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PRIME MINISTER

CLEGG COMMISSION REPORT ON TEACHERS

When we spoke on Thursday I promised to bring you up-to-date by this evening on developments in this matter, so far as England and Wales are concerned.

2. Agreements were reached in the two negotiating committees to implement the salary scales originally recommended by the Standing Commission by stages dating from 1 January 1980 and 1 September 1980. The first question is whether these agreements should now be challenged or whether we should attempt to restore the situation through the arbitrations already inevitable on the April 1980 increases. Judgements on tactics are largely in the hands of the local authorities, and elected members wish to consider every option before coming to a decision. It is the view of the independent Chairman that as a matter of fact both Committees reached firm agreements on April 1979 pay rates. The Remuneration of Teachers Act obliges me to implement recommendations of the Committees unless they were successfully challenged in the courts.

3. I have sought and received the opinion of the Attorney General on the likelihood of success if either the Management Panels or I were to proceed to litigation to have the agreements declared void. I attach it. Briefly, he advises that if such an application were made the courts could, by way of a discretionary remedy, declare the agreement void ab initio. Whether or not such a remedy would be granted would turn mainly on the evidence available (and this could prove inadequate); but the courts would also have regard to the conduct of those concerned and might take the view that this was such as to make discretionary relief inappropriate.

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4. In view of the inherent uncertainty in any legal action, I incline to the view that the best course does not lie in challenging the agreements reached on the former Standing Commission recommendations, but in seeking to get the situation restored through arbitration on the April 1980 rates. I shall be meeting leading representatives of the local authority associations on Wednesday to hear and discuss their views prior to a joint meeting of the two Management Panels on Thursday, after which I shall let you know further how they intend to proceed.

5. I am copying this to the Secretaries of State for Employment, Scotland and Wales, and to the Attorney General.

R J Green

R 19/5/80.

p.p. MARK CARLISLE
(Dictate by the Secretary of State and signed in his absence.)

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SECRETARY OF STATE FOR EDUCATION

1. I understand that you have asked for my advice on the legal implications of the "Clegg error" as reported in his letter of 15 May to the Prime Minister.

2. The main issue is whether you could resist giving effect, under ss.2(3) and 2(4) of the 1965 Act, to Burnham Committee recommendations on teachers' pay for 1979/80 which are based on the uncorrected figures in table 4 of Clegg Commission Report No 7 (paragraph 68) and do not have the unqualified support of both sides of the Committee now the Clegg error has been revealed.

3. May I first comment on your suggestion for dealing with the practical consequences of the error. This would be to implement the uncorrected Clegg figures but to ensure that the error was not perpetuated in subsequent years by calling on the arbitrator for the 1980/81 pay settlement to take account of it in fixing his award for that year. From the legal point of view this would be a perfectly sound arrangement. But it would depend on there being an unimpeachable agreement in the Committee, under s.2(2) of the 1965 Act, which would then be embodied in a recommendation sent to you under that section.

4. For the agreement and recommendation to be valid beyond dispute it would be necessary for the Committee as a whole to inform you that despite the Clegg error they "stood by" their original decision based on the uncorrected figures. It would

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be best if this were recorded in the Committee proceedings. There would as a result be no basis for questioning the amounts in the s 2(4) document giving effect to the new scales. When the arbitrator for the 1980/81 pay settlement is appointed, it would be possible for the management side of the Committee to make representations to him that he should reduce his base figures by the appropriate percentage so that the Clegg error for 1979/80 was not repeated in future years. The standing arrangements for arbitration under section 3 would allow evidence to be brought on this, and the arbitrator to take it into account.

5. There are two caveats here. The first is that the arbitrator would have no power to order the recovery of any "overpayment" for 1979/80 due to the Clegg error; all he could do would be to ensure that it was not perpetuated. The second is that the arbitrator would not necessarily make the full adjustment - he would be bound to consider any submission from the teachers' side that the base figures in future should be the uncorrected amounts. But in my view it is likely that he would make an allowance.

6. If however a recommendation is forwarded to you on the basis of the uncorrected figures despite the fact that the management side has not agreed to the above arrangements, you need to know whether in these circumstances you could contest it.

7. It is clear that you cannot act before a purported recommendation is transmitted under s.2(2). In theory it would be possible for the management side (at the instance of your

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representative appointed under s.1(1)(b)) to act at an earlier stage, by applying for a declaration that there had as yet been no valid agreement (with the result that no valid recommendation could be forwarded at that time). They would use the arguments set out below. But for tactical reasons I doubt if that course would be attractive, and in any case I think the courts would be more sympathetic to an application by you as Secretary of State once the Committee had purported to act under s.2(2).

8. The basis of your application would be that there had been no real agreement under s.2(2) because the Committee had acted on a false basis of fact. The line would be that the Committee was entitled to rely on the work done by Clegg and did so, but their "agreement" on the original Clegg figures was vitiated because one or both sides had failed to recognise the error; the court would be asked to find that the Committee had failed to inform itself adequately in the performance of its statutory duty to review salaries.

