HOUSE OF LORDS
HOUSE OF COMMONS
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the Public and Commercial Services Union (PCS) and Prospect

Introduction

1. PCS, a respondent to the Civil Service Bill published in 2004, and Prospect broadly welcome the draft Constitutional Renewal Bill as it offers, for the first time in 150 years and possibly the last time, the opportunity to put civil service employment and the Civil Service Commissioners on a statutory footing.

2. PCS and Prospect - unions representing over 365,000 members, majority of whom work in government departments, agencies and public bodies - further welcome the proposal to enshrine the core values of the civil service namely impartiality, integrity, honesty and objectivity into law, as well as the principle of appointment on merit.

3. However, PCS and Prospect believe that the Draft Bill does not go far enough in terms of putting civil servants on the same footing as other employees because it has not addressed existing key anomalies which serve as a contradiction to the main purpose of the Draft Bill. The anomalies are set out in our responses to the questions posed by the Joint Committee as follows:

Do the provisions in the Draft Bill increase accountability of the civil service and the Civil Service Commission to Parliament?

4. Undoubtedly, the provisions are likely to lead to an increase in accountability to Parliament. However, the exclusion of the Secret Intelligence Service, the Security Service, GCHQ and the Northern Ireland Civil and Court Services , as well as the absence of a definition of what constitutes the civil service, may render the accountability process incomplete.

5. The argument for keeping the Secret Intelligence Service, the Security Service and GCHQ outside the scope of the Draft Bill as set out in paragraph 195 of the White Paper is that the "Government does not believe it would be sensible to operate two different systems, and therefore a saving provision for the retention of the prerogative in this area..." Whilst PCS and Prospect can understand why the Government wishes to retain a single system for national security vetting, it is

very mindful of the way that the prerogative was used to ban trade unions from GCHQ in 1984. We would therefore urge the Joint Committee to reconsider the argument being put forward for exclusion in each case.

The Draft Bill puts the Civil Service Commission on a statutory footing as a non-departmental public body. Will this increase the independence of the Commissioners?

6. Putting the Commission on a statutory footing is likely to lead to an increase in the independence of the Commissioners but it is arguable as to whether it will have the same effect on its function. For example, the Commission will not have the power to launch an investigation without the agreement of the Government when the latter is the employer. This may bring about conflict of interest on the part of the Government in circumstances where investigation outcomes are likely to impact negatively on the Government. This would, in effect, limit the scope for achieving mutual agreement.

Under the Draft Bill, the Commission retains the right to hear appeals from civil servants and make recommendations, but the Draft Bill does not state who recommendations should be made to. Should this be included in statute?

7. Yes, the statute should indicate who recommendations should be made to. It is recommended that they are made to the Head of the Civil Service, in the first instance.

Should the Commission be given the power and resources to initiate investigations without an appeal being made to it?

8. Yes, as this will increase the Commission's independence.

Appointments to the civil service must be made on merit following open and fair competition, but the Draft Bill sets out a number of exceptions to this (in clause 34(3). Are these exceptions appropriate?

9. The exemptions listed under clause 34(3) appear to be a departure from what was listed under clause 8 (3) of the Civil Service Bill 2004. Whereas the exemptions in the 2004 Civil Service Bill are precise and clear, thereby leaving little room for misinterpretation, those listed in the Draft Bill under clause 34(3) are ambiguous, and therefore open to misinterpretation. We would recommend

that further consideration is given to this clause, and in particular clarity in terms of what will actually be the impact on the ground.

10. Clause 34 also raises a number of other issues which are not covered by the Draft Bill. For example, clause 34 (2) of the Draft Bill states that "a person's selection must be on merit on the basis of fair and open competition". There can, of course, be no objection to that provision, which simply repeats in statutory form the current position in relation to the appointment of civil servants under the Civil Service Order in Council 1995.

11. A key issue which arises from that, however, is the question as to what the legal status of an employment contract of a civil servant would be if, through no fault of his / her own, he / she had not been appointed on merit on the basis of fair and open competition. Treasury Solicitors have argued on behalf of the Crown in, for example, the agency worker cases taken on behalf of PCS members; and in other PCS cases (e.g. Stirling -v - DWP, a Scottish Employment Tribunal case) that if appointment has not been made on merit on the basis of fair and open competition, the appointment is null and void and therefore void of legal effect. In the case of Mr Stirling, that meant that his seven years service with the CSA counted for nothing when he was told that his employment was null and void, and he was dismissed immediately.

