Civil Service Department

Legal Entitlements and Administrative Practices: a report by officials

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Part 1
INTRODUCTION

In July 1978 a group of officials was asked by the Head of the Civil Service to consider the implications for the Civil Service generally of the case which had been dealt with by the Parliamentary Commissioner for Administration in his Fourth Report for Session 1977-78 under the title "A War Pensions Injustice Remedied"*. The officials who made up the group are listed in Appendix 1.

2. In this case the forerunner departments of DHSS had withheld the small rank addition payable with war disablement pension to a certain group of ex- regular officers as a result of the way they interpreted the Royal Warrant which governs such payments. When advised by their lawyers in 1964 that this action was incorrect, officials concluded that it would suffice to revise pension awards only in those cases which came to light and that there was no need to search through the records to discover how many cases might be affected; (a search in 1978 discovered a total of 56). They further decided that in those cases of which they were already aware the increased pension should be paid only from I October 1964, the date when the Royal Warrant consolidating the existing war pensions instruments took effect (i.e. that full retrospective correction to the date of the original award should not be made); and that, so far as cases coming up in future were concerned, the increase should be paid from a current date only unless arrears were requested, in which case arrears should be paid only back to October 1964. The explanation to be given to the pensioners affected was that the consolidation of the Royal Warrant had shown they had title to the rank addition. This was clearly misleading. Following the publication of the report by the Parliamentary Commissioner for Administration, the matter was referred to the Director of Public Prosecutions to consider whether a charge of conspiracy to defraud should be brought against the officials concerned. No charge was made.

3. While the case had particular features which we believe are most unlikely to be repeated, it has given rise to concern that civil servants, in carrying out their duties in administering the legal entitlements of members of the public and in taking decisions which they believe to be justified on administrative and economic grounds, may run the risk of acting wrongly and unlawfully. The risk arises from the conflict of two principles. The first is that the primary responsibility of those handling work of this kind is to ensure that members of the public are justly and properly dealt with; in a report which is mainly about the position of civil servants, it is well to start by emphasising that. The second is that administration should be economical; in considering what lengths to go to in order to identify and pay in full those who have a legal entitlement, departments should also take fully into account the need to impose no more than a reasonable burden upon the general citizen who foots the bill. The risks of wrongful action that arise from this conflict are most acute where the circumstances are similar to those in the war pensions case but may also be present in other situations where, for one reason or another, payment of a legal entitlement is not made or is not made in full. We therefore considered:

* HCP 312, Session 1977-78

(i) the kind of administrative practices in which such risks might possibly arise (Part 2);

(ii) the aspects of the law that apply in this field of administration and how they affect the Ministers and civil servants engaged in it (Part 3);

(iii) the consequences of the law for the relevant administrative practices (Part 4);

(iv) the general implications of those consequences for the costs of administration (Part 5);

(v) what conclusions may be drawn (Part 6).

Our report does not seek to lay down rules of law; that is a matter for Parliament and the courts. Nor does it seek to guide departments on what constitutes legal entitlement in specific schemes and cases, or on the circumstances in which a change in the law or its interpretation should lead to the reviewing of previous decisions. Those are matters for departments to determine with legal advice. Our concern has been with the administrative practices which should be adopted once it has been determined in a given case that a legal entitlement exists.

Part 2

RELEVANT ADMINISTRATIVE PRACTICES

4. We decided that our principal concern was with the administrative practices adopted by departments in dealing with entitlements under statutes or statutory regulations which involved the payment of money to members of the public (whether individuals or corporate bodies) or the repayment of, or making of allowance against, tax or refunds of national insurance contributions. We recognise, however, that similar considerations will often apply to the administration of entitlements to benefit in kind and possibly to licences or permissions and that the conclusions in this report will, where appropriate, apply to them.

5. We excluded from the scope of our study administrative practices in the handling of payments, or claims for payments, where such payments are made under discretionary powers which do not provide for entitlement. Questions of law may arise in this field. For example, if discretion is exercised unreasonably or improperly, the courts may decide it is not a valid exercise of discretion and should be disregarded. In some cases, moreover, once a scheme of discretionary awards has been introduced and discretion has been exercised in someone's favour, the courts may subsequently take the view that entitlement, for example to continuous payments, has been established. Such circumstances cannot be provided for in a document intended for general guidance, and departments should therefore take legal advice on whether entitlements arise on any of the discretionary schemes which they administer.

6. We have also left on one side practices in pursuing payments which are legally due to the Government from members of the public. There are various circumstances in which departments, for one reason or another, do not seek payment in full or in part of money due to the public funds. But we have not pursued the issues involved here, since the question they raise is a different one from that of the individual's legal entitlement from the Government.

