1. The Public and Commercial Services Union ("PCS") is the largest union of civil servants, representing some 300,000 civil servants throughout the United Kingdom, the majority of whom earn less than £22,000 per year. PCS is a constituent of the Council of Civil Service Unions, a representative body of civil service trade unions with a long history of collective bargaining in the civil service.

2. This evidence has been prepared by PCS' lawyers, on its instructions.

3. At the time of finalising this evidence, PCS has just become aware of the amendment to the Bill to be moved in Grand Committee in the House of Lords, which was announced today (5 November 2010). Whilst it remains to be seen, of course, whether that amendment is carried forward, PCS includes such comments as it is able to make in the time available.

1. **Summary**

4. In its current form, the Superannuation Bill (the "Bill") makes provision for:
(i) the exclusion of the protection afforded by Section 2(3) of the Superannuation Act 1972 for compensation benefits payable under any new Civil Service Compensation Scheme (“CSCS”) except in relation to termination of employment arising out of either a notice of dismissal given, or an agreement reached, before the coming into operation of the new scheme; and

(ii) the imposition of limits on the aggregate amount of compensation payable under any CSCS in the future of, in the case of a compulsory severance, pensionable earnings for 12 months, or, in the case of a voluntary severance, pensionable earnings for 15 months.

5. At the same time, the government proposes to implement a new CSCS. If implemented according to the current proposals, the effect would be for compensation benefits on redundancy to be changed such that, for those below their normal pension age on their final day of service and leaving on compulsory terms, the entitlement would be to one month’s salary for every year of pensionable service up to a maximum of 12 months salary/payment. For those leaving on voluntary terms, the entitlement would be the same, subject to a maximum of 21 months/salary.

6. In summary, PCS’ evidence is as follows:

(i) the provisions in the Bill limiting the benefits payable under the CSCS, and the removal of the protection afforded by Section 2(3)
of the Superannuation Act 1972, involve an interference with the peaceful enjoyment of “possessions” of civil servants for the purpose of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(ii) the resulting deprivation of the possessions of civil servants is not justified by reference to the public interest, the conditions provided by law and by the general principles of international law when the following circumstances are properly taken into account:

(a) the issue here is not whether the limit on compensation benefits, and the removal of the protection afforded by Section 2(3) of the Superannuation Act 1972, would be justified in a scheme that was being introduced for the first time, or was only being introduced in relation to future service. The Bill will deprive individuals of benefits based on service already undertaken, and of which they had a legitimate expectation in the event of redundancy. The issue therefore is whether it is justified to defeat such existing expectations;

(b) the financial loss in some individual cases will be very considerable. It is not the case that it will be necessary to have served for a very long period before that is true;
nor is the issue whether a limit on benefits at some level would be justified. The question is whether this limit, and the removal of the protection of Section 2(3) of the Superannuation Act 1972 is justifiable;

in one sense, the limit on benefits applies equally to all civil servants. However, there is little doubt that a one year cap has a materially greater impact upon an individual at the lower end of the pay spectrum, whilst at the same time delivering less in savings to the employer.

It is true that the current proposals for a new CSCS provide for a minimum level of pensionable pay for the purpose of calculating compensation benefits. But the fact remains that the one year limit would be imposed by primary legislation;

the scheme which the government sought to impose in February 2010 was substantially less restrictive that the limits imposed by the Bill. The Minister has said that, had the February 2010 not been struck down, the present government would have seen a strong case for keeping it rather than seeking to restrict payments further. That statement is difficult to reconcile with a stance that there is now some imperative necessity to impose a one year limit;
Ministers have not sought to suggest that there is some financial calculation which has been carried out to establish that only a scheme on the terms of the present Bill is affordable. Indeed, the Minister’s letter of 25 October 2010, in response to the Chair of the Joint Committee’s letter of 13 October asking for an explanation of the why in the government’s view the provisions of the Bill are justified, is couched in terms of unquantified and vague generalities, as opposed to specific calculations as to what level of savings are required;

At the time of changes to the CSCS in 1987, there was a specific category of individuals with “pre-1987 reserved rights”. It was specifically recognised that the changes at that time would affect their accrued rights, and for this reason, the government introduced protection for them. Those transitional arrangements were the subject of a specific agreement, which ought not now to be disturbed;

There is no logical reason for continuing to have the provisions limiting compensation benefits in the same Bill that removes the protection of Section 2(3) of the Superannuation Act 1972 (assuming, for now, that the removal of that protection is justified). Once that
protection is removed, the government is in a position to impose a scheme which is as sophisticated as it wishes.

(iii) Whilst the CSCS is not a collective agreement as such, the form in which it currently stands is the product of negotiation and collective bargaining over the years, including trade union agreement given to changes that would have otherwise contravened Section 2(3) of the Superannuation Act 1972. That process has operated on the basis that the CSCS as so negotiated would enjoy the protection of Section 2(3). The legislative setting aside of that protection would be a breach of Convention rights, whether analysed in terms of a breach of Article 11 of the Convention, or in terms of the respect for collective bargaining that Article 11 requires being a further ground for establishing a sufficient legitimate expectation to give rise to a possession for the purpose of Article 1 of the First Protocol.

2. **Background to the current version of the CSCS and Section 2(3) of the Superannuation Act 1972**

7. To demonstrate precisely why Article 1 of the First Protocol and Article 11 are engaged, it is necessary to refer in detail to the background to the current version of the CSCS and Section 2(3) of the Superannuation Act 1972, as analysed earlier this year by the High Court (Sales J) in *R (Public
and Commercial Services Union) v Minister for the Civil Service (no.1) and (no.2) (“PCS 1” and “PCS 2” respectively). The account given below is extracted from the uncontested evidence of Mr Brian Sutherland, and parts of the evidence of Mr Cochrane which were largely uncontested, in PCS 1. Mr Sutherland was the full-time assistant secretary of the National Staff Side, which became the Council of Civil Service Unions, between 1980 and 1992. Mr Cochrane had been the Secretary of the Council of Civil Service Unions since 1995. Copies of their witness statement, and of the judgments in PCS 1 and PCS 2 and any other documents referred to, can easily be supplied if that would assist the Joint Committee.

8. Before 1972, the superannuation arrangements for civil servants were dealt with by primary legislation, which was consolidated as the Superannuation Act 1965. It was supplemented by the detailed provisions of the Civil Establishment Code, known as Estacode, but Estacode did not override the provisions of the Act.

9. Part 1 of the 1965 Act enabled the Treasury to pay pension and lump sum benefits payable normally at age 60, or below the age of 60 if the reason for retirement was ill-health or for service in certain countries abroad. The pension was known as a “superannuation allowance” and the lump sum was known as an “additional allowance”. The calculations of these allowances were spelled out in the Act. If the Minister for the Civil Service

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1 [2010] EWHC 1027 (Admin)  
2 [2010] EWHC 1463 (Admin)
Department certified that it would be in the interests of the efficiency of the department if she or he retired, then provided that she or he was aged at least 50, the Treasury was empowered to pay the civil servant her or his superannuation and additional allowance at the point of departure\(^3\). The Act also enabled the Treasury to pay special “compensation allowances” of an amount that the Treasury decided to be reasonable and just if a civil servant’s office was abolished or if the department wanted to reorganise the way its work was done\(^4\). If the reason for retirement was ill-health, the efficient running of the department or reorganisation, and the civil servant had at least 20 years’ service, the Treasury was empowered to enhance the superannuation and additional allowances by deeming that the civil servant had been in office for 20 years or had remained in office until age 60 if that was a shorter period\(^5\). This potential enhancement was also the maximum that could be paid if the civil servant’s office was abolished.

10. The purpose of the 1965 Act was to set out the limits to what pensions could be paid to civil servants on retirement, including retirement before normal retirement age. It was the statutory authority to pay, and not a code of what would be paid. It stated that nothing in the Act should be construed to extend to give any person an absolute right to any allowance or gratuity or to deprive the Treasury or the head or principal

\(^3\) Section 10  
\(^4\) Section 8  
\(^5\) Sections 5 and 10
officer of any department of their power to dismiss any person from the public service without compensation.

