special Advisers*; the *Model Contract for Special Advisers*;<sup>5</sup> the *Civil Service Code*;<sup>6</sup> and the *Ministerial Code*.<sup>7</sup> Reference should also be made to the Government's draft Civil Service Bill in 2003-04 for an appreciation of the Blair Government thinking on the role of special advisers<sup>8</sup> and the draft *Constitutional Renewal Bill* of March 2008 for the Brown Government position on their role.<sup>9</sup>

The debate over the powers of special advisers is epitomised by the Public Administration Select Committee inquiry of 2001 which called its report *Special Advisers: Boon or Bane?*<sup>10</sup> The report summarised concern about the potential creation of a 'spoils system' of government associated with the American system, and whether the growth of special advisers within no 10 could be considered a move towards a more presidential style of government.

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<sup>1</sup> 2004 Politico's Publishing

<sup>2</sup> Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, March 2008, Cm7342 – I-III

<sup>3</sup> Cabinet Office July 2005 *Model Contract for Special Advisers*  
[http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics/special\\_advisers/model.asp](http://www.cabinetoffice.gov.uk/propriety_and_ethics/special_advisers/model.asp)

<sup>4</sup> Cabinet Office July 2005 *Code of Contract for Special Advisers* at  
[http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics/publications/pdf/code\\_conduct\\_special\\_advisers.pdf](http://www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/code_conduct_special_advisers.pdf)

<sup>5</sup> [http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics/special\\_advisers/model.asp](http://www.cabinetoffice.gov.uk/propriety_and_ethics/special_advisers/model.asp)

<sup>6</sup> [http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics/civil\\_service/civil\\_service\\_code.asp](http://www.cabinetoffice.gov.uk/propriety_and_ethics/civil_service/civil_service_code.asp)

<sup>7</sup> [http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics/publications/pdf/ministerial\\_code.pdf](http://www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/ministerial_code.pdf)

<sup>8</sup> *A Draft Civil Service Bill: A Consultation Document*, Cm6373, November 2004

<sup>9</sup> See Standard Note 2863 *Civil Service Legislation* for background

<sup>10</sup> Public Administration Select Committee, *Special Advisers: Boon or Bane?*, 28 February 2001, HC 293 2000-01

## 2 The Code of Conduct for Special Advisers

One of the recommendations from the Neill Committee on Standards in Public Life was for a code of conduct for special advisers, to be enforced, it stated, by 'permanent heads of department'.<sup>11</sup> This was first published in July 2001 by the Cabinet Office.

In July 2002, PASC also published "*These Unfortunate Events*": *Lessons of Recent Events at the Former DTLR*.<sup>12</sup> This examined the series of events which occurred at the former Department of Transport, Local Government and the Regions between September 2001 and May 2002, beginning with the email sent on 11 September 2001 by the special adviser, Ms Jo Moore. Although the report did give rise to some wider issues, it primarily focused on communication issues, particularly the handling of departmental announcements. Following publication, the Government established a review into the operation of the Government Information and Communication Service (GICS). The contents and action taken following publication of the Phillis Review, is covered in Library Standard Note SN/PC/2594 *Changes to Government Communications Machinery*

On 8 April 2003, the Wicks Committee on Standards in Public Life published its ninth report, *Defining the Boundaries within the Executive: Ministers, Special Advisers and the permanent Civil Service*.<sup>13</sup> The introduction made it clear that the inquiry was being conducted against a background of longstanding tensions between different parts of the executive, which had become more acute since the election of the Labour Government in 1997. As if to confirm the heightened attention, the Phillis Review and the Wicks Committee were separately scrutinising the overlapping responsibilities of the GICS and the Number 10 Communications Directorate at the same time as evidence to the Hutton Inquiry was hearing evidence concerning the informality of Government procedures in the context of policymaking towards Iraq.<sup>14</sup>

As well as making reference to the events surrounding the Jo Moore Affair, the opening remarks of the Wicks Committee's report highlighted some of the reasons for the continued interest in the role of special advisers since May 1997:

The number of special advisers has continued to rise – from 34 in 1994 to 78 by 1999-2000 (at the time of the Committee's Sixth Report), to 81 in 2003. Notwithstanding the publication in 2001 of a new Code of Conduct for Special Advisers and a Model Contract for Special Advisers (following recommendations made in the Sixth Report), questions have been asked regularly about the role, responsibilities and accountability of this growing cadre of political appointees, with particular attention paid to the two special advisers in the Prime Minister's Office with 'executive powers', and to one or two unpaid special advisers.

The report from the Committee on Standards in Public Life reiterated the widely held view that "special advisers have a valuable role to play precisely because they are free to act and advise in a way that a politically impartial civil servant cannot" but it did recognise the greater prominence and significance that has been attached to special advisers in Parliament and

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<sup>11</sup> Recommendation 22

<sup>12</sup> Public Administration Select Committee, "*These Unfortunate Events*": *Lessons of Recent Events at the Former DTLR*, 19 July 2002, HC 303 2001-02

<sup>13</sup> Committee on Standards in Public Life, *Defining the Boundaries within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, 8 April 2003

<sup>14</sup> An Independent Review of Government Communications, chaired by Bob Phillis, January 2004; Report of a Committee of Privy Counsellors, *Review of Intelligence on Weapons of Mass Destruction*, 14 July 2004, HC 898 2003-04

the media in recent years.<sup>15</sup> In chapter seven of its report, the Wicks Committee considered the status, role, accountability, number and funding of special advisers. Further information on the recommendations of the Committee and the Government's response can be found in Standard Note SN/PC/2863 *The Civil Service Bill 2003-04* and Standard Note SN/PC/2609 *Wicks Committee's report Defining the Boundaries and Government response 2003*.