12. It is entirely unsatisfactory that persons who have not been appointed on the basis of fair and open competition through no fault of their own, be liable to have their employment terminated at any point (in effect amounting to "employment at the pleasure of the Crown and liable to be dismissed at will"). Such a position is an anachronism and outdated. We would therefore recommend that there be a further subsection 5 added to section 34, to read as follows:

"(5) An appointment of a person to the Civil Service will not be deemed to be ultra vires by reason that the individual has not been appointed in accordance with subsection (2)".

The Draft Bill does not define the number or role of special advisors. Instead, special advisers must comply with a Code of Conduct published by the Government and the Government must lay an annual report containing information about the number and cost of special advisers. Are these provisions appropriate?

13. The provisions in themselves are appropriate in so far as accountability is concerned. However, PCS and Prospect remain concerned at repeated attempts by some Ministers to expand the role of special advisers.

14. We also believe that referring to special advisers as "temporary civil servants" in paragraph 190 of the White Paper when the Bill does not give a clear definition of what constitutes the civil service and, for that matter, a civil servant is not particularly helpful.

Is the way the Draft Bill defines 'civil servants' and 'the civil service' appropriate? Are the exclusions in clause 25(2) appropriate?

Definition and Scope

15. the Bill does not define who is a civil servant. It also does not define what constitute "Crown Servant", "Servant of Crown", or "Crown Employee" - all of which are used in legislation - and how they relate to a civil servant. In particular there is a need to clarify the position of those working for NDPBs.

16. Instead, clause 25 says that the relevant Part of the Bill "applies to the civil service of the State" with the exclusion of the Secret Intelligence Service, the Security Service, GCHQ and the Northern Ireland Civil and Court Services - clause 25(2). The same clause then blandly states that references to the civil service and civil servants "are to be read accordingly" - clause 25(3).

17. In particular, despite previous consultation on the possible definition of civil servants and submissions as to their status, the Bill does not address such long-standing issues as the contract of employment, the identity of the employer, whether to place civil servants on the same footing as other employees and whether to amend or revoke entirely those provisions that deny a range of employment rights to civil servants and others in Crown employment.

18. Putting the civil service on a statutory footing will enable all civil servants to enjoy the full benefit of employment status, something that has not always been asserted with confidence. The civil service has been managed under the Royal Prerogative by Orders in Council. Civil servants are Crown servants who, at common law, are employed at the pleasure of the Crown and could be dismissed at will and without notice.

19. In addition, a clearer definition of what constitutes a civil servant would provide greater certainty over the benefits and protections that employees of NDPBs are able to access. Current legislation refer to 'crown employment' being employment of a government department 'or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision'. This would mean that some, though not necessarily all NDPBs would be covered.

20. That said, employment protection legislation has gone some way to mitigate the uncertainty by including provisions that extend to relevant protection to those in Crown employment including civil servants. However, such devices are an incoherent and poor substitute for a modern, rational and comprehensive treatment of civil servants.

21. It is therefore recommended the Draft Bill needs to clarify what constitute "Crown Servant", "Servant of Crown", or "Crown Employee", and how they relate to a civil servant. It us further recommended that the Bill should be amended by adding a new clause 25(4) to provide that those civil servants that fall within Part 5 should be deemed to have contract of employment within the meaning of Section 230 (1) and (2) of the Employment Rights Act 1996 (ERA). PCS and Prospect considers that taking such a step would permit the repeal of the special provisions that extend employment protection to civil servants, and suggests that Section 191 of ERA 1996 could be repealed, except for (1), (3), (4), (da) and (e) and (6).

Exclusion of Employment Protection Rights

22. There currently exists exclusion of employment rights for civil servants, which may survive any measure to confer statutory status on them. We set out below some of the key relevant exceptions and exclusions and a full list is attached as an Appendix.

Employment Rights Act 1996

23. The most obvious is that section 191 of the Employment Rights Act 1996 does not extend to civil servants its rights under:

(a) Pt IV, together with ss 45 and 101 (rights for shop and betting workers in relation to Sunday working);

(b) ss 86-91 (minimum periods of notice);

(c) Pt XI (redundancy rights) (further provisions excluding redundancy rights are contained in ss 159 and 160; and

(d) Pt XII (rights on employer's insolvency).

24. It was presumably thought that the second and third of these entitlements were inconsistent with employment at the pleasure of the Crown. PCS and Prospect may consider that with the passage of time, that stance can no longer be justified (if it ever was) and so (again, whether or not civil servants are given contracts of employment) the exclusions should be ended. As we suggest above,

if employee status is conferred on civil servants by the Bill, section 191 should be repealed except for (1) (amended as necessary), (3), (4) (da) and (e), and (5). Part XII should still be excluded for civil servants (since an insolvent Crown could not make payments through the Insolvency Service). Section 159 should also be repealed.