11. The way in which the provisions of the Act were applied were spelled out in Estacode. Section N of Estacode explains how it came into being. It described the operation of the system of Whitely Councils which enabled the employers, represented by the Official Side of the Council, to negotiate terms and conditions of employment with the trade unions that made up the Trade Union Side. Their role was expressly not merely advisory\(^6\): constitutionally the decisions of the Councils “become operative”, but since the Official Side could not agree to anything without the consent of the relevant Minister, Whitley agreements were effectively made with the Government (and therefore the Crown). The same paragraph records the formal position in constitutional theory that Government Ministers cannot surrender their obligation to act in what they regard as the public interest, but that was a constitutional doctrine that Ministers could neither waive nor escape. The Whitley Councils had authority to reach agreements on various issues and they expressly included tenure and superannuation\(^7\). As agreements were reached, they were incorporated into Estacode.

\(^6\) Section N.b.4
\(^7\) see the constitution of the National Whitley Council, reproduced as Appendix 1 to Section N: the functions of the Council are listed in paragraph 13
12. In practice, Whitley Council agreements were always honoured. PCS is not aware of any instance where the government overrode the premature retirement and pension arrangements that were embodied in Estacode on the basis that it was in the public interest.

13. Section J of Estacode dealt with retirement, redundancy and notice. The constitutional position of civil servants was that they were employed at will, and that the Crown had the right to change their terms and conditions of employment at any time and could dismiss them without notice\(^8\). The date of retirement was a discretionary decision for the head of Department only after the civil servant concerned had reached age 60 and age 60 was regarded as the minimum age of retirement and that Departments would have to make an “exceptionally strong” case before it could operate compulsory retirement ages between 60 and 65\(^9\).

Compulsory retirement before age 60 was only permissible after a formal procedure and after consideration of the individual case by a Retirement Board, and even then the civil servant had the right of appeal to the Civil Service Appeal Board\(^10\).

14. Section M dealt with superannuation. It recited the provision contained in section 79 of the Act that there was no entitlement as a matter of law to any allowance or gratuity (including an ordinary pension at retirement

\(^8\) See Section J.f.1
\(^9\) See section J.a.3
\(^10\) See Sections J.a.12 to 16
age. Section M then went on to describe in detail how ordinary pensions would be calculated and the circumstances in which they would be paid. In cases where the civil servant’s office was abolished the compensation allowance was, according to section 8 of the Act, an amount that the Treasury considered reasonable and just, but in practice the maximum amount was always awarded. Section M also said that the civil servant “may” receive the superannuation and additional allowance for which her or his service qualified her or him.

15. Although section 79 of the Act said that no-one had an absolute entitlement to any superannuation benefit (including early retirement benefits), in practice benefits were always calculated and paid in accordance with the provisions of Part 1 of the Act as explained and supplemented by Estacode. Any reduction required a formal process with a right of appeal. PCS is not aware of a single instance in which an allowance was not paid or was paid at a reduced rate on the basis that benefits were all discretionary. Departments had discretion whether or not to make a person redundant, but once they had taken that decision the compensation terms were always applied.

16. In 1968, a Joint Superannuation Committee was set up by the National Whitley Council to review the superannuation arrangements for the civil

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11 See Section M.a.2  
12 See section M.a.23  
13 See section M.a.29
service. The review followed from the report of the Committee on the
Civil Service (the Fulton Committee) which recommended wider changes
to the civil service. The Fulton Committee recommended that
superannuation arrangements should not be set out in primary
legislation. Both sides of the Whitley Council wholeheartedly agreed.

17. The Joint Superannuation Committee produced a report in February
1972. It agreed that benefits should no longer be a matter of discretion.
The government said that it had never abused the discretion that it
theoretically had and the Staff Side agreed-benefits had always been
awarded as a matter of course. The Committee felt that it was wrong in
principle that benefits should appear to be discretionary. They should be
mandatory.

18. The Joint Committee recognised that there were some instances where it
would be in the interests of the civil servant that the benefits would be,
theoretically if not in practice, discretionary. The benefits singled out,
where it would be in the interest of the civil servant for the benefit to be
discretionary were death benefits, some gratuities, injury benefits and
premature retirement benefits. The reason why it was better for the civil
servant for these benefits to remain discretionary was “tax reasons”,
although these reasons were not spelled out.
19. The Bill that was to become the Superannuation Act 1972 was already before Parliament when the report was produced, and the Bill provided a facility to make a new superannuation scheme that in some parts would be mandatory and other parts would be discretionary. That was because the Bill was drafted with the conclusions of the Committee in mind.

20. The Joint Committee also recognised that moving from an arrangement where benefits were the subject of Parliamentary decision to an arrangements where benefits were to be set out in a scheme made by a minister was potentially to the disadvantage of civil servants. That had already been discussed by the trade unions and the government and as the report records\(^\text{14}\) the government had agreed to four important safeguards. First, any amendment to the scheme would require genuine consultation with “staff interests” meaning the National Whitley Council. Secondly, “staff representatives” would have to agree to any worsening to pensions in payment or pension rights already accrued. Thirdly, the Bill allowed the scheme to give a legal entitlement to benefits. Finally, any scheme would have to be laid before Parliament (even if Parliamentary approval was not required).

21. The second of these safeguards was enacted in Section 2(3) of the Superannuation Act 1972, as follows:

\(^{14}\) See Paragraph 12
“(3) No scheme under the said section 1 shall make any provision which would have the effect of reducing the amount of any pension, allowance or gratuity, in so far as that amount is calculated by reference to service rendered before the coming into operation of the scheme, unless the persons consulted in accordance with section 1(3) of the Act have agreed to the inclusion of that provision”.

22. The benefits payable in the event of premature retirement, on redundancy or efficiency grounds, had already been separately agreed by the National Whitley Council by the time the report was published. The agreed terms were the terms that were later embodied in the Principal Civil Service Pension Scheme (the “PCSPS”). The agreement was that these new terms would be introduced in the new scheme envisaged by the Superannuation Bill. Where the new agreed terms were better than the former abolition of office or efficiency terms they were already being paid in accordance with the Whitley Council agreement.

23. After the Superannuation Act 1972 received Royal Assent, the scheme itself had to be written. Drafting it was a joint venture. Both sides of the National Whitley Council went to the Russell Hotel for two or three days of negotiation and drafting. The real author was a civil servant working in the Civil Service Department called Brian Hudson but both sides agreed its terms.

24. The agreement on premature retirement was contained in Section 10 of what became the PCSPS. It was carefully drafted to distinguish between the ordinary superannuation benefits and lump sums that had become legal entitlements as in any other case, and the enhancements and early
payment terms that were to remain discretionary for tax reasons. There was a general understanding that the new Act permitted the scheme to be drafted on the basis that benefits might be mandatory or discretionary, but that in principle all benefits would become entitlements where it was to the advantage of the civil servant concerned.

25. Section 8 spelled out more clearly which benefits would remain theoretically discretionary. The list of the benefits concerned was taken from the report of the Joint Committee. The introductory wording was largely taken from section 79 of the Superannuation Act 1965. That meant that the benefits would theoretically remain discretionary in order to preserve the tax advantages that would flow from that, as recommended by the Joint Committee, but both sides knew full well that they would be paid inevitably and in every case.

26. When the PCSPS was created in 1972, it was supplemented by the Civil Service Pay and Conditions of Service Code ("CSPCSC") and Estacode was scrapped. It was made by Order in Council. The introduction explains that it is a collection of the legislation that was binding on the Crown or which ministers had undertaken to abide by even though strictly it was not binding, and agreements reached with the Trade Union Side of the National Whitley Council. But it went on to say that in constitutional
theory civil servants hold a personal appointment and are employed at will.  