7. Within the area defined in paragraph 4 above we looked at a number of practices which seemed relevant to the study though none involved decisions which seemed to be questionable in the same way as in the war pensions case. We did not attempt to cover the ground exhaustively; that would have taken far too long. We instead drew mainly upon the experience of the departments represented on our group to illustrate the kinds of practice we considered relevant. That experience covers a sufficiently wide range of statutory schemes providing for payment (or circumstances in which there is a legal entitlement to a refund of money) to the public to make us reasonably confident that we can draw conclusions of general application.

8. The kind of practices relevant to our study can be categorised as follows:

Category A *de minimis* practices under which, for example, small sums of money are not paid to members of the public who are known to be entitled to them (just as conversely small overpayments are not reclaimed),
or
tolerance rules which result in the rounding of sums due or in the omission of inquiries to establish whether or not the payment made represents the last penny of the legal entitlement;

Category B practices relating to the handling of entitlements arising from, or affected by, a change in statutory provisions or a change in their interpretation. In general terms such circumstances can give rise to four different types of case:

(i) new cases of entitlement arising from the change;

(ii) cases currently under consideration which are or may , be affected by the change;

(iii) cases dealt with in the past, which the department can identify and which may require adjustment because of the change, either from a current date or retrospectively;

(iv) cases dealt with in the past which the department cannot identify (and where it may no longer be in contact with the persons concerned), and in which entitlement may now arise because of the change, either from a current date or retrospectively.

9. *De minimis* and tolerance practices in category A by definition involve proportionally small sums of money, the withholding of which does not involve more than a minor financial loss to the individuals concerned but leads to the saving of the disproportionate administrative costs which would otherwise be incurred.

10. Because circumstances vary very widely, there is no common policy either within departments or for the Service as a whole concerning *de minimis* or tolerance practices. Departments seek to make arrangements appropriate to each scheme for which they are responsible, taking account of the nature and value of the entitlement as a whole and the administrative costs involved.

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11. Questions affecting practices in category B arise in a wide variety of statutory schemes of varying complexity. An amendment of the law concerning a certain entitlement will generally take effect from a current or future date, for example a reduction in the qualifying age for pension or an increase in child benefit payment, and will not give rise to retrospection. Such a change will give rise to new cases of entitlement if it *extends* the qualification for entitlement; the department then has to consider what action it should take to identify and pay those concerned, who may (as in category B(i) be people with whom the department has not previously had dealings or (as in categories B(iii) and (iv)) people with whom it has had dealings in the past.

12. Departments are faced with a more difficult task when a change in the administration of a statutory scheme arises from a change in the interpretation of the law, as opposed to a deliberate amendment of it. Where this occurs, the department will have to consider, as it does in the circumstances described in paragraph 11 above, the extent of any new qualification for entitlement that the change may entail. But it will also have to consider whether the change must be given retrospective effect. In only a few areas is guidance to be found in express statutory provision. In the taxation field, there are various statutory limitations on the extent to which settled cases can be reopened. More generally, the Limitation Acts (see paragraph 21) may be relevant. It is not the purpose of this report to offer guidance on the question whether a change in interpretation of the law requires a previous decision to be reviewed; the variety of circumstances in which the question may arise precludes that. Our task has been to consider the steps that departments should be recommended to take once a firm view has been taken that the law does indeed require retrospection.

13. The circumstances vary. They may range from those where only a handful of people are affected and the department has relatively little difficulty in identifying and paying them, to those where thousands (or even millions) of people may be affected and very considerable administrative costs may be involved in doing so. There are also cases where the number of beneficiaries is likely to be very small but the cost of identifying them very large, perhaps amounting to many times the total of the sums due. The amounts of money or additional money due may be important or unimportant to the individuals entitled. It may or may not be practicable for the department to identify from its own records all those concerned. If claims are invited by advertisement or other means of publicity, members of the public may or may not have a sufficiently detailed understanding of the qualifications for entitlement to know whether they should make a claim.

14. Thus a common feature of many of the cases involving extension or retrospection is the difficult task facing the department in judging the length to which it should reasonably go to identify those entitled. We found a number of cases in which a department has concluded either that it was simply not possible to ensure that all those with an entitlement were identified and paid or that in the interests of reasonable economy it should take action which fell short of making absolutely certain of that result. The practices we have considered are those that follow the reaching of such a decision, and include searching the records with varying degrees of intensity, publicity, advertising and so on.

Part 3

THE GENERAL POSITION IN LAW

15. In the war pensions case, the question arose whether there had been a conspiracy to defraud. Accordingly, we considered first the nature of the law on conspiracy to defraud and then its relevance to the two types of administrative practice we have identified.