Briefly, the Committee recommended there be a clear statement of what special advisers could not do and that the Code of Conduct for Special Advisers should continue to list the types of work a special adviser may do at the request of the minister. It also recommended that there should be an annual statement to Parliament setting out details of the special advisers and the Ministers for whom they worked and that the total number of special advisers should be limited by statute in the context of a Civil Service Bill. Finally, it recommended that the Ministerial Code should be amended to make sure that ministers were personally accountable to the Prime Minister and to Parliament for the management and discipline of their special advisers. Where necessary, the Prime Minister should be able to refer the matter for investigation in the same way as an alleged breach of the Ministerial Code. The Government response accepted that it should be the minister who took responsibility:

In its response to the Eighth Report of the Public Administration Select Committee, the Government made it clear that the ultimate responsibility for the discipline of an individual special adviser rests with the Minister who made the appointment. This also applies to the management of individual special advisers. This is on the basis that, unlike other civil servants, special advisers are personal appointments made by individual Ministers. It is, of course, also open to the Prime Minister to terminate employment by withdrawing his consent to the appointment concerned. The Government will make this clear in the next version of the *Ministerial Code*.<sup>16</sup>

The Government accepted that there would be benefit in amending the *Code of Conduct for Special Advisers* to provide a clarification of the relationships between special advisers and permanent officials. It provided a draft of the proposed changes in an Annex. However, it did not accept that individual contracts should stipulate the type of work to be done by a special adviser, preferring to rely on the Code as general guidance. The Government response noted the following in the case of allegations relating to the conduct of a special adviser.

It follows from the Government's response to recommendation 19 that the investigation of an allegation relating to the conduct of an individual special adviser will be a matter for the appointing Minister. In the first instance, the relevant Permanent Secretary would be expected to investigate and make recommendations to the Minister on any disciplinary action but the ultimate responsibility for initiating an investigation and disciplining a special adviser rests with the appointing Minister. The Government agrees with the Committee that it is for the appointing Minister to account to Parliament, as necessary, for the outcome and for the action taken in consequence of an investigation.

The Government also committed itself to making revisions to the Ministerial Code which would make it clear that all Ministers are personally accountable to the Prime Minister and to Parliament for the management and discipline of their special advisers and for investigating alleged breaches of the Code of Conduct for Special Advisers. The Government also

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<sup>15</sup> Committee on Standards in Public Life, *Defining the Boundaries within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, 8 April 2003, p43. The sources for the table were HC Deb 31 January 2003 c1956w; 22 January 2001 c469w

<sup>16</sup> Cm 5964 September 2003

committed itself to continuing the process of providing annual statements with data on the number and role of special and unpaid advisers in Government. Finally, it agreed to amend the letter of appointment for unpaid advisers so that it included a requirement not to use official resources for party political activity or to undermine the political impartiality of civil servants.

On 4 December 2003, the Government published a revision of its Response to the Wick's Committee, following concern from the Committee on Standards in Public Life about the proposed amendment to the Code set out in the Annex to the Government Response. The Committee was worried that the amendment which had been proposed by the Government would enable special advisers to convey the "instructions" of Ministers to officials. It noted its belief that this change would enhance the position of Special Advisers as well possibly leading to confusion within Departments over issues of accountability.<sup>17</sup> In a letter the then Cabinet Secretary, Sir Andrew Turnbull, confirmed that after "reflecting on the wording", the Prime Minister had decided to delete "instructions" from the amendment to the Code.<sup>18</sup> The Committee welcomed the change as a "constructive development" which it hoped would lead to further reflection by the Government "on those recommendations in the Ninth Report that it felt unable to accept at the time of its response".<sup>19</sup>

### 3 Unpaid advisers

Although most attention has been focused on the role of special advisers, the Ministerial Code also includes provision for the appointment of unpaid advisers. Using the Code, which has paragraphs on the use of unpaid advisers, the Committee on Standards in Public Life defined the main requirements of unpaid advisers as follows:

Appointees provide advice to Ministers in their ministerial capacity;

Prior written approval of the Prime Minister is required;

Such appointments are **exceptional**;

Appointments **carry no remuneration** or reimbursement from public funds;

The appointment is a **personal appointment** by the Minister;

There is **no contractual relationship** with the department;

Ministers must ensure **no conflict of interest** with advisers' private concerns;

**A letter of appointment** must be issued by the employing Minister making this clear;

Aside from **accommodation costs** an unpaid adviser should constitute no cost to the public purse; and

The Official Secrets Act and Business Appointment Rules apply.<sup>20</sup>

The Committee report recommended as follows in relation to unpaid special advisers:

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<sup>17</sup> [http://www.public-standards.gov.uk/speeches/9th\\_report\\_chair's\\_statement\\_on\\_Govt\\_response.htm](http://www.public-standards.gov.uk/speeches/9th_report_chair's_statement_on_Govt_response.htm)

<sup>18</sup> [http://www.public-standards.gov.uk/news\\_releases/archive/2003/PN143\\_revisionofgovtsresponsetoninth.htm](http://www.public-standards.gov.uk/news_releases/archive/2003/PN143_revisionofgovtsresponsetoninth.htm)

<sup>19</sup> [http://www.public-standards.gov.uk/news\\_releases/archive/2003/PN143\\_revisionofgovtsresponsetoninth.htm](http://www.public-standards.gov.uk/news_releases/archive/2003/PN143_revisionofgovtsresponsetoninth.htm)

<sup>20</sup> Committee on Standards in Public Life, *Defining the Boundaries within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, 8 April 2003, p51

- The Ministerial Code provides that unpaid advisers are identified on the basis of a letter of appointment from the employing Minister which sets out the conditions contained in the box above (at para 7.50). However, it is clear that this approach is not being applied evenly and that individuals exist who apparently satisfy the criteria set out in the box but who have not been defined as an unpaid adviser. This is highly unsatisfactory. **We recommend** that the term, unpaid adviser, should cover any person providing, on an unpaid basis, advice to any Minister or representing any Minister in this country or abroad on a recurring or continuous basis; and
- There is nothing in the Ministerial Code which requires unpaid advisers to comply with the Code of Conduct for Special Advisers. **We recommend** that the relevant essential elements of the Special Adviser's Code – that is, the requirement to uphold the political impartiality of civil servants and the requirement not to use official resources for party political activity – should be included in the letter of appointment.

The Government response accepted these recommendations, but noted that there was a wide range of unpaid advice available to ministers, and not all of these sources should be treated as special advisers:

Where an adviser is acting on similar terms to a special adviser but on an unpaid basis then they should conduct themselves as if they were a special adviser. However, it should also be remembered that there is a wide range of unpaid advice available to Ministers including advice from members of NDPBs, task forces and other short-term reviews. The Government does not believe it would be appropriate for these advisers to be covered by the *Ministerial Code*.

Relevant changes were made in the new version of the Ministerial Code, issued in July 2005, in paras 2.12-2.14.<sup>21</sup>

Particular attention was paid to the role of Lord Birt in no 10 Downing Street until his resignation in 2006. The following Parliamentary answer provides information about his role:

**Lord Hanningfield** asked Her Majesty's Government:

What are the terms of reference of the Prime Minister's strategy adviser, the Lord Birt.  
[HL610]

**Lord Bassam of Brighton:** Lord Birt is the Prime Minister's unpaid strategy adviser. He provides the Prime Minister and other Cabinet Ministers with private advice on a range of issues. Lord Birt is also a member of the Cabinet Office Strategy Board and the Civil Service Reform Programme Board.<sup>22</sup>

Reports produced by Lord Birt have been released under the Freedom of Information legislation by the Cabinet Office, along with his terms of appointment. The Cabinet Office website stated the following:

Lord Birt, the Prime Minister's Strategy Adviser, provides confidential advice to the Prime Minister and other Cabinet Ministers on a range of issues. His work has included reports on London, Drugs, Health, Education, Transport and Crime. The project teams for these reports included departmental officials and external advisers. All but the Crime report was produced in conjunction with the Prime Minister's Strategy Unit. Each report was produced in two phases. Phase One set out the evidence and analysis of the issues. Phase Two set out policy advice and recommendations. We are publishing

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<sup>21</sup> For more details, see Standard Note no 3750 *The Ministerial Code*

<sup>22</sup> HL Deb 4 July 2005 c61WA

the evidence and analytical phases of each of the reports (in the case of the London report, the analytical and final reports have already been published). These reports were intended to provoke discussion and contribute to debate across Government. They are not statements of Government policy.<sup>23</sup>

Lord Birt's letter of appointment confirmed some of the information that had already been released. However, it also added some further detail concerning the relationship between the Prime Minister's Strategy Adviser and the other units within the centre of government. He was initially appointed for three years but, in line with the conditions of his appointment, his continued tenure was reviewed every twelve months subject to a three-month notice period by either party. Lord Birt renewed his contract twice since his original appointment on the 5 October 2001, once on the 1 October 2004 (which took effect from the last day of his initial three year term of appointment) and then again on the 4 October 2005.<sup>24</sup> Both renewals were based on the same terms and conditions as his original appointment on 5 October 2001.<sup>25</sup> However, on 15 December 2005, Downing Street announced Lord Birt's resignation and new position with the private equity firm Terra Firma.<sup>26</sup> The press notice confirmed that the appointment had been approved by the Business Appointments Committee, which regulates the appointment of ex-civil servants and ministers.<sup>27</sup>

#### **4 Numbers of special advisers**

One factor that has led to the increased attention has been the growth in the number and expenditure on special advisers. The Neill Committee on Standards in Public Life had recommended in 2000 a cap on the overall number of special advisers.<sup>28</sup> The Government response to the Neill Committee report had accepted the need for a cap, in the context of legislation on the civil service, as follows:

The Government accepts that an overall limit on the number of special advisers should be included in Civil Service legislation. Once that legislation has been enacted, increases in the limit will require the consent of both Houses of Parliament. The Government remains committed to the introduction of such legislation (see the response to recommendation 17 above). It will review the appropriate definition and level of the limit when drawing up the legislation. In the meantime, the appointment of special advisers will continue to be regulated by Order in Council on the basis set out above.<sup>29</sup>

However, in the Government response to the Committee on Standards in Public Life report in 2003, it no longer accepted the case for a cap on the number of special advisers:

R22. (a) The total number of special advisers should be contained in statute, with an upper limit subject to alteration by resolution approved by both Houses of Parliament. The issue of legislation is dealt with in response to recommendation 6. However, the Government does not believe that the issue of special advisers can be considered as a numerical issue. The issue is about being transparent about accountability, roles and

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<sup>23</sup> <http://www.cabinetoffice.gov.uk/publicationscheme/requests.asp>

<sup>24</sup> *The Guardian*, 7 October 2005, p5;

[www.cabinetoffice.gov.uk/publicationscheme/documents/pdf/lord\\_birt\\_appoint.pdf](http://www.cabinetoffice.gov.uk/publicationscheme/documents/pdf/lord_birt_appoint.pdf)

<sup>25</sup> *The Guardian*, 7 October 2005, p5;

[www.cabinetoffice.gov.uk/publicationscheme/documents/pdf/lord\\_birt\\_appoint.pdf](http://www.cabinetoffice.gov.uk/publicationscheme/documents/pdf/lord_birt_appoint.pdf)

<sup>26</sup> "New job for Lord Birt" 15 December 2005 10 Downing Street PN

<sup>27</sup> For further detail, see Library Standard Note no 3745 *Business Appointment Rules*

<sup>28</sup> Cm 4557 January 2000

<sup>29</sup> Cm 4817 July 2000 Response to Recommendation 21

responsibilities and numbers. The Government also participates in regular Parliamentary debates on this issue.<sup>30</sup>

Since July 2002, the Prime Minister has provided information to the Commons on an annual basis detailing the names, expertise, pay range, number and cost of special advisers.<sup>31</sup> Information for earlier years has been extracted from parliamentary answers and summarised by the Committee on Standards in Public Life in its 2003 report.<sup>32</sup> Each answer gives the number of special advisers in post in July annually and offers a pay total figure which relates to the previous year.<sup>33</sup>

### Special advisers 1994/95 to 2008/09

Year (July)	Total	of which: No 10	Departments	Special Adviser Pay £m	Change in pay on previous year (%)
1994/95	34	6	28	1.5	-
1995/96	38	8	30	1.5	0
1996/97	38	8	30	1.8	20
1997/98	70	18	52	2.6	44
1998/99	74	25	49	3.5	35
1999/00	78	26	52	4	14
2000/01	79	25	54	4.4	10
2001/02	81	26	55	5.1	16
2002/03	70	27	43	5.4	6
2003/04	72	26	46	5.3	-2
2004/05	84	28	56	5.5	4
2005/06	82	25	57	5.9	7
2006/07	68	20	48	5.9	0
2007/08	73	23	50	5.9	0
2008/09	74	25	49	5.9	0

There is a discontinuity in the calculation of the total pay bill between 2001/02 and 2002/3. Parliamentary answers since then have included the total cost, including salary, severance pay and estimate of pension costs. Previously, the pay bill only was included.

Numbers in this table include special advisers in no 10 who are paid salaries above normal pay band. They also include members of the Council of Economic Advisers employed on special adviser terms, where information is given in the relevant parliamentary answers or written ministerial statements.<sup>34</sup>

<sup>30</sup> Cm 5964 September 2003 Response to Recommendation 22

<sup>31</sup> HC Deb 21 July 2005 c160WS. HC Deb 22 July 2004 c 466W – 470W: HC Deb 16 July 2003 c328 – 330W; HC Deb 24 July 2002 c1372 – 1374W; Numbers in this table include special advisers in no 10 who are paid above the pay bands given, and members of the Council of Economic Advisers

<sup>32</sup> Committee on Standards in Public Life, *Defining the Boundaries within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, 8 April 2003, p50

<sup>33</sup> See HC Deb 22 January 2001 c469w

<sup>34</sup> These are; HC Deb 16 July 2009 c73-76WS; HC Deb 22 July 2008 c100WS; HC Deb 22 November 2007 c147-WS; HC Deb 24 July 2006 c86WS; HC Deb 21 July 2005 c160WS. HC Deb 22 July 2004 c 466W – 470W: HC Deb 16 July 2003 c328 – 330W; HC Deb 24 July 2002 c1371 – 1373W

## 5 Special Advisers Code and Order in Council 2005

As noted above, the Government response to the Wicks Committee accepted the need for greater clarity of their status including ministerial responsibility for conduct and discipline in the next version of the *Code of Conduct for Special Advisers*. The Ninth Report of the Committee on Standards in Public Life had noted that the Civil Service Order in Council relating to special advisers of 1995 had referred to their role as one of “giving advice only”. This was inconsistent with the Code of Conduct for Special Advisers which listed activities that special advisers could be asked to do by their Ministers. These activities went far beyond only giving advice. The Public Administration Select Committee had therefore recommended the wording “providing assistance” in its report on a draft Civil Service Bill in 2004.<sup>35</sup>