27. The CSPCSC included an explanatory guide to the PCSPS. The ordinary age retirement benefits were stated in terms of entitlements and not discretions. Other benefits, including compensation payments for compulsory early retirement were payable at the discretion of the Treasury but the premature retirement benefits set out in the PCSPS “should” be paid. The early retirement provisions were outlined in great detail. Although the benefits are generally described in terms of what a civil servant “may” be paid, paragraph 8770 said that if a civil servant was required to retire on compulsory grounds the benefits described in the subsequent paragraphs “will” be paid. Paragraph 8777 said that if the civil servant was over age 50 and had 5 years’ service, annual compensation payments “will” be paid and paragraph 8778 said that a lump sum compensation payment “will” be paid. Paragraph 8781 described the lump sum that will be paid if he or she was under age 50 and had more than 5 years’ service. Paragraph 8787 said that if a civil servant was retired early on flexible early retirement terms the benefits described in the paragraphs that follow “will” be paid. Paragraph 8800 said that the benefits described in the following paragraphs “will” be paid if a civil servant

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15 See Paragraphs 11 to 15
16 which was printed as an annexe to paragraph 8554, although it had its own statutory basis in the Superannuation Act 1972
17 as explained in paragraphs 8551 to 9432
18 see paragraph 8554.
19 see paragraph 8564
20 See paragraph 8561
21 in paragraphs 8761 to 8819
servant is retired early on approved terms and paragraph 8802 said the same about benefits that “will” be paid if a civil servant left on the grounds of inefficiency. The preserved arrangements for civil servants who were already in post when the 1987 changes were made are also described\(^\text{22}\): again the benefits described in the paragraphs that follow “will” be paid\(^\text{23}\).

28. From 1972 onwards, there were fairly regular minor amendments made. The need for amendment might arise because a specific case revealed a drafting error, or because there was a change in Government policy or the general law. Typically the issue would be discussed in a meeting or in correspondence; the Official Side would then draft an amendment that would be circulated to the pension officers of the trade unions and the terms of the revision would be agreed in correspondence.

29. In 1984 the Cabinet Office, which had by then taken over the responsibility for the PCSPS from the Treasury, approached the CCSU with a view to making changes to Section 10 of the PCSPS. There were no concrete proposals, but the Cabinet Office’s broad wish was to introduce new categories of early retirement. In addition to the three main categories of redundancy, limited efficiency and inefficiency, they wanted to introduce two new categories of voluntary early retirement (which would be instigated by the department) and voluntary early severance (which would be at the request of the civil servant). The terms on offer

\(^\text{22}\) See paragraph 8816
\(^\text{23}\) See paragraphs 8816 to 8819
would be less than the existing terms for early severance, but the aim was to remove the stigma of early retirement on limited efficiency grounds. There was never any suggestion by the Cabinet Office that CCSU consent was not required on the basis that the premature retirement terms were discretionary and could be revised by ministers at any time.

30. Prior to the amended scheme laid before Parliament in February 2010, which was the subject of PCS 1 and PCS 2, PCS cannot recall any instance, significant or trivial, where the Treasury, or later the Cabinet Office, tried to force through an amendment to the scheme over the protests of the CCSU.

31. In 1987, the then Trade Union Side Secretary of the Joint Superannuation Committee, Jean Thomson (now Jean Johnson) and the trade union side wanted to introduce changes to the scheme which would have the effect of removing the distinction between mobile and non-mobile grades. These proposed changes were not supported by the employers’ side. At the same time, the employers’ side wanted to introduce in more detail the changes which they had earlier floated. Eventually, an agreement was reached to introduce the changes proposed by both sides. But there was no question of the employers’ side attempting to introduce its proposed changes in the absence of agreement with the trade unions side.
32. The changes that were made in 1987 are relevant because the agreement made shows how the position of staff already in post was preserved.

33. Moreover, the group with rights that were protected in 1987, known as staff with “pre-87 reserved rights” still exist but their numbers are diminishing rapidly. If the Government’s current proposals are put into effect these pre-87 reserved rights will be lost even though the government agreed to protect them in 1987.

34. The changes that were made in 1987 were made by agreement between the Cabinet Office and the CCSU and put into effect as a scheme made under section 1 of the Superannuation Act 1972. The purpose of the change was two-fold:

(i) First, under the previous arrangements a distinction was made between the benefits paid to more senior civil servants and others. The more senior civil servants are called mobile because their contracts of employment contained a mobility clause, but in fact the distinction reflected the grading structure: with very few exceptions, mobile civil servants are those employed as Executive Officers or in more senior grades. Non-mobile civil servants are those employed in manual or junior clerical grades. If mobile civil servants left on redundancy or similar grounds at or over the age of 40, they were entitled to a package that involved payment of an early and enhanced pension. This is described more fully below.
Mobile civil servants under the age of 40 and non-mobile civil servants were entitled to a lump sum payment. The first purpose of the 1987 changes was to give the same terms to mobiles and non-mobiles.

(ii) Secondly, the triggers for payment were outdated. Mobile civil servants could be paid lump sum severance or early retirement terms if they were retired in the public interest, meaning that they were required to retire on the grounds of redundancy, on the grounds that the structure of the department made their retirement desirable (in order to remove a promotion blockage for instance) or because the department would run more efficiently if they retired. Non-mobiles were entitled to a severance lump sum if they were dismissed for redundancy or for efficiency reasons. There was no concept of voluntary redundancy or voluntary early retirement as there was in the private sector, and voluntary redundancy exercises were in fact the way in which jobs were shed. The reforms were intended to reflect the reality, and so the triggering events leading to entitlement were re-classified as “compulsory”, “flexible” and “approved” early retirement if aged 50 or over, or “compulsory” and “flexible” early severance if under that age.

35. Redefining the triggering events led to no loss of benefits for anyone but unifying the benefits on early retirement would have led to worse terms
for some civil servants if the old terms had not been protected. The potential losers were mobile civil servants who were required to retire in the public interest. Under the old terms, if they were over age 40 they were paid, from the point of departure, annual compensation payments equal to their accrued pension, with an enhancement equal to an additional period of deemed pensionable service of up to 6 2/3rds years, and their pension lump sum, with this enhancement, was paid immediately. In effect, they were paid their pension entitlements, with enhancement, provided they were at least aged 40. Under the new terms, they would only receive these benefits if they were aged 50 or more. (Either way they were also paid a lump sum of six months’ pay).

36. The reserved rights that were agreed depended on the question whether the person concerned was already at or over age 40 on 1 April 1987. If they were already aged 40, they continued to have the same terms as previously. The additional value of their pension accrued by service between April 1987 and the point of redundancy was included in the calculation of their annual compensation payments and the lump sum that was paid early. If they were under age 40, the benefits they were paid were of the same value but they were not paid annual compensation payments and their pension started from age 50. The difference between what they would have had under the old terms if made redundant at or over age 40 and what they would get under the new terms were
calculated as an actuarially equivalent capital sum and paid at the point of redundancy (with a reduction to account for accelerated receipt).

37. In short, although the triggering events might have changed, in financial terms no-one who was in post on 1 April 1987 was worse off financially if they were made redundant (whatever their age on 1 April 1987).

38. These pre-87 reserved rights continue to be payable under the CSCS. They are now set out in appendices 1 and 2 to the CSCS. There are now no civil servants who were over age 40 in April 1987. There are approximately 5,000 civil servants with pre-87 reserved rights who were under age 40 on 1 April 1987. They will all have left employment by 2016.

39. In 1990, the Superannuation Act 1972 was amended to take account of pension rights under money purchase schemes which were to become available. Section 2(3) was amended to read:

“(3) No scheme under the said section 1 shall make any provision which would have the effect of reducing the amount of any pension, allowance or gratuity, in so far as that amount is directly or indirectly referable to rights which have accrued (whether by virtue of service rendered, contributions paid or any other thing done) before the coming into operation of the scheme, unless the persons consulted in accordance with section 1(3) of this Act have agreed to the inclusion of that provision”.