25. Sub-section (4)(da) substitutes a reference to the national interest for the reference to the employer's undertaking in s 98B(2), whilst sub-s (4)(e) provides equivalents for other references in the Act to undertakings. Hence our advice that those provisions should be retained.

26. Section 191(5) imposes a limit on the right to time off for public duties under s 50 where the individual's post is politically restricted, and to the extent that the public duties (eg service as a councillor) would infringe the restriction. We would recommend a repeal of this provision.

27. Section 193 specifically excludes Part IVA of the Act (protection for whistleblowers) in relation to the staff of the Security Service, the Secret Intelligence Service and GCHQ.

28. Section 159 excludes from an entitlement to statutory redundancy payments any employee who is treated as a civil servant for pension purposes. This catches staff of NDPBs who, strictly speaking, are not Crown employees but who are treated as holding public office under the Superannuation Acts or for the purposes of superannuation benefits as being in the civil service of the state e.g. employees of most NDPBs.

TULRCA: Redundancy Consultation

29. Section 273 of Trade Union and Labour Relations (Consolidation) Act 1992 apply most of that statute's provisions to civil servants (see the Appendix for the full section). However section 273(2) excludes section 87(4)(b) (power of tribunal to make order in respect of employer's failure to comply with duties as to union contributions); sections 184 and 185 (remedy for failure to comply with declaration as to disclosure of information); and Chapter II of Part IV (procedure for handling redundancies).

30. Section 273(2) refers to 'Crown employees'. This includes not only civil servants but also employees of NDPBs. See for example the recent case of Adult Learning Inspectorate and Others v Beloff (UKEAT/0238/07/RN) in which the EAT held that employees of ALI were in Crown employment and therefore excluded from the right to collective consultation under section 188 et al of TULR(C)A 1992.

31. For the same reasons as mentioned above, PCS and Prospect consider that the time is now right to remove theses exclusions. The most significant exclusion is the procedure for handling redundancies. That arises from Article 2 of Council Directive 98/59/EC, as enacted by section 273(2). Interestingly, Government previously saw fit to apply the redundancy consultation provisions to local government employees. We would therefore recommend the repeal of section 273(2) of TULR(C)A 1992.

TUPE

32. The Transfer of Undertakings (Protection of Employment) Regulations 2006 implement the Acquired Rights Directive of the European Union (ARD). TUPE does not per se exclude civil servants - regulation 2(1) defines employee as "any individual who works for another person whether under a contract of service or apprenticeship or otherwise..."

33. However, Regulation 3(5) (which mirrors Article 1(c) of the Directive) excludes from the definition of a relevant transfer "an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities". This effectively excludes much (though by no means all) public sector reorganisation from the scope of TUPE in its entirety i.e. not only the individual protection rights but also the collective rights to information and consultation.

34. It should be noted, however, that this exclusion depends not on the employment status of civil servants but on the European policy that such reorganisations should be exempt from the Directive. It may therefore be argued that this exclusion could survive any measure to confer employment status on civil servants. However, in line with the above recommended modernisation of the status and rights of civil servants, we would recommend that Regulation 3(5) be repealed.

Special Provisions

35. We now turn to consider some special provisions that apply to civil servants.

TULRCA: Trade Disputes

36. Over and above the provisions of section 273 of Trade Union and Labour Relations (Consolidation) Act 1992, there are two issues that arise out of trade disputes.

37. The first concerns the protection conferred by section 219 on trade unions that conduct a ballot of relevant members and serve relevant notices on employers in accordance with the Act. That protection extends to inducements to break contracts of employment or interfere with their performance etc.

38. It was held in Associated British Ports v TGWU (1989) that the protection does not extend to inducing statutory torts i.e. breaches of a statutory duty. We have considered whether the Bill, by placing the Civil Service Codes on a statutory footing, might create a risk for PCS and other civil service unions that otherwise lawful industrial action might leave them exposed. On balance we do not think that that would happen, since the Codes will not themselves have statutory force. However, it would be helpful if we can be given assurances to that effect.

39. The second issue concerns the special provision in section 244, which defines a trade dispute. Subsection (3) provides that a dispute between a Minister of the Crown and any workers shall be a trade dispute, despite the fact that the Minister is not their employer, if it relates to matters which have been referred for consideration by a joint body on which the Minister is represented by virtue of provision made by or under any enactment; or if the dispute cannot be settled without the Minister exercising a power conferred by or under an enactment.