16. A note on the law on conspiracy to defraud prepared by the Treasury Solicitor's representative is reproduced at Appendix 3. On the basis of the advice in this note and supplementary advice given orally, we established the following basic points of interpretation:

(i) conspiracy -the crime of conspiracy to defraud takes place when two or more individuals agree to injure the rights of another. No further action is required. In practice, however, it is difficult to prove conspiracy, unless the agreement to do something dishonest is put into effect;

(ii) dishonesty -acting dishonestly is an essential ingredient in the crime. In legal terms the knowledge of doing something wrong in relation to another person (whether overtly or covertly) constitutes dishonesty. Where covert action is concerned, it may not be necessary actually to tell a lie or misrepresent the truth; a decision by someone who is aware of the true position to remain silent and in this way deprive an individual of his entitlement may constitute an implied lie or misrepresentation; and deliberate failure to correct a previous wrong interpretation of an individual's entitlement which he took on trust almost certainly amounts to an implied lie. It is important to note that such action -or failure to act -constitutes dishonesty even if the person concerned believes in good faith that some valid public purpose is being served by it;

(iii) to defraud -this is to deprive someone of something to which he is properly entitled; either directly or by implied lie or misrepresentation.

17. We noted that the position in Scotland is different in that to commit a criminal offence an individual need not be involved in a conspiracy. Under Common Law in Scotland, an individual acting alone can be charged with fraud. (A note about this, prepared by the Lord Advocate's Department, is reproduced at Appendix 4.) But the differences between English and Scottish law do not affect the broader considerations relating to the interaction between the law and the administrative practices we have studied, and our conclusions apply equally to Scotland and to the rest of the United Kingdom.

18. We also noted that the constitutional answerability of a Minister to Parliament for the actions of his civil service staff does not affect their position in law. In constitutional terms, the Minister is responsible for the actions of his departmental staff who act on his behalf and whose authority is delegated to them by him*. This however does not absolve the individual civil servant from

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* In a number of cases this general statement does not apply since the statutory functions involved are not vested in a Minister, but are vested directly in officials either as individuals or as a corporate body, e.g. a national insurance officer in DHSS; the Commissioners of Inland Revenue; Commissioners of Customs and Excise. Quite frequently in these situations provision is made for an appeal on the substance of the decision of the official concerned to a special tribunal.

his obligation to act within the law in carrying out his duties; if he breaks the law he cannot seek to excuse himself in terms of the constitutional responsibility of his Minister. There is an important distinction between answerability to Parliament and personal responsibility for criminal action which applies equally to Ministers and civil servants.

19. It is clear, therefore, that the individual civil servant (or Minister) who is involved in the kind of administrative practices and problems described in Part 2 is operating in an area in which he may, if he acts dishonestly, make himself vulnerable to a charge of conspiracy to defraud. If he is knowingly a party to a decision to conceal or misrepresent the legal entitlement of an individual he is open to such a charge. This means that if a civil servant is directed to do something which is dishonest and, knowing the circumstances which make it so, he proceeds to do it he becomes a party to the conspiracy. Conversely, if a civil servant follows directions in the belief that they are right or if, though he himself has misgivings about whether they are right, he defers to what he assumes is the better judgement of his superior officer, the courts would be likely to take the view that he is not being dishonest in taking the action. Paragraphs 4-5 of Appendix 3 set out the position rather more fully.

20. The interaction between the law and the administrative practices under consideration goes much wider than criminal law. The point of crucial importance is that the statutory entitlement of an individual or corporate body cannot be taken away by an administrative act which is not itself based on an overriding statutory provision such as the Limitation Acts. This means that, where an individual's statutory entitlement was not met in full by the department, this would constitute failure to implement the law as laid down by Parliament. In these circumstances, it would be open to a member of the public to bring civil proceedings against the department. It must be noted, however, that the point at which, or the circumstances in which, a legal entitlement arises will vary according to the differing statutory provisions for various schemes. In many cases, the onus is placed firmly on the claimant to make his claim and the question of payment arises only when he duly does so. In others-especially in the public service pension field-payment arises automatically as a result of appropriate service having been rendered or contributions paid: in these cases, no claim is required to trigger the right to payment. Where the onus is on the member of the public to make a claim, the statutory provisions may entitle him to payment for periods before the date of the claim; whether they do or do not depends in each case on the proper construction of the relevant provisions.

21. We considered how far the provisions of the Limitation Acts would justify a department in withholding payments which have been due for more than 6 years (the normal limitation period), but, having regard to the note (at Appendix 5) prepared by the Treasury Solicitor's representative on the committee and the Lord Advocate's Department, we concluded that no advice of general application could be given and that, in particular cases, departments would have to consult their legal advisers. Nevertheless, in many cases the Limitation Acts would operate to justify a restriction of retrospective payments. In Scotland largely similar provisions are to be found in the Prescription and Limitation (Scotland) Act 1973, although the normal limitation period is five years (see Appendix 5).

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22. A distinction can therefore be made between the specific law of conspiracy to defraud and the more general question of departments ensuring that their administrative practices are within the law. Thus, it would be perfectly possible for a department not to meet a legal entitlement in full without the individuals involved necessarily committing a conspiracy to defraud -for example, if the department failed to make payment in good faith or through administrative error. But in these cases it would still be liable to civil proceedings brought by a member of the public who had not received his full entitlement.