It emerged in July 2005 that the Government had changed the terms of the Order in Council which governs the role of special advisers and was drafting a new Code of Conduct and new Model Contract for special advisers. The Prime Minister, Tony Blair, announced the changes in a parliamentary written statement on 21 July 2005.<sup>36</sup> The Prime Minister stated:

I have today placed in the Libraries of the both Houses copies of the revised code of conduct for special advisers and the revised model contract for special advisers. These reflect commitments given by the Government to the Public Administration Committee and the Committee on Standards in Public Life. The civil service Order in Council governing the appointment of special advisers has also been amended to the effect that special advisers are appointed to assist Ministers.

The Government therefore changed the wording of the Model Contract for Special Advisers in July 2005 from special advisers “giving advice only” to special advisers “providing assistance to the Minister”.

The manner of the change upset the Committee of Standards in Public Life, whose chairman, Sir Alastair Graham, issued two press releases on 19 and 21 July, quoting from his correspondence with the Cabinet Office:

The Chairman of the Committee on Standards in Public Life, Sir Alistair Graham, has expressed his dismay at the way the Government has changed the legislation governing the role of Special Advisers. It emerged today that the legislation – the Civil Service Order in Council – was amended on the 22nd June by the Privy Council but no statement to Parliament or public announcement has yet been made by the Government. Sir Alistair Graham said today:

“I am very disappointed that the Government has chosen to make changes to the legislation governing the role of Special Advisers using prerogative powers without any proper parliamentary and public debate on an issue which has been of clear concern to the public, parliament and media for some time. On this important constitutional matter, not only has the Government not consulted Parliament, it has chosen not to tell them about the changes. Even if the intention is not to extend special advisers’ powers, the

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<sup>35</sup> HC 128 2003-4 January 2004. For background see Library Standard Note no 2863 *The Civil Service Bill 2003-4*

<sup>36</sup> HC Deb 21 July 2005 c162WS Dep 05/1001 (Code of Conduct for Special Advisers) and Dep 05/1002 (Model Contract for Special Advisers). The Code can be found at [http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics/publications/pdf/code\\_conduct\\_special\\_advisers.pdf](http://www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/code_conduct_special_advisers.pdf)

manner in which the changes have been made could lead to this very perception and consequently a loss of trust in the machinery of Government.”<sup>37</sup>

On 21 July Sir Alastair commented on the new code:

‘First, we fully endorse the need for civil servants and special advisers to work collaboratively. However, that is very different from inserting advisers formally into the hierarchy of the civil service even if only while they are doing a particular job. To do that would be to undermine the impartiality of the service and appointment on merit and, if it began to happen frequently, would discourage able people from committing to careers in the service. So the Committee believes it unwise to delete from paragraph 7 the phrase about special advisers standing “outside the departmental hierarchy.’

‘The Committee also accepts that there has for a long time been a capacity for the creation of expert advisers, but the proposed revision set out in paragraph 2 adds to the existing exemptions to the merit principle as set out in the Order in Council. The revision lays the Prime Minister open to the suggestion that he is strengthening the mechanisms through which personnel can be recruited into the civil service outside the normal merit-based arrangements.

‘Secondly, in your letter you make clear that the proposed change to the description of the role of special advisers from “providing advice” to “providing assistance” to Ministers follows the wording suggested by the Public Administration Select Committee (PASC) in their draft Civil Service Bill, produced following this Committee’s Ninth Report. This (PASC) proposal was made and debated in the very explicit context of a Civil Service Act and the subsequent exposure of the Codes of Conduct to Parliamentary scrutiny and decision. The Committee points out that this is very different from the context of the Government’s current proposal i.e. the use of prerogative powers.’<sup>38</sup>

There was a starred question debate in the House of Lords on 7 November 2005 on the number and role of special advisers.<sup>39</sup> Several peers expressed concern that the role of special advisers was being extended in a way that usurped the role of permanent civil servants. In response, Lord Bassam of Brighton, said as follows:

At the heart of this debate is the question put by the noble Baroness, Lady Wilcox, as to whether the Government propose to make any changes to the role of special advisers. The answer to that is simply "no". In July of this year, the Civil Service Order in Council was amended to clarify the role of special advisers. That amendment was made as a direct result of a recommendation by the Public Administration Select Committee, and reflects the reality of how special advisers have been operating under successive administrations. The amendment, from saying that special advisers give "advice" to Ministers, was changed to say that special advisers give "assistance" to Ministers. It did not seek to give additional powers to direct civil servants. It simply corrects an anomaly that has existed for a number of years properly to reflect the reality of what special advisers do.