40. Further changes were made in 1994 because placing the early retirement and severance terms in the PCSPS caused problems for reasons related to Inland Revenue approval of the scheme, and the increasing volume of privatisations.
41. The Head of Civil Service Pensions, Derek Pain, wrote to John Ellis, the Secretary of the CCSU on 15 September 1994 to propose a formal separation of the early retirement and severance provisions contained in section 10 of the PCSPS. He said that the Treasury was interested in exploring scope for greater flexibility but said that the reasons for creating a new scheme were the Inland Revenue and privatisation issues referred to above. He was at pains to stress that there would be no detriment in the financial terms although some re-packaging might be agreed; that any new Scheme would be made under section 1 of the Superannuation Act 1972 and that meant that the CCSU would have to be consulted on its implementation and that the CCSU would have to agree to any future changes that would have the effect of reducing the amount of any accrued entitlement or payment; and if departments were to have the flexibility to offer different terms which worsened accrued rights then they would have to make separate schemes under the Superannuation Act 1972 with the consent of the CCS.

42. If it had been suggested by the employers in 1994 that the payments concerned would not be subject to the protection of Section 2(3) of the Superannuation Act 1972, the reaction would certainly have been one of consternation on the trade union side. Such a suggestion would have completely undermined the trade union side’s understanding of the statutory scheme of protection afforded by the CSCS and the PCSPS. Had such a suggestion been made, the trade union side would certainly have
responded with a major campaign amongst members of individual trade unions, and urgent meetings would have been sought with the Prime Minister. Because of the long-running process of reaching agreement on changes to the scheme, such a suggestion would have come as a complete surprise.

43. The same point was made in a letter from the Financial Secretary to the Treasury, Sir George Young. His letter was reproduced in a Whitley Council Bulletin published by the CCSU in November 1994. The minister repeats the point that removing the benefits to a separate CSCS would not result in any detriment. He says that the new scheme would be made under the Superannuation Act 1972, like the PCSPS, and would have the same statutory force.

44. John Ellis was concerned that behind the proposals was a wider attack on the PCSPS. That concern was not universal on the trade union side and many saw the logic in separating the ordinary pension benefits from the early retirement and severance terms. An assurance was that the new Scheme would be made under the Superannuation Act 1972 and appreciated that the significance of this was that the Scheme could not be amended later, to the detriment of members’ accrued rights, without CCSU consent.

45. When the rules of the proposed new scheme were published, they contained rule 2(i), which later became Rule 1.4 of the CSCS, and which expressed the early retirement and severance entitlements as
discretionary. There had always been a debate about whether the early retirement and severance entitlements under the PCSPS should be expressed in mandatory or discretionary language and the CCSU and constituent unions had always been told that whatever the terminology used, they were in truth mandatory. The actual language used was to the effect that the scheme provided for the benefits to be paid, and that they would always be paid in accordance with the rules of the scheme. Over the years, the CCSU and constituent unions have been reassured by the Senior Civil Servants responsible for the PCSPS and the CSCS, Derek Pain, John Barker and Don Raison, that the apparent discretionary nature should not be a matter of concern to the trade unions or their members. Over the years, the composition of the employer’s side remained relatively constant. However, numerous individuals joined and left the trade union side and so the assurances were repeated over and over again in person. PCS representatives received this assurance on numerous occasions in negotiating and representative meetings, as well as other formal and informal meetings, with the employers’ side. Those reassurances were given both in relation to rule 1.4 (or equivalent provisions) and those parts of the Scheme where reference was made to benefits or payments which “may” be made. PCS was never given any indication at all, until the proposals which led to the new scheme being laid in February 2010 were discussed, that the employers regarded the benefits as anything other than mandatory. Draft rule 2(i) seemed to be nothing more than the usual nicety that had discussed before.
46. In the period following 1987, there have been numerous amendments to the PCPS and the CSCS—often as many as six per year—many of which have involved detrimental changes to benefits. Up until the scheme was parliament in February 2010, those amendments have always been introduced following agreement between the employers’ and trade union sides.

47. One example of a change to the CSCS occurred in 1997. Prior to then, all prior pensionable service counted for the purpose of calculating benefits under the CSCS, including pensionable service in respect of a pension entitlement with a previous non-civil service employer which was transferred into the PCPS. If, for example, a civil servant had a previous entitlement to a pension from employment with a private sector company and elected to transfer that pension entitlement into the PCPS, then, for the purpose of benefits under the CSCS, the full extent of pensionable service with that private sector employer would be counted towards the calculation of benefits under the CSCS. The employers wanted to change this so that only pensionable service in the PCPS would count towards the calculation of benefits under the CSCS.

48. The trade union side took a pragmatic view, recognising that the previous arrangements for counting previous non-PCPS service were generous. It therefore decided to agree to the changes, which had a detrimental affect on the amounts payable to civil servants. But if the employers’ side had been of the view that the agreement of the trade unions was not
required, there would have been no need for it to seek agreement in the first place.

3. The current operation of the PCSPS and CSCS in practice

49. On appointment, civil servants are given a series of leaflets that describe their pension entitlements. These leaflets are also available on the Civil Service Pensions Website. There are now five civil service pension schemes, called “Classic”, “Classic Plus”, “Premium”, “Partnership” and “Nuvos”. The first three of these are defined benefit, final salary pension schemes and are now closed to new entrants. Nuvos is a defined benefit pension scheme but benefits are based on career average earnings. Partnership is a defined contribution scheme.

50. The CSCS leaflets are not automatically supplied to employees but they are referred to in the main scheme leaflets, and they are available on the Civil Service Pensions website. There is no leaflet describing the benefits payable under the CSCS to members of Nuvos: the main Nuvos leaflet says that the member’s employer will pay benefits under the CSCS that are the same as the benefits payable if the member had chosen to retire (but Nuvos members have the option to transfer to the Partnership scheme and if they do so they are eligible for Partnership redundancy benefits).

51. The CSCS leaflets describe the compulsory, flexible and approved early retirement and severance benefits. They explain that flexible and
approved early retirement can be offered if the employer decides to offer the option to go and an individual’s application is accepted. They also explain that compulsory terms may be offered by the employer if it calls for volunteers. There is nothing in the CSCS leaflets to indicate that CSCS benefits are discretionary: they describe the benefits that Civil Service Pensions will pay without suggesting that they are anything other than entitlements. Although the employer has the right to offer or withhold approval if an application is made to volunteer, once the application is accepted the leaflets outline what will be paid – there is nothing to suggest that the employer may offer anything less than the standard flexible or approved packages (or compulsory terms if they have been offered), or that Civil Service Pensions may decide to pay something less. In cases where redundancies are required and there are insufficient volunteers, the employer has the right to decide whether or not to make compulsory redundancies (after proper consultation and after looking for ways to avoid compulsory redundancies) but having done so, there is nothing in the leaflets to suggest that anything less than the standard compulsory terms will apply or that Civil Service Pensions may decide to pay something less.

52. All of the leaflets say in the introduction that they do not cover every aspect of the scheme in question, and explains that if there is a conflict between the description in the leaflet and the rules of the scheme, the latter will prevail. But a civil servant who reads these leaflets is not told
anything to suggest that the benefits described can be changed at will. To the contrary, the benefits are described in such detail that the impression is given that the terms have been carefully formulated and that as they have changed over the years, the entitlements for civil servants who were employed before the change was made remain entitled to the former terms.

53. The benefits payable under the CSCS are an intrinsic component of the overall pay settlement for civil servants. That settlement is to the effect that, whilst the pay of civil servants may not be particularly high, that is compensated for by the provision of a decent pension and a reasonably secure job. Job security is underpinned by the fact of entitlement to benefits under the CSCS. That underpinning may be traced back to the concept of a civil servant as an office holder, who should be entitled to compensation in the event of loss of office.

54. It is correct to record that, in PCS 1, Ms Wood, giving evidence on behalf of the Minister, recounted her own perception of the existence of the CSCS and its lack of impact on her desire to stay in the civil service. But PCS is strongly of the view that there is a widespread awareness of CSCS benefits amongst staff, especially since the widespread departures of the 1980’s. Where PCS held staff meetings in relation to the last government’s proposals for reform, there was no need to explain to members what the CSCS was. There is also, PCS believes, a widespread
awareness that the terms of the CSCS can not be changed without the agreement of the trade unions.