Part 4

HOW THE LAW AFFECTS ADMINISTRATIVE PRACTICES

23. The application of the law to the administrative practices of each department can be determined precisely in each case only in consultation with lawyers. But a number of basic conclusions can be derived from the advice we received and summarised in Part 3 of this report.

24. Since an individual's legal entitlement cannot be taken away except by legislation which overrides it, no administrative practice which has the effect of not meeting in full an entitlement which has been properly established and to which (where appropriate) a claim has been made can be considered acceptable. If, for policy reasons, there is a case for a limitation of entitlements, that should be achieved by legislation whether in relation to the particular scheme or by the introduction of more general provisions of the kind to be found in certain tax legislation which provide that once an assessment has become final and conclusive, it is not to be reopened even though the interpretation of the law under which it was settled is subsequently found to be mistaken. But there will be situations where the position is not so clear cut, whether in terms of deciding whether an entitlement has arisen or of identifying those who have an entitlement.

25. On the kind of practices in category A -*de minimis* and tolerance -the fundamental principle stated in paragraph 20 above would certainly preclude a refusal to pay the last penny to those who make a properly established claim for it (in cases where payment is due only when a claim is made[*]), but the courts would be unlikely to criticise a department as having acted improperly in exercising tolerance or *de minimis* practices where no claim in terms for the specific amount has been made if the following conditions are met:

(i) that the department is seen to be fair and reasonable in determining its practices, and in particular that any tolerance is in reasonable proportion to the entitlement involved and does not result in any significant damage to the interests of those affected (since grants to companies are likely to be of a different order of size when compared with payments to individuals, it might be expected that larger absolute tolerances would be acceptable on the basis that, proportionately, they were small); and

[*] In cases where the legal entitlement arises automatically (e.g. public service pensions) there would appear to be an onus on the department to make sure that normally the full and precise entitlement is paid in every case.

(ii) that the department gives appropriate publicity to the entitlement rules so that those who are entitled can discover their precise entitlement and therefore can, if they wish, claim the last penny. Where they do so, the department should pay in accordance with the basic principle we have referred to. (See also paragraph 36b).

26. The administration of the kind of case described in category B is more complex. The major difficulty which may arise from a change in the legal entitlement is to determine how far the department should go, in order to keep within the law, in identifying those who now have a new entitlement or increased entitlement as a result of the change -whether it be an entitlement to current and future payments or to retrospective payment. Generally neither the relevant statutes nor the law in general provide a specific direction for this and there is an area here where departments have to make their own judgments.

27. If the department takes no action, it may not only be liable to civil proceedings but may also place officials administering the entitlements in a position where they risk a charge of conspiracy to defraud. As indicated in paragraph 16 (ii), a decision to remain silent and thereby deprive an individual of his entitlement or a failure to correct a previous wrong interpretation of an individual's entitlement could be held in certain circumstances to constitute dishonest behaviour designed to deprive someone of something to which he is properly entitled. In the absence of legislation to extinguish the entitlement, the department should act reasonably in taking such steps as may be practicable to identify those with an entitlement; and must then meet in full the entitlement wherever this is validly established. It may take direct administrative action in order to trace those who are, or may be, entitled; or it may give publicity to the change and invite claims from those who believe they may have an entitlement. A department will have to exercise judgment on how it should proceed, bearing in mind that not all those with an entitlement or possible entitlement may be reached by or respond to publicity about the new position (or readily comprehend it if the changes are complex or technical ones). In cases where there is normally no obligation on an individual to take the initiative in registering a claim, there will be a strong presumption that the department itself will take action to identify those concerned from its own records; and if payment is not made to those persons who are known from the department's records to have an entitlement, those concerned would be in the area of risk of a charge of conspiracy. But identification in this way of those with an entitlement may not always be practicable. For example, the necessary records may no longer exist; or searching through a very large number of files may involve costs which are out of all proportion to the significance of the prospective benefit to the individuals concerned. In the first place, publicity is the only course open to the department; in the second, it may be judged right to take no further action if (but only if) the balance of the relevant factors is so heavily tipped as to defeat the strong presumption we have referred to.

28. It is not possible to offer a detailed prescription for departmental action. In broad terms it should be action which the courts would regard as being in proportion and a proper exercise of judgment (on the view which the courts

might take of a particular course of action, departments may wish to consult their legal advisers). It is suggested that the considerations to be taken into account in deciding what action to take should include the following:

(a) is there any onus under the relevant legislation for members of the public to make a claim?

(b) did the department make a mistake in the past in its interpretation of entitlement in consequence of which people may have been misled and/or suffered an injustice?