40. PCS is very familiar with this provision. It would seem desirable to retain this measure.

Sections 171 and 177 ERA 1996

41. As stated above, the provisions of Part XI of The Employment Rights Act 1996 (i.e. in relation to Redundancy) do not apply to civil servants (see sections 159 and 191 ERA 1996). Further, enabling Regulations have not been made (pursuant to section 171 ERA 1996), applying the provisions of part XI to civil servants.

42. Section 177 of ERA 1996 gives certain potential rights to those whose employment falls within section 159 ERA 1996 (which basically means civil servants, together with those working for NDPBs who are entitled to be members of the PCSPS). The right under section 177 (1) is to take a claim to an employment tribunal for entitlement to a payment under a redundancy compensation scheme (which the CSCS would amount to) where the terms and conditions upon which a person is employed include provision for the making of such a payment (which arguably is the case for civil

servants and NDPB employees) and where the terms and conditions include provision "for referring to an employment tribunal any question as to the rights of any person to such a payment in respect of that employment or as to the amount of such a payment" (177(1)(b) ERA 1996). This latter condition does not appear to have been met, since the terms and conditions of civil servants or those working for NDPBs do not contain, to our knowledge, such a term. Further, the CSCS does not appear to contain any general right to take a claim to an Employment Tribunal in relation to a payment under the CSCS.

43. Were civil servants to be deemed to have contracts of employment, as recommended above, and were the provisions of section 159 ERA 1996 and 191, to be amended / repealed as recommended, sections 171 and 177 would no longer have relevance to civil servants (although they could still have relevance to the other classes of employees set out in subsection 171(3). If Government cannot be persuaded to take such steps, then at the very least an additional provision ought to be added to the Constitutional Renewal Bill, to make it clear that for the purposes of section 177 ERA 1996, all of that class of employees as set out in section 159 ERA 1996 are deemed to be employed on terms and conditions which include a provision for referring to an employment tribunal any question as to the right of any person to a payment to which section 177 applies, including the right to payments under the CSCS.

44. Finally, PCS and Prospect are disappointed that the Draft Bill does not deal with nationality issues in relation to civil service employment, which are likely to affect black and ethnic minorities disproportionately. This is in spite of the numerous commitments given by the Cabinet Office and Ministers, as well as the private member's bill brought by Andrew Dismore MP, which supports our position, and was also supported by the Government. Matters concerning nationality are part and parcel of the recruitment process and therefore their inclusion in the Draft Bill would be more than appropriate.

9 June 2008

APPENDIX

RELEVANT STATUTORY CLAUSES

Sections 159, 160, 171, 177 and 191 ERA 1996

159 Public offices etc

A person does not have any right to a redundancy payment in respect of any employment which-

(a) is employment in a public office within the meaning of section 39 of the Superannuation Act 1965, or

(b) is for the purposes of pensions and other superannuation benefits treated (whether by virtue of that Act or otherwise) as service in the civil service of the State.

160 Overseas government employment

(1) A person does not have any right to a redundancy payment in respect of employment in any capacity under the Government of an overseas territory.

(2) The reference in subsection (1) to the Government of an overseas territory includes a reference to-

(a) a Government constituted for two or more overseas territories, and

(b) any authority established for the purpose of providing or administering services which are common to, or relate to matters of common interest to, two or more overseas territories.

(3) In this section references to an overseas territory are to any territory or country outside the United Kingdom.

171 Employment not under contract of employment

(1) The Secretary of State may by regulations provide that, subject to such exceptions and modifications as may be prescribed by the regulations, this Part and the provisions of this Act supplementary to this part have effect in relation to any employment of a description to which this section applies as may be so prescribed as if-

(a) it were employment under a contract of employment,

(b) any person engaged in employment of that description were an employee, and

(c) such person as may be determined by or under the regulations were his employer.

(2) This section applies to employment of any description which-

(a) is employment in the case of which secondary Class 1 contributions are payable under Part I of the Social Security Contributions and Benefits Act 1992 in respect of persons engaged in it, but

(b) is not employment under a contract of service or of apprenticeship or employment of any description falling within subsection (3).

(3) The following descriptions of employment fall within this subsection-

(a) any employment such as is mentioned in section 159 (whether as originally enacted or as modified by an order under section 209(1)),

(b) any employment remunerated out of the revenue of the Duchy of Lancaster or the Duchy of Cornwall,

(c) any employment remunerated out of the Queen's Civil List, and

(d) any employment remunerated out of Her Majesty's Privy Purse.