For example, it has long been recognised that one of the jobs of a special adviser is to brief the media. You could not possibly argue that that could be defined as "advice to

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<sup>37</sup> “Changes to the law on Special Advisers” Committee on Standards in Public Life PN 19 July 2005. The relevant Order in Council is the Civil Service (Amendment) Order in Council 2005 made 22 June 2005 which can be found at <http://www.gazettes-online.co.uk>

<sup>38</sup> “Revision of the Code of Conduct for Special Advisers” Committee on Standards in Public Life PN 21 July 2005

<sup>39</sup> HC Deb 7 November 2005 c482-98

Ministers". That change, which has been taking place over 20 to 30 years, had to be properly reflected in a change to the Civil Service Order.

There was, and is, no intention to extend special advisers' powers. The code of conduct and model contract for special advisers are clear about their roles and what they can and cannot do.

There has been some suggestion that Parliament was not properly consulted or informed of the changes. We informed Parliament of that in the normal way—by means of a Written Ministerial Statement—and the amendment was also published in the *Gazette* in the usual way.

Concerns have also been raised about special advisers directing civil servants. The Civil Service Order in Council permits the employment of up to three special advisers in No. 10 with executive powers to manage and direct civil servants. Currently only one special adviser has those powers. I can confirm, as I have on other occasions, that there are no plans to appoint any other special advisers with executive powers.<sup>40</sup>

## 6 Special advisers and the Brown Government

The new Prime Minister, Gordon Brown, took office on 27 June 2007. The afternoon press briefing for that day noted that "In his first act as Prime Minister he revoked the Orders of Council granting powers to special advisers to give instructions to civil servants."<sup>41</sup> This was a reference to the revoking of the powers given to Tony Blair in 1997 to appoint up to three special advisers with executive powers.

On the same day Mr Brown announced a restructuring of positions within no 10 and the Cabinet Office. He appointed a career civil servant, Tom Scholar, as Chief of Staff and Principal Private Secretary, so ending the division of roles under Mr Blair, whereby Jonathan Powell as special adviser had acted as Chief of Staff. However, the Deputy Chief of Staff, Gavin Kelly, was a special adviser. Mr Scholar was subsequently replaced by Jeremy Heywood, who had initially been appointed as an additional permanent secretary for domestic policy at the Cabinet Office in June 2007. Mr Heywood became chief of staff in January 2008, as a civil servant, not a special adviser.<sup>42</sup>

The Prime Minister's spokesman was a civil servant, Michael Ellam, but Damien McBride was appointed as a special adviser on political press issues. Mr McBride had acted as Mr Brown's special adviser when Chancellor. Mr Brown's director of government relations, Sue Nye, was a special adviser as was the new head of the no 10 policy unit, Dan Corry, formerly Chair of the Council of Economic Advisers at the Treasury. A former Treasury special adviser, Spencer Livermore, was appointed as Director of Political Strategy on special adviser terms. There was some press comment to the effect that the new appointments had several links with the Treasury and with the pressure group IPPR.<sup>43</sup>

Changes were also made to the machinery of government, as the Delivery Unit moved to the Treasury and the Strategy Unit reported to the Minister for the Cabinet Office:

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<sup>40</sup> HL Deb 7 November 2005 c496

<sup>41</sup> No 10 Downing Street Afternoon Press Briefing for 27 June 2007 at <http://www.number-10.gov.uk/output/Page12162.asp> The relevant Order in Council is the *Civil Service (Amendment)(No 2) Order in Council 2007*, made on 28 June 2007. This Order did not make amendments to the new power given to special adviser to assist ministers in the Order in Council amendment made in 2005 by Mr Blair

<sup>42</sup> "Brown calls up big hitter to restore order" 24 January 2008 *Financial Times*

<sup>43</sup> "Brown to put civil servants back at heart of Government" 7 June 2007 *Daily Telegraph*

**Mr. Heald:** To ask the Prime Minister if he will make a statement on the future of the Prime Minister's Delivery Unit and Strategy Unit within the Cabinet Office. [146875]

**Edward Miliband:** I have been asked to reply.

The Prime Minister's Delivery Unit will report jointly to the Prime Minister and to the Chancellor and will be based in the Treasury. The Strategy Unit will continue to be based in the Cabinet Office and will report to the Prime Minister through the Minister for the Cabinet Office.<sup>44</sup>

The Green Paper *The Governance of Britain* was published on July 2007.<sup>45</sup> It contained commitments to bring forward legislation on the civil service and to include within this legislation the regulation of special advisers:

45. Amongst other matters, the legislation will clarify the legitimate and constructive role of Special Advisers within government. Having Special Advisers allows Ministers to get the political advice they need, and reinforces the political impartiality of the permanent Civil Service by clearly distinguishing the sources of political and non-political advice.

46. It is important that the boundaries of the role of Special Advisers are made clear. Article 3(3) of the Civil Service Order in Council 1995 (as amended in 1997) allowed the Prime Minister to appoint up to three Special Advisers in 10 Downing Street who were not subject to the general restriction that their role is to provide assistance to a Minister, and are allowed to give orders to civil servants.

47. The Government believes that it is inappropriate for even a limited number of Special Advisers to have such a role and has revoked these provisions by an Order in Council. This will be made permanent in the forthcoming legislation.

There was no commitment in the Green Paper to limit the role of special advisers to advice and not assistance, and no commitment to include a limit on the numbers of special advisers in the proposed civil service legislation.