(c) is it administratively possible for the department itself to trace all those affected and to establish their entitlement?

(d) would the costs to the department of trying to trace all those affected be very large in relation to:

(i) the likely degree of success; and

(ii) the amount of money in view and the relative significance of this to those with a valid claim?

(e) how effective is publicity likely to be in informing prospective beneficiaries of the changed position?

29. When a department weighs these and other relevant factors and decides that it should invite claims from those who believe that they may be affected rather than attempt itself directly to trace all those with a prospective entitlement, it should give sufficient publicity to the new entitlement or corrected interpretation of the law for there to be a reasonable prospect that those who are or may be affected will be informed about, and will understand, their position, and will thus have an opportunity to claim their entitlement. Again it is not possible to lay down general rules about what would constitute reasonable publicity. This can only be determined in the circumstances of each case and has to be related both to the entitlement and to the situation of those to whom it is likely to apply. There may be people who have or may have legal entitlement, but who for one reason or another do not put forward a claim. The department may be held to have acted properly towards them, if it can be seen to have taken reasonable steps to publicise the position and its decision to rest on this course of action constitutes a fair and reasonable exercise of its judgment.

Part 5

THE COSTS OF ADMINISTRATION

30. A key factor in all the practices we have examined is the administrative cost incurred by the department (and therefore by the taxpayers) if it seeks to identify and pay in full all those with legal entitlement to a payment of money. In the category B type of case, there is a difference between the expected costs of implementing new or amended legislation and the cost of giving effect to a change of interpretation. In the former case, government and Parliament will have considered the costs as part of the policy they have adopted and will thus have approved the provision of the resources needed for its administration. This will generally not be so, however, where there is a change of interpretation which may give rise to an unexpected and additional demand on the department's resources. If the additional demand is seen to be

relatively small, there should be no difficulty for the department in taking steps to ensure that all concerned are identified and paid. But the demand may well be a large one.

31. The Civil Service pension case described in Appendix 2 gave rise to a need to pay retrospective increases in pensions and the department considered inviting claims. However, given the complexity of the issues and the associated administrative machinery, it was judged that this would have given rise to a very high level of fruitless claims. It was decided, therefore, that the more economical course in terms of time and effort was to go through some 300,000 case files, even though it was known at the outset that only a relatively small number of cases would need revision. This may involve up to two years' work for about two dozen extra clerical staff, i.e. an administrative cost of around £1/4m.

32. In the Irish pension cases also described in Appendix 2, action by the department began in July 1978 to review 5,700 Irish pension cases dealt with on the basis of UK records only. Up to the end of June 1979, 5,388 of these cases had been examined of which 737 had been identified as being underpaid. In 549 cases the underpayment was below 50p a week and was between 50p and £1 per week in a further 145 cases. So far arrears have been paid in 511 cases, totalling some £47,000 plus a further £2,400 paid in compensation. The total cost to the department in running this exercise currently stands at £55,000 and is expected to rise to £60,000 before it is completed. Because the oldest cases have been dealt with first those still to be paid will not produce payments in proportion to those already made. The total arrears paid when the exercise has been completed is unlikely, therefore, to exceed the administrative costs.

33. In the fields in which *de minimis* practices operate the disproportion between administrative costs and the entitlement is often much greater; the cost of a transaction involving payment of perhaps only a few pence would clearly be many times more than the amount to be paid.

34. This serves to illustrate the difficulty that departments may face in judging what action they should take. The public rightly demands economical administration and is constantly critical of the size of the Civil Service. While we have not attempted to form any estimate of the total additional cost of paying every last penny of every entitlement under present legislation as it is currently drawn, we are in no doubt that it would amount to a formidable sum.

Part 6

CONCLUSIONS

35. While the claims of economy are of great importance especially at the present time, it is even more important that they should not lead civil servants to cross the borderline between frugal administration and practices which are against the law. The general principle is that a legal entitlement, once validly established and, where necessary, properly claimed, must be met, whatever the administrative difficulties or costs involved in doing so. If these difficulties or costs are so great as to be unacceptable, the only remedy lies in changing the entitlement. Any such change can be achieved only by legislation which

specifically provides for it, and cannot be lawfully achieved by administrative decisions on the part of either Ministers or civil servants. We therefore **recommend:**

(a) that departments should review their relevant current administrative practices, and where it appears that any of them are in conflict with the general principle we have stated, should submit their findings to their Ministers with appropriate recommendations. The general position in law as explained in Part 3 of this report seems to us to carry the clear implication that, if any such practice comes to light, it should be ended. If however it is decided to introduce amending legislation to validate the practice, either currently or retrospectively, this intention and the reason for it should be made public. This should safeguard the position of those concerned in administering the practice. Moreover if, before the legislation is altered, claims are made and entitlements established, they should be met unless, exceptionally, where a department intends to introduce legislation which is to have retrospective effect, Ministers decide that they should not be met and inform Parliament of their intention;

(b) that when fresh or amending legislation is being drawn up which provides for legal entitlement, special care should be taken to provide statutory cover for any adjustments of entitlement which it can be foreseen may be needed in the future.