177 References to [employment tribunals]

(1) Where the terms and conditions (whether or not they constitute a contract of employment) on which a person is employed in employment of any description mentioned in section 171(3) include provision-

(a) for the making of a payment to which this section applies, and

(b) for referring to an [employment tribunal] any question as to the right of any person to such a payment in respect of that employment or as to the amount of such a payment,

the question shall be referred to and determined by an [employment tribunal].

(2) This section applies to any payment by way of compensation for loss of employment of any description mentioned in section 171(3) which is payable in accordance with arrangements falling within subsection (3).

(3) The arrangements which fall within this subsection are arrangements made with the approval of the Treasury (or, in the case of persons whose service is for the purposes of pensions and other superannuation benefits treated as service in the civil service of the State, of the Minister for the Civil Service) for securing that a payment will be made-

(a) in circumstances which in the opinion of the Treasury (or Minister) correspond (subject to the appropriate modifications) to those in which a right to a redundancy payment would have accrued if the provisions of this Part (apart from section 159 and this section) applied, and

(b) on a scale which in the opinion of the Treasury (or Minister), taking into account any sums payable in accordance with-

(i) a scheme made under section 1 of the Superannuation Act 1972, or

(ii) the Superannuation Act 1965 as it continues to have effect by virtue of section 23(1) of the Superannuation Act 1972,

to or in respect of the person losing the employment in question, corresponds (subject to the appropriate modifications) to that on which a redundancy payment would have been payable if those provisions applied.

191 Crown employment

(1) Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers.

(2) This section applies to-

(a) Parts I to III,

[(aa) Part IVA,]

(b) Part V, apart from section 45,

[(c) Parts VI to VIIIA]

(d) in Part IX, sections 92 and 93,

(e) Part X, apart from section 101, and

(f) this Part and Parts XIV and XV.

(3) In this Act 'Crown employment' means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

(4) For the purposes of the application of provisions of this Act in relation to Crown employment in accordance with subsection (1)-

(a) references to an employee or a worker shall be construed as references to a person in Crown employment,

(b) references to a contract of employment, or a worker's contract, shall be construed as references to the terms of employment of a person in Crown employment,

(c) references to dismissal, or to the termination of a worker's contract, shall be construed as references to the termination of Crown employment,

(d) references to redundancy shall be construed as references to the existence of such circumstances as are treated, in accordance with any arrangements falling within section 177(3) for the time being in force, as equivalent to redundancy in relation to Crown employment,

[(da) the reference in section 98B(2)(a) to the employer's undertaking shall be construed as a reference to the national interest, and]

(e) [any other reference] to an undertaking shall be construed-

(i) in relation to a Minister of the Crown, as references to his functions or (as the context may require) to the department of which he is in charge, and

(ii) in relation to a government department, officer or body, as references to the functions of the department, officer or body or (as the context may require) to the department, officer or body.

(5) Where the terms of employment of a person in Crown employment restrict his right to take part in-

(a) certain political activities, or

(b) activities which may conflict with his official functions,

nothing in section 50 requires him to be allowed time off work for public duties connected with any such activities.

(6) Sections 159 and 160 are without prejudice to any exemption or immunity of the Crown.

Section 273 TULR(C)A 1992

273 Crown employment

(1) The provisions of this Act have effect (except as mentioned below) in relation to Crown employment and persons in Crown employment as in relation to other employment and other workers or employees.

(2) The following provisions are excepted from subsection (1)-

[section 87(4)(b) (power of tribunal] to make order in respect of employer's failure to comply with duties as to union contributions);

sections 184 and 185 (remedy for failure to comply with declaration as to disclosure of information),

Chapter II of Part IV (procedure for handling redundancies).

(3) In this section 'Crown employment' means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by an enactment.

(4) For the purposes of the provisions of this Act as they apply in relation to Crown employment or persons in Crown employment-

(a) 'employee' and 'contract of employment' mean a person in Crown employment and the terms of employment of such a person (but subject to subsection (5) below);

(b) 'dismissal' means the termination of Crown employment;

(c) ...

(d) the reference in 182(1)(e) (disclosure of information for collective bargaining: restrictions on general duty) to the employer's undertaking shall be construed as a reference to the national interest; and

(e) any other reference to an undertaking shall be construed, in relation to a Minister of the Crown, as a reference to his functions or (as the context may require) to the department of which he is in charge, and in relation to a government department, officer or body shall be construed as a reference to the functions of the department, officer or body or (as the context may require) to the department, officer or body.

(5) Sections 137 to 143 (rights in relation to trade union membership: access to employment) apply in relation to Crown employment otherwise than under a contract only where the terms of employment correspond to those of a contract of employment.

(6) This section has effect subject to section 274 (armed forces) and section 275 (exemption on grounds of national security).