55. It is certainly the case that the CSCS encourages individuals to become civil servants (as a part of the pay settlement described). It also encourages individuals to stay in the civil service. That incentive has applied at times when leaving to seek other employment is likely to have been easier than it is now. Indeed, some Non-Departmental Public Bodies in the civil service see the CSCS as part of its recruitment and retention package as a means of encouraging individuals to apply for employment.

4. The February 2010 Scheme, PCS 1 and PCS 2

56. Against the above background, the then Minister laid before Parliament on 5 February 2010 a new CSCS which had not been agreed to by PCS. PCS sought judicial review of the Minister’s decision to lay the scheme before Parliament on the basis that the amendments deprived its members of accrued rights in respect of redundancy and other payments, and that, by virtue of Section 2(3) of the Superannuation Act 1972, as amended, its consent was require before such changes could validly be brought into effect.

57. In PCS 1, Sales J concluded that severance payments under the CSCS, though not amounting to “legal entitlements”, amounted to “administrative entitlements” and attracted the protection of Section
2(3). He rejected arguments on behalf of the Minister to the effect that there could be no accrued rights in relation to future redundancy payments (as opposed to pension), and he held that Section 2(3) protected payments which fell to be made in accordance with the terms of the CSCS, regardless of whether there was a strict legal entitlement to such payments. He said this:

“"The conclusion I have reached that section 2(3) of the 1972 Act as originally drafted covered payments due as a matter of administrative practice rather than legal entitlement, payable in circumstances of loss of office or employment, where such payments were calculated by reference to service rendered before the coming into operation of the scheme” gives rise to what might be regarded from a certain perspective as an odd position. Why should the strong protection in section 2(3) apply in relation to benefits to which there is no legal entitlement? I consider that the oddity disappears when it is recalled that, by long tradition, the discretion not to pay such benefits by virtue of section 79 of the 1965 Act was formally reserved but not appear to have been operated in practice. As a matter of practice, both staff and management sides in 1972 took the benefits set out in the 1965 Act and Estacode to be entitlements in all but legal theory. In light of that it made considerable sense from the point of view of civil servants and their unions that the 1972 Act should include the protection set out in section 2(3) as a protection covering not just ordinary pension and lump sum payments upon retirement in the ordinary course, but also pension and lump sum payments (if calculated by reference to length of service) payable as compensation for earlier loss of office or employment as contemplated by Section 2(2) of the 1972 Act. In both cases a civil servant was to be regarded as having built up by reference to length of service an expectation closely analogous to a right to enhanced protection ........whether in the from of expectation of an increased pension entitlement if retiring at the ordinary retirement age, or enhanced protection if made redundant or compulsorily retired before then."”

24 See Paragraph 43
58. Sales J subsequently made an order quashing the new CSCS and, in PCS 2, he held that the protection of Section 2(3) extended to payments made upon voluntary termination, and to payments for which individuals were only eligible after serving for a certain period, even if the formula for calculating such payments was not based upon the number of years served.

5. **The Provisions of the Bill as an interference with “Possessions” for the purpose of Article 1 of the First Protocol**

59. PCS notes the statement of Lord Wallace of Saltaire, pursuant to section 19(1)(a) of the Human Rights Act 1998, that in his view the Bill is compatible with the Convention rights. The government considers that the amendments of section 2(3) of the Superannuation Act 1972 and the limits in clause 2 are not an interference with the right to possessions protected by Article 1 of the First Protocol.

60. PCS has seen the Chair of the Joint Committee’s letter of 13 October to the Minster, in which the suggestion is made that the Bill may involve an interference with possessions for the purpose of Article 1 of the First Protocol, and the Minster is invited to set out the government’s arguments by way of justification.

61. Contrary to the ministerial statement currently contained in the Bill, and the explanatory notes, PCS considers that the provisions in the Bill limiting the benefits payable under the CSCS, and removing the
protection of Section 2(3) of the Superannuation Act 1972, do involve an interference with possessions.

62. The relevant principles were summarised by the European Court of Human Rights (Grand Chamber) in its judgment in Kopecky v Slovakia\(^\text{25}\). In short, “possessions” may take the form either of existing possessions or of assets in respect of which the applicant can argue that he or she has at least a legitimate expectation of obtaining effective enjoyment of a property right.

63. Also relevant is what the Court said in its judgment in Broniowski v Poland\(^\text{26}\), another Grand Chamber decision, emphasising that the concept of “possessions” for the purpose of Article 1 of the First Protocol is not limited to material goods, but is an autonomous concept independent of any domestic law classification. The question in each case is whether the circumstances, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of the First Protocol.

64. It is true that no civil servant who has not been selected for redundancy has any immediate entitlement to a redundancy payment. Using the terminology of Kopecky, there is no existing possession. It is also true that any future entitlement to a redundancy payment is, by definition, contingent upon the civil servant being made redundant. But the mere fact that an entitlement to payment or other property will arise only in

\(^{25}\)[2005] 41 EHRR 43, at paragraph 35
\(^{26}\)[2005] 40 EHRR 21, at paragraph 129
the future, and if certain events occur, does not prevent a right to be paid or receive property if and when those events occur from amounting to a “possession” within the meaning of Article 1 of the First Protocol. This is well illustrated by Broniowski, where the right to credit certain sums against the cost of sales of state-owned property was held to be a “possession” notwithstanding that it did not exist until realisation through a successful bid at auction. It made no difference that the right “was created in a kind of inchoate form”.

65. PCS contends that the circumstances surrounding the Bill give rise to a legitimate expectation, for the purposed of Article 1 of the First Protocol, that entitlements under the CSCS which are protected by Section 2(3) of the Superannuation Act 1972 will be honoured when the relevant service has been performed. It relies on three features of those circumstances which lead to the conclusion that such entitlements are indeed the “possessions” of an individual civil servant who has been employed for the necessary period:

(i) the very fact that such entitlements are protected by Section 2(3) gives rise to a legitimate expectation that they will be honoured. There is, in effect, a statutory assurance that benefits, once earned, will not be taken away without agreement;
(ii) it has frequently been recognised that an entitlement to a future pension under such a scheme may amount to a “possession”, even if non-contributory, where it represents part of the employer’s promise in return for which the employee has given service\(^{27}\).

Benefits under the CSCS are not all by way of pension. However, there is no good reason why the same principle should not apply to non-pension benefits. The government as employer has bought the service of civil servants by promising, amongst other things, that if they serve for a certain period, they will receive certain benefits in the event of future redundancy, subject only to any changes which their representatives may agree. Like the pension discussed in Purja v Ministry of Defence\(^{28}\), this is part of the overall payment package upon which civil servants are engaged; and

(iii) the judgment in PCS1 makes it clear that, even if there is no strict legal entitlement to payments under the CSCS, they are “in substance a matter of administrative entitlement” which can be “relied on with full certainty”\(^{29}\). PCS says that this feature alone is sufficient to establish the necessary legitimate expectation.

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\(^{27}\) See for example T v Sweden (application no 10671/83, 4 March 1985), Stigson v Sweden (application no 12264/86, 13 July 1988) and Azinas v Cyprus (application no 56679/00, 20 June 2002)\(^{28}\) 2004] 1 WLR 289

\(^{29}\) See paragraphs 43 and 51
66. As to the specific protection of Section 2(3) of the Superannuation Act 1972, whether there was actually a breach of Article 1 of the First Protocol in relation to any individual would be likely to depend on what amending scheme is ultimately laid before Parliament, which is not a matter before the Joint Committee. However, PCS is very concerned that a Bill which originally commenced its passage through Parliament as a measure to impose limits on compensation benefits under the CSCS, and which was originally intended to take the form of a Money Bill, has now been amended so as to remove the protection of Section 2(3) where notice is given, or agreement reached, after the Bill is enacted, a subject which will be returned to below.

6. Justification for any interference with “Possessions” for the purpose of Article 1 of the First Protocol

67. Prior to the Minister’s letter of 25 October 2010 to the Chair of the Joint Committee (in response to his letter of 13 October), PCS is not aware that the Minister has advanced any grounds for justifying such interference with possessions as may arise out of the Bill for the purpose of Article 1 of the First Protocol.