9. If this argument were successful, it would follow that any resulting recommendation was invalid and that you could not act under ss.2(3) and 2(4). It would then be for the Committee to reconvene and reach an actual agreement under section 2(2) and, failing that, go to arbitration under section 3.

10. The argument on your behalf would be that the court had a discretion to grant relief where an administrative body such as the Burnham Committee had erred in such a fundamental way that

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its decision was invalid ab initio and thus left you with no basis for acting under ss 2(3) and 2(4), but in practice the only safe course would be to apply to the court for a declaration.

11. This argument would probably not rest on the ordinary contractual rules for determining the existence of a valid agreement (but see below). It would not then be crucial to decide whether the Committee's mistake in failing to recognise the Clegg error was one of fact or law - as it might be if the position had been contractual. (If the contractual rules were to apply, I think the mistake would almost certainly be regarded as one of fact.)

12. I now turn to the evidence which would be needed to sustain this argument. It would at least be necessary to show the following:

(a) that there had been a genuine mistake on at least one side of the Committee in that it failed to notice the Clegg error at the time the purported agreement was made;

(b) that the Committee as a whole regarded comparability as a vital factor in the outcome - in other words that they were concerned with the process by which the Clegg Commission arrived at its figures, and not merely in the result of its work as a means of resolving an impass in negotiations. This would amount to evidence on a balance of probabilities that the Committee would not

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have reached an agreement in terms of Clegg if both sides had recognised the error.

13. I have not seen all the evidence and at this stage I cannot be firm in my advice on this. Assuming, as I believe is the case, that the management side failed to recognise the error, affidavit evidence from them would be available on (a). But (b) is more difficult; I have read the relevant proceedings of the Committee including those on 24 April in which it "agreed" to endorse the original Clegg figures and no clear answer emerges from them on this vital question.

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14. In my view your case will be made much stronger if it can be proved that the teachers' side did recognise the error and failed to communicate it to the management side. That would be regarded by the court as "sharp practice" and would, I think, significantly increase your chances of obtaining relief; it would tend to prove (b) above by inference. Support for this contention is given in a report by Paul Williams in yesterday's Sunday Telegraph.

15. If knowledge on the part of the teachers' side cannot be proved then all I can do is say that I believe the court would be sympathetic to a claim for relief by you if convincing evidence of (a) and (b) above could be obtained.

16. In any proceedings to test the validity of a recommendation, the teachers' side would probably argue that, if there were any mistake on the management side, the common law rules on the effect of mistake of fact on contracts applied by analogy to the agreement under s. 2(2) even though it was not itself contractual. As noted above, I doubt if the courts would rest on that argument, but if they did so then the agreement would probably be held to be valid. The general rule of common law is that where there is consent between the parties as to the subject matter of the contract and one side intends to and does accept the offer made to him, he cannot

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impugn the contract by showing that his acceptance was due to a mistake of fact. The position is the same in equity, unless "sharp practice" by one party can be proved, when the court may grant relief; but equally it is not certain that the court would apply the equitable doctrine in this case. This reinforces the argument that your best course would be to apply for judicial review.

17. It is theoretically possible that if the Committee reconvened and the management side declined to agree to the recommendation being transmitted, the teachers' side might bring an action for an order of mandamus to compel them to do so. The arguments for resisting such an action would be those given above.

18. Finally I should point out that any proceedings by you would be bound to have some embarrassing aspects.

19. In the first place, the court could well be very critical of the failure of the management side of the Committee, on which you have a statutory representative, to pick up the error. This would not defeat a claim for relief but it would certainly reduce the court's willingness to exercise its discretion in your favour.

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20. In the second place, Clegg's letter of 15 May to the Prime Minister would be in evidence and the last paragraph suggests that the source of the error was "in information presented to" his Commission. As I understand it, this refers to information given to the Commission by staff in the Office of Manpower Economics, which claims that it was based on advice given over the telephone by your officials, no records being kept of this. Evidence that OME staff were misled by your officials would not be fatal to a claim for relief but, again, it could well have an adverse effect on your chances of success.

21. This advice is on a hypothetical basis because the attitude of the two sides of the Committee is not known, nor has any recommendation been forwarded. I shall of course be willing to advise again if requested when the position becomes clearer or further evidence is sent to me. My advice should not be shown to any member of the Committee other than your statutory representative.

MH

19 May 1980

Education

The Prime Minister urgently requested an account from the Department of how the error in the Clegg Commission's report on teachers occurred.

In the time available, it has only been possible to obtain notes on the error, respectively, from the Office of Manpower Economics (OME) and the Department of Education and Science (DES). These are enclosed.

It seems clear that the essential factual information about the starting salary of graduate entrants was obtained by the OME by telephone from the DES. There are no full records of these exchanges and it is not now possible to be sure where responsibility for the error might rest.