36. *De minimis* and tolerance practices raises the question whether legal entitlement must be in every case be met in full. Given the scale and complexity of many statutory schemes, it seems clear to us that practices of this kind are necessary in order to keep the costs of administration at a level tolerable to Parliament and the taxpayer and it is our understanding that the courts would, if these were challenged, treat them as they do other matters to which the *de minimis* maxim applies. **We recommend** that departments should review these practices, and submit appropriate recommendations to their Ministers, with the following points in mind:

(a) to be acceptable, such practices should be genuinely *de minimis,* in the sense that they should have only a minimal effect upon the interests of the individual citizen who is affected by them. Departments should consult their legal advisers in any cases of doubt;

(b) it is desirable that departments should make these practices public. Where the full amount is claimed it should be paid in full. If publicity results in criticism of some practice and/or a burdensome flood of applications, it may be necessary to consider whether legislative cover should be sought for the practice in order to maintain its effectiveness. This would of course involve additional work for the department and for Parliament, but in view of the fact that silence can constitute an implied lie or misrepresentation in law (see paragraph 16 (ii) above), we think it unsound to conceal practices which have the effect that legal entitlement is not paid or not paid in full, even where the shortfall is minimal.

As a special case of our general recommendation in paragraph 35 (b) above, we also recommend that new or amending legislation should normally provide for practices of this kind wherever the need for them can be foreseen.

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37. New entitlements arising from new or amending legislation, or from a change in interpretation, should be met in accordance with the general principle we have stated. Here the area for judgment concerns the steps the department should take, and the lengths to which it should go, in order to identify cases and stimulate claims. We do not think it possible to provide for this in detail. We think it important however that departments should take into account, and be seen to have taken into account, the factors we have listed in paragraph 28 above.

38. In the light of the war pensions case, moreover, we think it desirable to make it clear that where there is any doubt whether new or amending legislation or a change of interpretation gives rise to a retrospective entitlement, legal advice should be taken and the Minister consulted.

Civil Service Department December 1979

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APPENDIX 1

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Mr R F Prosser CB MC Department of Industry
Mr A W Russell Civil Service Department

Secretary: Mr R Daly Civil Service Department

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APPENDIX 2

COSTS OF ADMINISTRATION

Examples from the Civil Service Department and the Department of Health and Social Security

PENSIONS INCREASE ACT 1971 *(see paragraph* 31)

A Civil Service pensioner raised a complex technical point on the interpretation of section 8(2)(a) of the Pensions Increase Act 1971 relating to the "beginning date" of his pension for the purpose of pensions increase. On the advice of Treasury Counsel, which reversed legal advice received some years earlier, the case was conceded. It was agreed by Ministers that, since there could have been significant underpayments of pensions as a result of a faulty interpretation of the statutory entitlement, every effort should be made to trace those affected. The changed interpretation is being publicised, but the pension paying authorities have concluded that, because of the complexity of the issue, the most economical course administratively is to review some 300,000 case files rather than invite claims, many of which would inevitably be ill-founded. This may involve up to two years' work for about two dozen extra clerical staff.

IRISH "PRO-RATA" PENSION CASES *(see paragraph* 32)

Under EEC regulations, where a person claiming retirement pension contributed to both the UK and Irish schemes (or any other EEC country), a formula exists for taking account of the contributions paid in both countries. Where the operation of the formula produces a higher rate than the calculation based solely on UK contributions, this rate, which is known as the pro-rata rate, is put into payment. This system was operated from 1973 to 1975 but there was a considerable build-up of Irish pension cases in the relevant section at Newcastle Central Office and this had grown to 6,219, well in excess of a year's intake, by the end of 1975. In addition there were about 2,000 claims in Dublin on which they had been unable to take the first step of sending a reference to Newcastle. The main reasons for the delay and the build-up of such relatively large volumes of claims were the complexity of the EEC Regulations and associated administrative arrangements, coupled with delay on the part of the Irish Authorities in forwarding details of Irish insurance records, without which the calculation of entitlement cannot begin.

It was accordingly decided to suspend pro-rata action where there was a separate entitlement under UK legislation and payment was made solely on the UK record. It was thought at that stage that this treatment would rarely result in any significant different entitlement to pension. This allowed the backlog to be cleared and claims to be dealt with more quickly, but resulted in certain pensioners receiving less pension than would otherwise have been the case. Pro-rata calculations were subsequently resumed in February 1978 for current cases and action began in July 1978 to review 5,700 Irish cases dealt with on the basis of UK records only.