68. The Minister’s grounds of justification may be summarised as follows:

(i) there is a “very pressing need for reform of the CSCS”, which is unaffordable and “significantly out of kilter with other parts of the public sector, and also the private sector”;
(ii) the Superannuation Bill is “an essential reform”, which “strikes a fair balance between public and private interests”;

(iii) the current proposals for a revised CSCS are reasonable;

(iv) the removal of the Section 2(3) protection is necessary because “we can not continue with the status quo, namely a trade union veto on any reforms of the current CSCS terms”;

(v) the limits in clause 2 “are necessary until a new scheme is implemented, otherwise we would return to the unacceptable position we are currently in”;

(vi) the limits of 12 and 15 months reflect the desire that the best terms should be available to those who volunteer to depart, but these “figures are not the last word on the issue”. They are “comparable to good practice in the private sector and a sound basis for discussion”; and

(vii) there are appropriate transitional arrangements and safeguards.

69. At the outset, PCS notes that the Minister’s grounds of justification are couched in the most general and unquantified terms. In particular:

(i) there is no calculation or quantification of the savings which are required to be made, nor of the savings which are expected to be achieved;
(ii) there is no mention of the specific entitlements under other public, and private, sector arrangements with which the Minister says that the terms of the CSCS are “significantly out of kilter”. There is no evidence of any actual comparison having been made at all;

(iii) there is nothing to suggest that any consideration of alternative approaches which might achieve savings without the same impact on entitlements already earned through pre-existing service, and protection afforded by Section 2(3) of the Superannuation Act 1972; and

(iv) no account is taken of the fact that the terms of the CSCS have been part of the package that have over the years been used as an incentive to recruit and retain individuals in civil service employment.

70. PCS’ more detailed observations in relation to justification are set out below

(i) The circumstances of the Bill, and the issue of Past Service

71. It is essential to have in mind that the issue here is not whether the limits would be justified in a scheme that was being introduced for the first time, or was being introduced only with effect in relation to future service. The issue is whether the limits are justified in the circumstances of the past history of the CSCS, which PCS has set out in extensive detail
above, and where the limits are to apply even in relation to service already undertaken.

72. For several decades, generations of civil servants have given their service on the understanding, and with the legitimate expectation as a matter of administrative practice, that the terms of the CSCS would be honoured should they come to depart on redundancy. That legitimate expectation relates not only to compensation benefits in respect of future service, but also to accrued rights in respect of service already undertaken. In PCS 1, Sales J held that such accrued rights, even though they arose out of administrative practice, under the CSCS were protected by virtue of Section 2(3). He explained in detail why this was not an “odd” thing.

73. Yet the provisions of this Bill would defeat those entitlements not only for future service, but also for service already undertaken.

(ii) Very considerable financial loss

74. In his letter, the Minster acknowledges that there will be large reductions for some individuals (in the region of 60% to 70% of their current entitlements). He adds, however, that the impact on the majority of staff will not be as significant, and that individuals will, in any event remain entitled to 12 months’ salary.

75. PCS disputes this analysis. Figures for redundancies between April 2005 and April 2008 show that, for all types of severance payments under the
CSCS, in the great majority of cases, average redundancy costs exceeded one year’s pay.

76. PCS also notes that the Minister has advanced no evidence whatsoever that terms more generous than one year’s pay are unknown, or very unusual in the private sector.

77. PCS cites by way of example the circumstance of one of its members employed as an administrator in the Government Office network. He is aged 47 and has 29 years’ service, earning £24054.00 per year.

78. Under the current version of the CSCS, he would be entitled to a redundancy payment of £58,000, calculated as 29 months’ pay plus one months for every year after age 30, plus one month for each year after age 35.

79. If the Bill were to be enacted, this member’s compensation payment would be limited to one year’s pay-£24054-notwithstanding that he will have worked for 29 years with a legitimate expectation that any redundancy terms would be those provided by the CSCS before the imposition of the limits, and that no worsening of those terms could be imposed without the agreement of the union.

(iii) Whether these Limits are justified

80. The issue is also not whether limits on benefits at some level would be justified. The question is whether these limits are justified.
In his evidence to the Public Administration Committee on 27 July 2010, the Minister said that he would need “huge persuasion that we should move off the 12 month cap on compulsory redundancy”. This appears to be at odds with his comment in his letter of 25 October to the Chair of the Joint Committee that “[these figures] are not the last word on the issue.”

The limit set on voluntary redundancy payments in the Bill is 15 months. Yet, the limit in the current version of the proposals for an amended CSCS is 21 months.

Evidence compiled by PCS in relation to other redundancy terms in the public sector does not support the view that a 12 month limit in the event of compulsory redundancy is the norm. For example, in local government, the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 (SI 2006/2914) provide that employers can consider compensation payments to employees whose employment is terminated in the interest of the efficiency of the service of up to 104 weeks’ pay. Similar provisions apply in relation teachers.

The current terms applicable in the National Health Service, agreed in 2006, provide for a lump sum compensation payment of one month’s pay for each complete year of pensionable service, up to a maximum of 24 months. These terms are not discretionary.
85. The Minister has put forward no reasoned basis for selecting the actual limits contained in the Bill.

(iv) **Disproportionate effect on the lower paid**

86. In one sense, of course, the limits apply equally to all. However, there can be little doubt that a 12 month limit has a materially greater impact upon an individual who is at the lower end of the pay spectrum, whilst at the same time delivering less in savings to the employer. It is true that the current proposals for a revised CSCS include a lower paid threshold. However, the Minister has effectively acknowledged in debates and evidence on the Bill that the limits as they stand are unsatisfactory for this reason.

87. Two reasons have been given for the inclusion of the limits:

(i) one is that the kind of provisions required to introduce a satisfactory taper to protect the position of the lower paid employees are too complex for primary legislation; and

(ii) the other is that the Minister has said more or less openly that the Bill is intended as blunt instrument to force the unions into negotiations to agree a better scheme.

88. It does not seem to PCS to be impossible to have included some sort of taper in the Bill. Nonetheless, the answer give by the Minister invites the question-why impose a cap by primary legislation, rather than by
legislating if necessary to allow limits to be imposed by a scheme regardless of consent under Section 2(3), and then making a suitably sophisticated scheme?

89. As to the second reason, it does not seem to PCS that this is a legitimate basis for what would otherwise be a disproportionate encroachment upon individuals’ property rights.

90. For the record, PCS wishes to be absolutely clear that it does not accept that the transitional provisions in the current proposals for a revised CSCS provide sufficient protection. Many if its objections as to the crudity of the limiting provisions in the Bill apply equally to the current proposals for the revised CSCS.

(v) The February 2010 Scheme and the savings to be made

91. The scheme which the last government sought to impose in February 2010 was substantially less restrictive. The Minister has said previously (in his evidence to the Public Administration Committee) that, had the 2010 scheme not been struck down, the present government would have seen a strong case for keeping it rather than seeking to restrict payments further.

92. That is not consistent with the argument that there is now some imperative necessity for a one year limit in the event of compulsory redundancy.
93. There is no suggestion that the Minister has carried out some financial calculation to establish that only a scheme on the current terms is affordable. During his evidence to the Public Administration Committee, the Minister was asked by Mr Mulholland:

“….Could you give us some idea as to how much the proposals as they stand would save? The benchmark we have is that when the former Prime Minister, Gordon Brown, announced the reforms back in March 2009 he said that the reforms as proposed then would save £500 million over three years. Can you give the Committee a sense of how much you are telling us that this will save as it stands now?”

94. The Minister’s answer was:

“No, not really; it is really hard to do that……I can not possibly know at this stage and departments will be working out their plans for how they deliver the spending reductions which are needed to meet our deficit reduction commitments.”

95. That position has apparently not altered as at 25 October, when the Minister replied to the Chair of the Joint Committee’s letter.