With hindsight, the OME would have been well advised to have checked this basic information with the DES in the final drafting of the Commission's report when it became clear that it was to be of prime significance. The DES note comments on the sequence of events after the report was submitted.

STANDING COMMISSION ON PAY COMPARABILITY

HOW THE MISTAKE IN REPORT NO 7 WAS MADE

1. A comparability study was undertaken for the Commission by management consultants. It was divided into two parts, the first to yield interim results at the end of 1979 and the second to yield final results in March 1980.

2. When the Commission received the results of the first stage of the study it decided that it could not (as the teachers had requested) produce an interim report based on those results. The Commission also had some worries about how the study was progressing; and for that reason the Chairman of the Commission asked the Office of Manpower Economics (OME) Secretariat to do work on alternative methods of comparison. One of these was a comparison between the starting salaries of graduate teachers and other graduates.

3. In order to obtain information about the starting salaries of graduate teachers the Higher Executive Officer concerned in the OME was asked to check with the Department of Education and Science the incremental benefits given to graduate teachers. She cannot now remember whom she consulted, nor is there any written record of the name of her contact. She is, however, clear that the information which she was given did not mention either the extra increment given for a fourth year of study after the age of 18; or the fact that the extra increment for a Post Graduate Certificate in Education (PGCE) is also awarded in respect of the education content of a BEd, regardless of the number of years of study in either case.

4. The Principal in charge of the reference incorporated the information given to his HEO in a paper for the Commission. At that stage the information had not assumed the importance which it was later to have, since the comparability study by the consultants was still in progress and it was still the Commission's intention that its proposals on teachers' pay would be based on the results of that study.

5. When the results of the study were available to the Commission in March, the Commission decided, in private and without OME advisers being present, that they could not be used to support recommendations and that an alternative approach would have to be adopted.

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6. The Chairman of the Commission himself devised and wrote the alternative approach, drawing on information selected from the earlier OME paper for the Commission. This alternative approach used as its starting-point a comparison between the starting salaries of graduate teachers and other graduates.

7. The alternative approach was considered by the Commission at a further private meeting without OME advisers being present. The Chairman told OME advisers that his colleagues had endorsed the alternative approach subject to relatively minor changes. These were incorporated in a fresh draft of the alternative approach which was considered by the Commission at a meeting the following week. The early part of that meeting, which considered the new draft of the alternative approach, again took place in private.

8. The information on the starting salaries for graduate teachers should have been, but was not, checked by the OME Secretariat. It had been provided as part of a wide-ranging background paper for the Commission. It should be added that the last stages of the Commission's work on this reference were unusual in two main respects. First, a number of crucial meetings took place in private. Secondly, the Commission's eventual approach to comparability for teachers was not, as with earlier references, discussed with the negotiating parties.

OFFICE OF MANPOWER ECONOMICS
19 May 1980

STANDING COMMISSION'S ERROR: PRIME MINISTER'S ENQUIRY

Summary note by Department of Education and Science

There are two questions about the mistake: how did it happen and how was it not noticed on the management side before Mr Paul Williams began making enquiries?

How it happened

2. It is for OME to explain how the crucial paragraph 63 was assembled. The management side submitted main evidence and supplementary evidence, whether requested by the Commission or otherwise, mainly through LACSAB. On a number of matters, especially statistical data, enquiries came direct to DES, much of it by telephone. In some instances DES were invited to check factual sections: specifically on paragraphs 5, 6, 7, 8, and the England and Wales portions of Appendix 3, but were not invited to check paragraph 63; nor, we understand, were LACSAB. The Department has no record or remembrance of any question that could have led to the assembled content of paragraph 63 of the report. There might have been piecemeal questions such as "what does graduate status earn?", to which a correct answer would be that graduation as such would earn two increments for a degree falling short of "good honours", and four increments for good honours; but more comprehensive questioning would have led fairly naturally to a number of reservations.

Receipt of the report

3. In view of the sensitivity of the report (the main teachers' unions' Easter Conferences took place between receipt and publication) copies of the report were very tightly controlled in DES and were specifically not shown to staff whose technical familiarity with the Burnham salaries document might have led to detection of the error. The conclusions were much as expected and the report was seen as a subjective assessment undertaken when the original elaborate management consultancy exercise collapsed.

Publication and after

4. Against DES advice, the Management Panel had agreed to a negotiating meeting of the Burnham Primary and Secondary Committee within the week of

publication of the Commission's report. All concerned were under pressure of time, and within the Management Panel much emphasis was being laid on the tactics of obtaining reassurances about teachers' conditions of service as an adjunct to the current pay negotiations. Supporting staff in DES were heavily engaged, in close collaboration with LACSAB staff, on checking the costings implied by the recommended increases in pay. Nobody in the Department, LACSAB or individual authorities noticed the error - or at least brought it to the attention of the management side of Burnham. The first hint of trouble to reach the Department arose from Mr Paul Williams's enquiries on about 30 April.