

‘A Debt of Honour’



Parliamentary
and Health Service
Ombudsman

‘A Debt of Honour’

The ex gratia scheme for British groups interned by the Japanese during the Second World War

4th Report

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Introduction

1. This report sets out the results of my investigation of a complaint by Professor Jack Hayward about the ex gratia scheme for members of British groups interned by the Japanese during the Second World War.
2. This scheme was administered by the War Pensions Agency (WPA), an executive agency of the Department for Work and Pensions (DWP: for part of the relevant time, the DWP was called the Department of Social Security – DSS). Responsibility for the WPA transferred to the Ministry of Defence (MOD) on 8 June 2001 and the WPA was renamed the Veterans Agency. The Veterans Agency administered the scheme after this date.
3. The report does not contain every detail investigated by my staff but I am satisfied that nothing of significance has been omitted.
4. I consider that it is appropriate to lay this report before Parliament for a number of reasons. First, while this report sets out the results of my investigation into Professor Hayward's complaint, his was only one of a number of complaints about the same matters received by my Office. Thus, the representative investigation I conducted into his complaint has application to other people in a similar position to Professor Hayward.
5. Secondly, the complaint relates to matters which raise public policy issues that have been of interest to Parliament and which have been debated there on a number of occasions.
6. Thirdly, the recommendations I make in this report have significance beyond the particular scheme complained about and are relevant to other ex gratia schemes operated by public bodies.
7. Finally, the Government – exceptionally – has not accepted all of the recommendations I have made in this report. I consider it appropriate to bring this to Parliament's attention.

8. Therefore this report is laid before Parliament pursuant to section 10(3) of the Parliamentary Commissioner Act 1967, which denotes that I have found injustice caused by maladministration that the Government does not propose to remedy.

Structure of the report

9. In that context, this report addresses the circumstances of Professor Hayward's complaint, outlines my investigation, and sets out my conclusions and resulting recommendations.

10. But first, I set out the reasons for my decision to investigate Professor Hayward's complaint in the context of my statutory role and jurisdiction.

My role and jurisdiction

My role

11. My powers are set out in the Parliamentary Commissioner Act 1967, as amended. The 1967 Act provides that my role is to investigate action taken by or on behalf of bodies within my jurisdiction in the exercise of their administrative functions. Complaints are referred to me by a Member of the House of Commons on behalf of a member of the public who claims to have suffered injustice in consequence of maladministration in connection with the action so taken.

Bodies and matters in my jurisdiction

12. When deciding whether I should investigate any individual complaint, I have to satisfy myself, first, that the body or bodies complained about are within my jurisdiction. Such bodies are listed in Schedules 2 and 4 to the 1967 Act. Secondly, I must also be satisfied that the actions complained about were taken in the exercise of that body's administrative functions and are not matters that I am precluded from investigating by the terms of Schedule 3 to the 1967 Act, which

lists administrative matters over which I have no jurisdiction.

13. Professor Hayward's complaint was directed at the MOD, as this is the department which has policy responsibility within Government for the scheme about which he complains. Moreover, the body responsible for administering the scheme, the Veterans Agency (formerly the WPA), has been one of the MOD's executive agencies since 8 June 2001. The MOD is listed in Schedule 2 to the 1967 Act and so it and its executive agencies are within my jurisdiction. The DWP, which previously had responsibility for the WPA, is also within my jurisdiction for the same reason.

14. My investigation has shown, however, that officials from other public bodies were involved in an informal inter-departmental working party which made recommendations to Ministers in the MOD concerning the ex gratia scheme. These included both officials and legal advisers in the DWP and a member of the Overseas and Defence Secretariat of the Cabinet Office, who chaired the group. Other officials who attended the group came from the Foreign and Commonwealth Office, Her Majesty's Treasury, and the Inland Revenue. All of these bodies are within my jurisdiction, being listed in Schedule 2 to the 1967 Act, with the exception of the Overseas and Defence Secretariat of the Cabinet Office, which is expressly excluded from my jurisdiction by virtue of a Note to that Schedule.

15. Upon discovering that this was the case, I considered whether this was relevant to my decision to investigate. Having done so, I was satisfied that the actions complained about were taken in the exercise of the administrative functions of a body within my jurisdiction – the MOD, whose Ministers made the relevant decisions and whose officials in the Veterans Agency and its predecessor administered the

scheme – albeit with the advice of officials from other public bodies, one of which is not in my jurisdiction.

Alternative remedy

16. The 1967 Act also provides, in section 5(2)(b), that I may not conduct an investigation into any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law unless I am satisfied that, in the particular circumstances of the case, it is not reasonable to expect the person aggrieved to resort to such a remedy.

17. My Office's consideration of this question in relation to Professor Hayward's complaint was initially delayed. The relevant events are covered in more detail later in this report.

18. However, to outline these briefly, my predecessor received the referral of Professor Hayward's complaint in a letter from Austin Mitchell MP dated 12 December 2001. While my predecessor was considering whether to investigate Professor Hayward's complaint, he was informed that the Association of British Civilian Internees Far Eastern Region (ABCIFER) had initiated an application for judicial review impugning the **legality** of the scheme. In that context, my predecessor decided to defer consideration of Professor Hayward's complaint until the ABCIFER litigation had been concluded.