APPENDIX 3

CONSPIRACY TO DEFRAUD

Note by the Treasury Solicitor's representative

1. For any question of a criminal conspiracy to arise there must be two or more persons who agree to certain action or conduct or the achieving of a particular purpose. It is agreement which is the essential ingredient; on the one hand, discussion of possible action prior to agreement is not sufficient to give rise to a conspiracy but, on the other hand, once there is agreement there is no requirement that any action be taken in furtherance of the common object (though in practice it is often difficult to prove that the "conspirators" have moved from the discussion to the agreement stage without evidence of some action in furtherance of their object). The fact that a number of persons severally take similar action does not constitute them "conspirators" in the absence of a meeting of minds as to the action to be taken or the object to be achieved. The point was referred to by Paull J in pithy language in *R* v *Griffiths* 1965 2 AE 448 at p.455:

> It is right and proper to say that the learned judge correctly pointed out the principles, saying that the Crown had to prove that the conspirators put their heads together to defraud the ministry. The trouble is that it never seems to have been considered, nor was there any direction, whether or not in this case each farmer merely put his head together with the appellant Griffiths' head without any thought of a general conspiracy. As is indicated in Wright on Conspiracy p.69, it must be shown that the alleged conspirators were acting in pursuance of a criminal purpose held in common between them. In our judgment, there was no evidence of a conspiracy between all those convicted as opposed to a number of different conspiracies between the appellant Griffiths, the appellant Booth and one or other of the appellant farmers.

It should be noted, however, that in a particular case there may be a consensus, or meeting of minds, without each conspirator having been in direct communication with every other conspirator. And so long as a conspiracy exists, it may be joined by persons who were not the original conspirators.

2. The elements of the criminal offence of conspiracy to defraud were considered in *Scott* v *Metropolitan Police Commissioner* 1975 60 Cr. App. R. 124. At p. 129 Lord Dilhorne cited the dictum of Lord Radcliffe in *Welham v DPP* in support of his view that deceit (in the technical legal sense) is not a necessary element of conspiracy to defraud:

In *Welham* v *Director of Public Prosecutions* (1960) 44 Cr. App. R.124; [1961] A.C. 103, this House had to consider the meaning of "intent to defraud" in relation to forgery. In the course of his speech Lord Radcliffe said (at pp.141 and 123 of the respective reports):

> "Now, I think that there are one or two things that can be said with confidence about the meaning of this word "defraud". It requires a person as its object: that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning. Secondly popular speech does not give, and I do not think

> ever has given, any sure guide as to the limits of what is meant by "to defraud". It may mean to cheat someone. It may mean to practice a fraud upon someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him or, though not belonging to him, as due to him or his right." Later Lord Radcliffe said that he was unable to accept Buckley J's observations in *Re London and Globe Finance Corporation Limited* (supra), which he said were *obiter*, as an authoritative exposition of words employed in a subsequent statute.
>
> While the meaning to be given to words may be affected by their context and Lord Radcliffe was only considering the meaning of intent to defraud in section 4 of the Forgery Act 1913 the passages which I have cited from his speech are, I think, of general application; and certainly those passages and his speech lend no support to the contention that there cannot be a conspiracy to defraud which does not involve deceit.

At p.131 he said:

> ...in my opinion it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his suffices to constitute the offence of conspiracy to defraud.

That the conspirators must be acting dishonestly was underlined by Lord Diplock at p.131:

> (2) Where the intended victim of a "conspiracy to defraud" is a private individual, the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might become entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough.
>
> (3) Where the intended victim of a "conspiracy to defraud" is a person performing public duties as distinct from a private individual, it is sufficient if the purpose is to cause him to act contrary to his public duty, and the intended means of achieving this purpose are dishonest. The purpose need not involve causing economic loss to anyone.

3. While Lord Diplock said that dishonesty of any kind is enough for the purpose of conspiracy to defraud he did not say what amounts to dishonesty and appears to have used the word in an ordinary non-technical sense. It would seem likely that in this context the courts would hold that conduct which was neither tortious nor criminal in itself was dishonest if the person concerned knew that what he was doing was wrong in relation to another person (even though, in good faith, he might think that some public purpose was served by "doing down" that other person).

4. Even if certain officers of a department committed the offence of conspiracy to defraud, it is quite probable that subordinate staff who, on instructions; in specified circumstances wrote letters following a specified model would not be parties to the agreement or "meeting of minds". In such case the subordinate staff would not be parties to the conspiracy. The position might well be different if a subordinate officer had doubts about the course

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being followed and discussed them with his superiors (who were parties to the conspiracy). In such case, the superiors might explain exactly what was happening and why. The subordinate who in those circumstances accepted his superiors' scheme would almost inevitably become one of the conspirators; the proper course for an officer who is instructed to do something which is dishonest is to take the matter to a higher level in his department.