On 22 November 2007 a written ministerial statement was issued giving the list of special advisers appointed under the Brown Government. There had been a reduction in the number of special advisers in both no 10 and in the Treasury, since at this point only one member of the Council of Economic Advisers had been appointed.<sup>46</sup> At the same time a revised Code of for Special Advisers and a revised Model Contract was published.<sup>47</sup> There were no major changes in the revisions and there has been no change in the Order in Council setting out the role of special advisers. The revision omits the justification for specialist special advisers in the 2005 version and promotes their use as 'an additional resource for the Minister, providing assistance from a standpoint that is more politically committed and politically aware than would be available to a Minister from the permanent civil service' (para 2). The twelve types of work suitable for a special adviser remain the same.

Following the decision not to hold a general election in autumn 2007, Mr Brown remodelled the staffing of Downing Street. The former head of Ofcom, Stephen Carter, joined as a senior

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<sup>44</sup> HC Deb 16 July 2007 : c61w

<sup>45</sup> Cm 7170 Ministry of Justice. For further details see Library Research Paper 07/72 *The Governance of Britain Green Paper*

<sup>46</sup> HC Deb 22 November 2007 c147WMS-150W. For CEA, see "Two's a crowd" 26 October 2007 *Financial Times*

<sup>47</sup> Dep 2007/0134, available on Cabinet Office website at [http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics/special\\_advisers/code/code.aspx](http://www.cabinetoffice.gov.uk/propriety_and_ethics/special_advisers/code/code.aspx)

adviser from the lobbying firm Brunswick.<sup>48</sup> Jennifer Moses, a former Goldman Sachs managing director, was recruited in March 2008 as an unpaid adviser on policy.<sup>49</sup> Spencer Livermore was replaced by David Muir, an advertising executive.<sup>50</sup> There were press reports that the cost of advisers has risen recently to £6.3m.<sup>51</sup> Further changes followed as Stephen Carter left no 10 in October 2008 and became a junior Minister for communications in the Lords. Press reports indicated that there had been tension with Damien McBride, the longstanding special adviser to Mr Brown.<sup>52</sup> Mr McBride resigned in April 2009. In June 2009 it was reported that Simon Lewis would become director of communications at no 10, on civil servant terms, to replace Michael Ellam from October 2009.<sup>53</sup>

## 6.1 The draft *Constitutional Renewal Bill*

The Queen's Speech on November 6 2007 referred to the proposed *Constitutional Reform Bill* as draft, and this was duly published on 25 March 2008 as a white paper and draft bill, *The Governance of Britain: Constitutional Renewal*.<sup>54</sup> The proposals to place the civil service on a statutory footing are discussed in detail in Library Standard Note 2863 *Civil Service Legislation*.

**Clause 34 (3) (c)** specifically exempts special advisers from the appointment on merit and in open competition principles. This is in line with the Civil Service Orders in Council which currently regulate their employment. The draft bill does not make provision for a cap on their numbers or for a parliamentary debate on the numbers of advisers. **Clause 38** defines a special adviser as a persons appointed directly by a minister to "assist" that minister. The appointment must be approved by the relevant Prime Minister or First Minister. The term of office ends with that of the Minister or the relevant election day. These provisions mirror the current position as set out in the Order in Councils, except that at present there are limits on the numbers of special advisers in both Scotland and Wales introduced as devolution took effect in 1999.<sup>55</sup> The draft bill removes those limits.

There is expected to be some pressure for parliamentary involvement in the numbers and roles of special advisers, given the perennial political interest. The Public Administration Select Committee bill to establish a statutory civil service in 2003-04 had provided for a cap on numbers to be approved by a resolution of each House.<sup>56</sup>

**Clause 33** provides for a code of conduct for special advisers, also to be laid before the relevant parliament/assembly. There is no provision for a parliamentary debate on its contents.

Pre legislative scrutiny of the draft bill was undertaken by a variety of committees, including a specially constituted joint committee of both Houses. The Public Administration Select Committee (PASC) held two evidence sessions on aspects of the Draft Bill – they

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<sup>48</sup> Press reports indicated that Mr Carter's salary was £180,000 "No 10 'fixer' earns as much as Brown" 19 April 2008 *Telegraph*

<sup>49</sup> "Adviser heads big names beefing up no 10" 10 March 2008 *Financial Times*

<sup>50</sup> "Blue on blue fire taking toll on Brown's old guard" 23 March 2008 *Sunday Telegraph* and "Brown's new strategy chief blamed as No 10 infighting goes public" 19 March 2008 *Times*

<sup>51</sup> "Brown's 24 advisers push Labour aides bill to £6.3m" 10 May 2008 *Guardian*

<sup>52</sup> "Spin cycle of advisers is giving Brown a rough ride: On PR Danny Rogers" 15 September 2008 *Guardian*; See also "I warned them that McBride was bad news" 14 April 2009 *Independent*

<sup>53</sup> "Brown appoints new communications chief" 17 June 2009 *Daily Telegraph*

<sup>54</sup> Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, March 2008, Cm7342 – I-III

<sup>55</sup> *Civil Service (Amendment) Order in Council 1999*. . Background is given in the Committee on Standards in Public Life Sixth Report, para 6.13.