19. In summary, in the judicial review proceedings ABCIFER challenged the **legality** of a Government decision to introduce a bloodlink criterion as a requirement for eligibility for certain claimants. ABCIFER contended that that decision was disproportionate and/or irrational, involved a breach of legitimate expectation created by the Ministerial announcement of the scheme on 7 November 2000 and/or was conspicuously unfair and an abuse of power.

20. ABCIFER was unsuccessful before the High Court. An appeal to the Court of Appeal also failed. Other litigation – which found against the Government in relation to the position of the Gurkhas – was also initiated. The latter proceedings did not directly relate to the matters which were the subject of Professor Hayward’s complaint.

My decision to investigate

21. Following the conclusion of the ABCIFER court proceedings in April 2003, I gave careful consideration as to whether it was reasonable to expect Professor Hayward to resort to legal proceedings as an alternative to my investigating his complaint.

22. In doing so, I first considered whether Professor Hayward had already exercised an alternative remedy.

23. Professor Hayward was not party to the judicial review proceedings concerned with the position of civilian internees and he had never been a member of the organisation which initiated them. It was my conclusion that he had not exercised an alternative remedy through ABCIFER’s actions.

24. I next considered whether it would have been reasonable to expect him to initiate legal proceedings on his own behalf.

25. Professor Hayward’s complaint, which my predecessor had received prior to the initiation of any proceedings, was not directed at whether the scheme was **lawful** but concerned the injustice he claimed to have suffered in consequence of **maladministration**. His complaint was in my view therefore not one that was wholly amenable to an application for judicial review, as maladministration is not synonymous with acting unlawfully. Thus I considered that in this case the availability of an alternative remedy was limited.

26. In any event, having regard to the circumstances of his case I did not consider it reasonable to expect Professor Hayward to exercise any alternative remedy – to the limited extent that he might have had such a remedy – by means of proceedings before a court of law. I believed that such proceedings might well have been costly to him – in both emotional and financial terms.

27. I also had regard to the fact that court proceedings are adversarial in nature and, given the particular circumstances of Professor Hayward’s case, I did not consider it reasonable to expect him to have to resort to such a process when that could have been distressing and as he had firmly indicated that instead he wished me to investigate his complaint.

28. In addition, I considered that it would have been difficult for Professor Hayward to have obtained the evidence necessary to pursue legal proceedings as he did not have access to official files. I have considerable powers in relation to access to evidence. That being so, in the circumstances of this case I considered that my fact-finding powers made an investigation by me more appropriate than expecting Professor Hayward to initiate legal proceedings.

29. Finally, I considered whether the ABCIFER application for judicial review, and the judgments in relation to it, prevented me from carrying out an investigation into Professor Hayward’s complaint.

30. In doing so, I considered his specific case in the wider context of the purpose of my Office as decided by Parliament, which is to investigate complaints about injustice caused by maladministration on the part of public bodies in my jurisdiction.

31. While it is for the courts to determine questions of **legality**, Parliament has determined

that my role is to consider whether the administrative actions about which individuals complain constitute **maladministration** causing injustice to them. Professor Hayward had asked me to investigate such a complaint.

32. It was proper that I should have had regard to the challenge by others to the lawfulness of **some** of the actions about which Professor Hayward complained and it is also proper that I should not question the decisions of the courts about the scheme, some of which have upheld its lawfulness and others which have not.

33. However, I considered that these proceedings and decisions did not prevent me from investigating whether those actions constituted maladministration causing injustice to Professor Hayward. My investigation would be confined to determining whether the administrative actions of the MOD constituted **maladministration falling short of unlawfulness**.

34. For the reasons set out above, I decided that I should investigate Professor Hayward's complaint.

35. In its response to my draft report (see annex), the Government has said that my reasons, given above, for considering that it was not reasonable to expect Professor Hayward to initiate legal proceedings are 'unsatisfactory'.

36. The MOD's position appears to be that I should have expected Professor Hayward to have taken legal action (presumably, given the terms of the rest of their response to this report, only in relation to some aspects of his complaint) and that I should not, therefore, have conducted an investigation.

37. The Government did not raise any such objections in June 2003 when I first asked the MOD, as I am required to do, for any observations that it might have on my proposal to investigate Professor Hayward's complaint. The

first time such objections were raised by the MOD was some months after I sent my draft report to it.

38. Section 5(5) of the Parliamentary Commissioner Act 1967 provides that in determining whether to initiate, continue or discontinue an investigation I shall act in accordance with my discretion and that any question as to whether a complaint is duly made shall be determined by me.

39. I have considered the Government's representations on this point and I do not find them persuasive. I am satisfied that Professor Hayward's complaint was duly made and, having considered his complaint carefully, for the reasons given above I have exercised my discretion to investigate it. I believe I have done so properly and appropriately.