5. Alternatively, the subordinate's superior officers might be less forthcoming and attempt to persuade him that there was nothing wrong (in the sense of dishonest, as that word is used above) in the course he was instructed to follow. If he was completely persuaded, he could scarcely be said to be dishonest and so criminally liable. The position might well be less clear cut; the subordinate might be left with lingering doubts but accept that his superior probably knew best. In such a situation it would seem likely that the courts would take the view that in carrying out his instructions the subordinate was entitled to rely upon his superior officers' assurance that everything was all right and that, accordingly, so doing would not constitute dishonesty on his part.

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APPENDIX 4

FRAUD: THE POSITION IN SCOTLAND

Note by the Lord Advocate's Department

With the exception of certain specific frauds created by various statutory provisions, the concept of fraud, and the doctrine surrounding it is, in Scotland, a matter regulated by the Common Law. In its application to this report, it is as well to look at three aspects of the criminal situation.

The clearest Scottish definition of what would be called "simple fraud" is "the bringing about of some definite practical result by means of false pretences". The "definite practical result" may be brought about in many diverse ways, but in the context of this report, it could arise through "fraudulent silence". This could happen if an official who had a clear statutory duty, or could be held to have such a duty, to give a certain person or class of persons information to put them in a position whereby they would be able to claim entitlement to certain benefits failed to give that information whereby the person was unable to make the claim to which he was entitled, then that might constitute a fraud. More particularly, there would be "fraudulent silence" if the official had previously given information which he subsequently discovered to be incorrect and failed to communicate the true situation if that failure would result in the person remaining ignorant of a right to claim.

There is however an old offence at common law, practically unknown today, which is described as "wilful neglect to duty by a person entrusted with an official situation of trust". Most of the types of official prosecuted in the past would now be covered by specific statutory provisions.

The conspiracy element would appear to be quite different from the English position. In the first place it would not be true in Scotland that the wrongful actings of only one official would not be criminal. Conspiracy in Scotland does not appear to have developed or to have been employed to anything like the same extent as in England, though in recent years it has become more popular. However a conspiracy only applies if it is to effect any purpose which is of itself criminal, and its use in Scotland is only of limited effect. It is very difficult to conceive of a situation where any person involved in a conspiracy to commit a crime could not in any event be convicted of being guilty" art and part" (roughly equivalent to "aiding and abetting") of the crime.

In conclusion, the major difference between the English and Scottish positions would therefore appear to be (apart from the almost obsolete "breach of duty" offence) that the fraud could be committed by one person acting alone, and that where more than one act together the need to use the "conspiracy" tag is, at least, doubtful.

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APPENDIX 5

THE LIMITATION ACTS

Note by the Treasury Solicitor's representative and the Lord Advocate's Department

1. So far as the law of England and Wales is concerned, the effect of section 2(1) of the Limitation Act 1939 is that a person cannot normally bring legal proceedings against a department to recover a sum to which he became entitled more than six years earlier. Nevertheless, it does not follow that in a case falling within category B of paragraph 8 of the report a department is never under a liability to make payments in respect of such an earlier period which could be the subject of legal proceedings.

2. In a few fields (e.g. children's pensions) the extension of the limitation period made by sections 22 and 33(2), and (3), in the case of minors and persons of unsound mind, may be relevant.

3. More importantly, section 26 provides that in the case of legal proceedings which are based upon' 'the fraud of the defendant or his agent" or the right to bring which has been "concealed by the fraud of any such person", the limitation period does *not* begin to run until the fraud has been, or with reasonable diligence could have been, discovered. In this context, the courts have given "fraud" a very flexible meaning and the application of section 26 in a particular case is something on which specific legal advice should be sought. In *Kitchen v RAF Association and Others* [1958] 2 All E.R 241, at p.249, Lord Evershed M.R., said:

> "It is now clear, however, that the word "fraud" in section 26(b) of the Limitation Act 1939 is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v A.R. T.S. Ltd* ([1949] 1 All E.R 465), that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other."

There may be some cases, at least, in which the courts would regard a department's conduct towards a member of the public as "unconscionable" having regard to "some special relationship" between the department and the person concerned.

4. In Scotland, the Limitation Acts do not apply and consideration would require to be given to the application of the Prescription and Limitation (Scotland) Act 1973 in relation to any particular case. Certain statutory obligations for the payment of money may be subject to the short negative prescription which means that the obligation will normally prescribe in 5 years, although some adjustment may require to be made in computing that period in certain circumstances e.g. as under the law in England and Wales, no account is to be taken of any period during which the creditor was induced to refrain from making a claim by reason of the fraud of the debtor or any error induced by him, unless the creditor could, with reasonable diligence, have discovered

the fraud or error. Other statutory obligations are subject to the long negative prescription which means that they will only prescribe in 20 years.

5. It must be emphasised that in any case relating to Scotland where it is intended to rely on prescription, departments should consult their appropriate Scottish legal adviser before making any final decision.

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