(vi) Pre-1987 Reserved Rights

96. PCS has explained in detail the changes to the CSCS which were introduced in 1987 to standardise the terms for mobile and non-mobile workers and to redefine the trigger events for payments. Unifying the benefits on early retirement would have led to worse terms for some civil servants if the old terms had not been protected. The potential losers were mobile civil servants who were required to retire in the public interest. Under the old terms, in effect, they were paid their pension entitlements, with enhancement equal to an additional period of deemed
pensionable service of up to 6 2/3 years, provided they were at least 40. Under the new terms, they would only receive those benefits if they were aged 50 or more.

97. An agreement was reached to protect these so-called “reserved rights”. For those aged 40 or over as at 1 April 1987, they continued to have the same rights as previously. For those aged under 40, the benefits they were paid were of the same value, but they were not paid annual compensation payments and their pension started from age 50. The difference between what they would have had under the old terms if made redundant at or over age 40 and what they would get under the new terms were calculated as an actuarially equivalent capital sum and paid at the point of redundancy (with a deduction for accelerated receipt).

98. In short, the agreement was that no-one would be worse off. Given the lengths gone to in 1987 to protect this category of civil servant (and there continue to be approximately 5,000 civil servants with pre-1987 reserved rights who were aged under 40 on 1 April 1987, all of whom will have left employment by 2016), it seems doubly unjustifiable now to remove that protection so close to retirement date.

99. PCS says that there is no logical justification for continuing to have the limits on compensation set out in the Bill (assuming for now that the

(vii) The logic of retaining limits in the Bill whilst at the same time removing the protection of Section 2(3)
removal of the Section 2(3) protection is valid). As soon as the Section 2(3) protection is removed, the government is able, on its own analysis, to impose a scheme which is as sophisticated as it chooses. It already has proposals which, although PCS does not agree to them, are certainly less crude than the limits provisions in the Bill.

100. In his letter of 25 October, the Minister says that the limits provisions are necessary unless and until a new scheme is implemented “otherwise we would return to the unacceptable position we are currently in”. That does not stand up as a matter of logic. On the government’s own analysis, once the Section 2(3) protection is removed, the limits provisions are entirely superfluous.

101. This logical flaw leads PCS to reflect as to why the Minister still insists on the inclusions of the limits provisions. The only reason it can imagine is that, if the limits provisions were to be removed, the character and content of the Bill would then be so divorced from the long title and content of the original Bill as introduced into Parliament as to make it impossible, from a procedural Parliamentary perspective, to proceed with. If that is the case, PCS suggests that it is not a good reason for the continued inclusion of the limits provisions.
7. **Article 11 and the Freedom to Conduct Collective Bargaining**

102. One of the reason why PCS has set out the historical background of the CSCS is to demonstrate that it is in fact the product of collective bargaining.

103. The amendment to be moved in Grand Committee in the House of Lords by Lord Wallace of Saltaire, announced today (5 November 2010) includes an amendment to the title of the Bill, which, if carried forward, would read (with the amendment italicised) “A Bill to make provision for and in connection with limiting the value of the benefits which may be provided under so much of any scheme under section 1 of the Superannuation Act 1972 as provides by virtue of section 2(2) of that Act for benefits to be provided by way of compensation to or in respect of persons who suffer loss of office or employment; and to make provision *about the procedure for modifying such a scheme*”.

104. PCS says that that amendment, if carried forward, makes it even more clear that the purpose of the Bill, given the longstanding history and machinery of collective bargaining in relation to the CSCS, is to dismantle a system of collective bargaining.

105. The Superannuation Act 1965 was empowering legislation which set the limits as to what pensions could be paid to civil servants on retirement, including retirement before retirement age. The amounts of payments were determined through collective bargaining by the Whitley Councils,
with collective agreements reached then being recorded in the Estacode, and always being honoured.

106. In 1972, on the recommendation of the Joint Superannuation Committee, it was decided that the pension arrangements until then set out in the Superannuation Act 1965, and details of the payments to be made, would be set out in a scheme made by the Minister.

107. Recognising the potential disadvantage to civil servants of having pension arrangements and payments determined by Ministerial order, the government agreed to the safeguards described. For current purposes, the most important safeguard was the principle that became Section 2(3) of the Superannuation Act 1972- that staff interests would have to agree to any worsening to pensions in payment or pension rights already accrued.

108. After the Superannuation Act 1972 received royal assent, the scheme itself was drafted. That scheme was agreed between the two sides of the National Whitley Council, and became the PCSPS. Until 1994, the early retirement and severance terms for civil servants were contained in the PCSPS. In 1994, the early retirement and severance terms were removed from the PCSP and replaced with the CSCS. As Sales J confirmed in PCS 1, the protection of Section 2(3) of the Superannuation Act 1972-in effect the right to bargain collectively in relation to the worsening of pension and severance benefits-applied not only to pension benefits, but also to accrued benefits under the CSCS.
109. The effect of the Bill is to extinguish, in one measure, the right of the unions to collectively bargain in relation to the worsening of benefits under the CSCS, bringing to an end at once an intricate and cooperative tradition and practice going back several decades.

(i) The Demir and Baykara Case

110. Until 2008, the European Court of Human Rights treated the right to collective bargaining, and the right to strike, merely as examples of individual aspects of the freedom of association from which States could choose as to the means of achieving the objective of Article 11—that is ensuring that trade unions can be heard30 But that analysis was expressly and deliberately resiled from by the Grand Chamber in its decision in Demir and Baykara v Turkey31. As will be explained, the Court elevated the right to collective bargaining in status to “essential elements” of Article 11. It did this following a far-reaching analysis of a number of international instruments, making it compulsory for such instruments, and the jurisprudence of their respective supervisory bodies, to be taken into account in defining the scope of rights under the Convention.

111. In the Demir case, the Claimants were, respectively, a members and the President of a Turkish trade union of civil servants. The union entered into a collective agreement with a municipal council in relation to the

30 see for example Swedish Engine Drivers v Sweden [1976] 1 EHRR 617.

31 [2009] IRLR 766
working conditions of its employees. When the council failed to fulfil some of its obligations under the collective agreement, the union brought proceedings. Although the union’s claims was upheld by the district court, it was quashed by the Court of Cassation.

112. The Grand Chamber reviewed in detail the texts of international instruments, and the jurisprudence of their supervisory bodies, namely:

(i) Article 2 of Convention No.87 of the International Labour Organisation on Freedom of Association and Protection of the Rights to Organise and Collective Bargaining;

(ii) Articles 4 and 6 of Convention No.98 of the International Labour Organisation concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (and the ILO’s Committee of Experts’ interpretation that Article 6 excluded from the application of Convention No.98 only those officials directly employed in the administration of the State);

(iii) Articles 1 and 7 of Convention No.151 of the International Labour Organisation concerning the Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service;

(iv) Article 8 of the International Covenant on Civil and Political Rights;

(v) Articles 5 and 6 of the European Social Charter;
(vi) Articles 12(1) and 28 of the EU Charter; and

(vii) The practice in contracting States to recognise the right of public employees to bargain collectively

113. The Grand Chamber then expressly and deliberately resiled from its previous case law:

“In the light of these developments, the Court considers that its case law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 (Swedish Engine Drivers’ Union, cited above, paragraph 39, and Schmidt and Dahlstrom) should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. Whilst it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement”. 32

114. The Court made it compulsory to give prominence to the relevant international instruments, and the jurisprudence of their supervisory bodies:

“The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of contracting parties may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.” 33

115. Two other important principles emerge from the judgment of the Grand Chamber.

32 See paragraph 153
33 See paragraph 85
116. First, Turkey was not a party to Articles 5 and 6 of the European Social Charter. Its argument that the European Social Charter should not therefore be used as an interpretative aid in proceedings brought against it was rejected—the Court holding that it was not necessary for a respondent state to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned.