<sup>56</sup> *A draft civil service bill: Completing the Reform* HC 128 Session 2003-4

concentrated on matters relating to the Civil Service and reform of the Royal Prerogative. Their report, *Constitutional Renewal: Draft Bill and White Paper*, was published on 4 June 2008.<sup>57</sup> The Committee linked the lack of the cap on numbers of special advisers in the draft bill to the lack of definition about their role. They stated that:

It needs to be absolutely clear in primary legislation that no special advisers should be able to authorise expenditure, or to exercise either management functions or statutory powers. With this added protection, there would be no need for Parliament to control the number of special adviser appointments.<sup>58</sup>

The Joint Committee examined the debate over the role of special advisers, concluding as follows:

296. We agree with the continued treatment of special advisers as temporary civil servants on the grounds that it is preferable for them to work within the same framework as other civil servants. For this reason, we reject the proposal that they be paid from "Short money", which would have the effect of removing them from the ambit of the Civil Service Code. We note the intention set out in the Green Paper to clarify the role of special advisers. On balance, we do not support calls for restrictions on advisers' functions to be put on the face of the Draft Bill. However, we recommend that paragraph 7 of the Code of Conduct for Special Advisers should be amended to make it explicit that special advisers may not authorise expenditure; recruit, manage or direct civil servants; or exercise statutory powers. We recommend that a procedure should be included in the appropriate Code for limiting the numbers of special advisers, preferably not by establishing a cap. We suggest this might be done by confining to Cabinet Ministers (or Ministers in charge of departments) the right to appoint special advisers and by limiting the number of special advisers that each Cabinet Minister should be able to appoint.<sup>59</sup>

The First Civil Service Commissioner, the Committee on Standards in Public Life and the FDA union had argued before the Joint Committee that the draft bill should clarify what special advisers could and could not do.<sup>60</sup> A number of witnesses had suggested that special advisers could be funded from the Short Money allocation given to Opposition parties to support their front bench work. PASC had also floated the idea in its 2001 report *Special Advisers: Boon or Bane?*<sup>61</sup> There was disagreement among Joint Committee members about the question of a cap on the number of advisers, as is evident from the Minutes of Proceedings. The Joint Committee were also not persuaded that there should be any formal parliamentary approval of the Code of Conduct for Special Advisers (para 300).

## **7 The Constitutional Reform and Governance Bill 2008-09**

This Bill had its first reading on 21 July 2009.<sup>62</sup> The clauses on special advisers now appear in part 1, which puts the civil service on a statutory footing and are very similar in purpose to the draft bill, although there are some changes in wording. Special advisers are exempted from the requirement to appoint civil servants on merit after a fair and open competition; they are appointed to "assist" ministers and in the context of the UK Government, appointments are approved by the Prime Minister. The Government therefore rejected the recommendation

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<sup>57</sup> Public Administration Select Committee, *Constitutional Renewal: Draft Bill and White Paper*, 4 June 2008, HC 499 2007-08

<sup>58</sup> *Ibid*, para 44

<sup>59</sup> HL Paper 166/HC 551 2007-08

<sup>60</sup> *Ibid* para 293

<sup>61</sup> HC 293 2000-01

<sup>62</sup> Bill 142 of 2008-09

from PASC that the functions of special advisers be set out in primary legislation.<sup>63</sup> There is no cap on numbers, but a requirement for annual reports to be laid before the UK Parliament, the Scottish Parliament and the National Assembly for Wales. A special advisers code would form part of the contract of employment and would be laid before the parliaments as before, but not subject to specific parliamentary approval. The Joint Committee report had recommended a limit on the numbers of special advisers to be included in the advisers' code of conduct. The Government response, published with the Bill, instead preferred the limits to be set out in the *Ministerial Code*.<sup>64</sup>

## **8 Further guidance for special advisers in April 2009**

Following the resignation of Mr Brown's Chief Press Adviser, Damien McBride, on 11 April 2009 as a result of leaked emails suggesting personal attacks on Opposition figures,<sup>65</sup> the Cabinet Secretary, Gus O' Donnell, wrote to the Permanent Secretaries of departments, with "strengthened" guidance on codes of conduct. Special advisers will be required to sign an undertaking that they are aware of the new guidance.<sup>66</sup> Mr O'Donnell also carried out an enquiry into any wider ministerial or political adviser role in the McBride emails and found no further involvement. His response to Francis Maude was deposited in the Library of the House.<sup>67</sup>

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<sup>63</sup> *Government response to the report of the Public Administration Select Committee on the draft Constitutional Renewal Bill Cm 7688 July 2009, para 30*

<sup>64</sup> *Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill Cm 7690*

<sup>65</sup> "Mc Bride's resignation statement in full" 11 April *BBC News*  
[http://news.bbc.co.uk/1/hi/uk\\_politics/7995107.stm](http://news.bbc.co.uk/1/hi/uk_politics/7995107.stm)

<sup>66</sup> "Email smears a "serious breach" 15 April *BBC News* [http://news.bbc.co.uk/1/hi/uk\\_politics/7999671.stm](http://news.bbc.co.uk/1/hi/uk_politics/7999671.stm)

<sup>67</sup> DEP 2009/1365 21 April 2009