117. Secondly, the Court held that the analysis of whether an interference with the Article 11 right was justified for the purpose of Article 11(2) as “necessary in a democratic society” must entail a consideration of whether the national authorities had applied standards which were themselves in conformity with the core Article 11 right:

“In determining in such cases whether a “necessity”- and therefore a “pressing social need”-within the meaning of Article 11(2) exists, states have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decision applying it, including those given by the independent courts (see for example Sidoropoulos v Greece, 10 July 1998, (1998) 27 EHRR 633, paragraph 40). The Court must also look at the interference complained of in the light of the case as a whole and determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it were “relevant and sufficient”. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the appropriate provision of the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see for example Yazar v Turkey, nos. 22723/93,22724/93 and 22725/93 [2002] ECHR 22723/93, paragraph 52)”34

34 See paragraph 119
118. Because the State’s “limited margin of appreciation” goes “hand in hand with the rigorous European supervision…” , the standards set in international instruments which define the parameters of that supervision must be considered not only at the stage of defining the content of the core right, but also in determining whether any restriction is “necessary in a democratic society”.

(ii) Cases following Demir

119. The Demir case represents a departure for the European Court of Human Rights. That departure has been maintained consistently in the case which have followed. These are Enerji Yapı-Yol Sen v Turkey 35, Danilenkov v Russia 36, Urcan v Turkey 37, Saime Ozcan v Turkey 38, Karacaya v Turkey 39 and Kaya and Seyhan v Turkey 40.

120. The Demir case has only been considered once by the Court Appeal, in the industrial action case of Metrobus v Unite 41. Apparently reverting to the pre-Demir and Baykara stance of the ECtHR, Lloyd LJ had this to say about the relevance of the international instruments referred to it by the union:

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35 Application No.68959/01
36 Application No.67336/01, 30 July 2009
37 Application No. 23018/04, 17 July 2008
38 Application No.22943/04, 15 September 2009
39 Application No.6615/03, 27 March 2007
40 Application No.30946/04, 15 March 2009
41 [2009] IRLR 859
It seems to me that, interesting as this material is, it does not, for the purposes of this appeal, affect the substance of the points arising under the ECHR itself. To the extent that material from these and similar sources informed the decision of the Court in Demir and Baykara, it provides part of the context for that decision. I do not regard it as relevant in any more direct way to the present appeal. The ILO general survey confirms what one might expect, namely that member states have a widely differing variety of legislative provision on these points. The binding effect of Article 11 of the ECHR does not restrict the scope for a wide variety of different legislative approaches, other than in a rather general way, at the extremes. Such variety is to be expected and is permitted by the margin of appreciation permitted to member states as regards conformity with the Convention.\(^2\)

121. Noting that the relevant legislation had been introduced by the Labour government and that obligations in questions did not appear “unduly onerous”, the Court of Appeal held that the relevant provisions did not amount to an unjustified interference with the Article 11 rights.

122. The decision of the Court of Appeal may be called into question on a number of grounds. First, the margin of appreciation afforded to Members States is as to the choice of means to provide for unions to be heard, not as to the restrictions which may be imposed.

123. Secondly, when addressing the issue of justification, the Court of Appeal failed to consider whether the restrictions in question were compatible with the core content of the Article 11 right itself, as defined in international instruments.

\(^2\) Paragraph 50
124. Thirdly, although the Court of Appeal concluded that the restrictions were “not unduly onerous”, it failed to answer the question whether they were “necessary in a democratic society”, as required by Article 11.

(iii) The Application of Article 11 to the Bill

125. PCS has already set out the circumstances in which it and the other unions have been entitled and able to conduct collective bargaining in relation to the terms of the CSCS over several decades, with the entitlement to conduct collective bargaining effectively being protected in Section 2(3) of the Superannuation Act 1972.

126. As the Grand Chamber did in the Demir case, PCS refers to the full spectrum of international labour law instruments concerning the right to bargain collectively as establishing that it has a right to bargain collectively in relation to the terms of the CSCS, and that its members have a right to have those terms collectively bargained by their trade union on their behalf. In particular, PCS refers to Article 7 of ILO Convention No. 151 concerning the Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, which has been ratified by the United Kingdom and which provides:

“Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees’ organisations, or
of such other methods as will allow representatives of public employees to participate in the determination of those matters”.

127. PCS says that, before enactment of the Bill, measures appropriate to national conditions in the United kingdom have been in place for several decades to promote the full development and utilisation of machinery for negotiation of terms and conditions applicable to civil servants, including in relation to the CSCS. One of those measures is Section 2(3) of the Superannuation Act 1972 in its current form.

128. The effect of the Bill is to disapply Section 2(3), the relevant national measure, in relation to notices of dismissal, or agreements as to termination of employment, after the coming into force of the provisions contained in the Bill. It may be said that the unions retain their right under Section 1 of the Superannuation Act 1972 to be consulted with in relation to the terms of any revised CSCS and that that is an “other method” which “will allow representatives of public employees to participate in the determination of those matters”. On any analysis, PCS says that a right to consultation does not amount to a suitable method to allow trade unions to “participate” in the determination of the terms of the CSCS is matter for conjecture. But it is not to the point.

129. It is not the terms of the revised CSCS which are before the Joint Committee. It is the Bill. And the Bill provides for the removal of the protection of Section 2(3) of the Superannuation Act 1972 for future redundancies and the imposition of limits for compensation payments.
Notwithstanding the long respected right of collective bargaining in relation to the CSCS, the Bill makes no provision for PCS, or the other civil service trade unions, to participate in matters relevant to the CSCS. PCS, and the other civil service trade unions, have also not had an facility to participate in the consideration of matters contained in the Bill.

130. It may also be said that the effect of the amendment to be moved in Grand Committee in the House of Lords by Lord Wallace, if carried forward as it stands today, would be to strengthen the effect of the consultation obligations contained in Section 1(3) of the Superannuation Act 1972 by way of some form of compensatory measure.

131. But PCS reiterates that the Bill, even as amended as proposed, would make no provision for it, and other civil service trade unions, to be able to participate in the consideration of matters relevant to the CSCS. The proposed amendment would simply require a report to be laid before Parliament of the consultation that had taken place for the purpose of Section 1(3) of the Superannuation Act 1972. Even then, two important point remain outstanding.

132. The first is that the report need only contain “such information as the Minister considers appropriate”.

133. The second is that, according to the proposed amendment to Clause 3(2A) of the Bill, on PCS’ initial understanding, the effect would be that the obligation to lay a report on consultation before Parliament would
not come into force until the end of the period of two months beginning with the date on which the other provisions of the Bill came into force. Unless PCS’ initial understanding is mistaken, this means that, were would be a gap of two months after the other provisions of the Bill came into force and before the obligation to lay a report on consultation before Parliament came into force.

134. PCS also says that the interference with its right to collectively bargain is not capable of justification as being “necessary in a democratic society”. PCS relies upon the Grand Chamber decision in Demir. The interference should be looked at in the light of the long history of collective bargaining in the civil service, and consideration must be given to whether the reasons adduced by the national authorities are “relevant and sufficient”.

135. In particular, PCS says that the consideration must involve an analysis of whether the national authorities applied standards which conformed with the principles embodied in the appropriate provision of the Convention and an acceptable assessment of the facts.

136. PCS says that the principles embodied in Article 11 must respect those contained in ILO Convention No.151. The standard for determining whether the interference is justified includes analysis of whether the interference conforms with Convention No.151. For the reasons given, the provisions of the Bill do not. In any event, PCS says that, on the basis of the Minister’s letter of 25 October, the interference arising out of the
Bill cannot in any sense be said to be made on the basis of an acceptable assessment of the facts.

137. From PCS’ perspective, it is possible to analyse the compliance with Article 11 as a freestanding issue—and it notes that the Minister has apparently said nothing about it to date. Indeed, given the amendment to be moved by Lord Wallace of Saltaire to the title of the Bill, the engagement of Article 11 is given yet greater prominence. It is also possible to analyse compliance with the Article 11 right as another aspect of why there is a sufficient legitimate expectation to give rise to a possession for the purpose of Article 1 of the First Protocol, with the principles as to justification for the interference with the Article 11 right contributing to the assessment of whether the interference with peaceful enjoyment of possession for the purpose of Article 1 of the First Protocol is justified. PCS contends that the result is the same either way.

138. PCS very much hopes that this evidence is of assistance to the Joint Committee. It would be pleased to elaborate on any matters arising, and to attend to give oral evidence before the Joint Committee if that would be considered useful.

Thompsons Solicitors

5 November 2010