Observations about the investigation

40. My investigation has taken a considerable time to complete. I decided to investigate Professor Hayward's complaint in June 2003. That decision was delayed for the reasons explained in this report. I am also conscious that Professor Hayward's complaint was first referred to my Office in December 2001 and that he and others have been waiting for the resolution of the investigation for many months.

41. I regret the length of time that it has taken to conclude this investigation, which was considerably longer than I would normally expect such investigations to take. I am deeply aware that the people affected by the subject matter of this investigation are elderly and that many have been considerably distressed by these events. I am grateful to Professor Hayward and to others for the great patience they have shown while this investigation has been undertaken.

42. Many of the causes of the delay in finalising this report are attributable to factors beyond my

control. We are responsible for others. However, one of the principal difficulties I have encountered in this investigation was ensuring that the respective roles of my Office and the courts were clearly delineated and properly understood.

43. I will reflect on how best to apply the lessons we have learned from this experience to our other casework.

The circumstances of Professor Hayward's complaint

44. Professor Hayward was born in Shanghai in 1931. His father was a British subject who was born in India and his mother was born in Iraq. His grandparents died before he was born. His birth was registered with the British Consulate, as was usual with the children of British subjects at that time. In early 1943, the Japanese authorities interned him and his parents as British subjects in Yangchow Camp C, near Shanghai in China. The late date of the internment is explained by the fact that there were many British subjects in Shanghai; it took some time for the Japanese to intern everyone. Many members of Professor Hayward's family were interned, but one of his sisters escaped internment because she was working in London as a nurse.

45. Following his release from internment, Professor Hayward accepted an offer of 'repatriation' to the UK and in 1946 he came here to live with an aunt. He went to boarding school and university in England and did National Service as an Education Officer in the Royal Air Force before embarking on an academic career. In the course of his career as a political scientist, he was appointed Professor at Oxford University, having been invited to establish a School of European Studies at St Antony's College. He specialised in the study of the French political system and was awarded the *Légion d'Honneur*. He is a Fellow of the British Academy and on

retirement from Oxford was appointed Research Professor at Hull University. His two children are pursuing careers in the UK.

46. On 7 November 2000, the Parliamentary Under-Secretary of State for Defence, Dr Lewis Moonie (now the Lord Moonie of Bennoch), announced in Parliament that the Government was making funds available for one-off ex gratia payments of £10,000 to the surviving members of the British groups who were held prisoner by the Japanese during the Second World War. One of the eligible groups was described as 'British civilians who were interned', without further qualification as to nationality or bloodline. The WPA advertised the scheme and issued claim forms to its welfare offices and to ex-service organisations who acted as its authorised agents. Some of these latter groups contacted individuals who they thought might be eligible under the scheme. Other groups advertised the scheme on websites and in periodical publications. Professor Hayward received an invitation to apply for the scheme and, thinking that he fell within the category of British civilian internees, in December 2000 he applied to the WPA for an ex gratia payment.

47. The WPA rejected Professor Hayward's application, and many other similar applications, on 25 June 2001. Their letter stated:

'Those who are entitled to receive the payment are former members of HM Armed Forces who were made prisoners of war, former members of the Merchant Navy who were captured and imprisoned and civilian internees who were British subjects, and were born in the United Kingdom or who had a parent or grandparent born in the United Kingdom... it would appear from the information held that you are not eligible to receive the ex gratia payment.'

48. Professor Hayward considers it outrageous and unacceptable that he should have been

asked to apply to the scheme and then refused payment because of an eligibility criterion that had been introduced months after the scheme was established and which was not disclosed to him at the time that he was asked to complete an eligibility questionnaire. He considers that he meets the eligibility criteria originally announced to Parliament as he was interned as a British subject and is now a British citizen who has lived in the UK since 1946 and thus can demonstrate a link to the UK. He seeks a review of the decision and an apology both to him and to other British civilians who have been refused recognition in similar circumstances.

My investigation

49. As explained above, Austin Mitchell MP first asked my predecessor to investigate Professor Hayward's complaint in a letter dated 12 December 2001. However, shortly thereafter my predecessor was informed that ABCIFER had made an application for judicial review of the Government's decision to require that civilian claimants must have been born (or have had a parent or grandparent born) in the UK to qualify for an ex gratia payment. My Office informed Mr Mitchell that we would consider whether to investigate the complaint once the outcome of the litigation was known.

50. Mr Mitchell and other Members of Parliament continued to press the case of Professor Hayward and other former civilian internees who were similarly affected. On 3 April 2003, the Court of Appeal handed down its judgment on ABCIFER's appeal against the High Court's judgment to dismiss its application for judicial review. Following consideration of the position in the light of the court judgments, my then Deputy informed Mr Mitchell on 25 June 2003 that I would carry out an investigation into Professor Hayward's complaint.

51. My Office also sent the statement of Professor Hayward's complaint to the Permanent Secretary of the MOD on 25 June 2003, together with a number of specific questions and a request for any observations the MOD might have on my proposal to investigate the complaint. The MOD's reply came in the form of a letter from the Treasury Solicitor dated 11 August 2003. The Treasury Solicitor's letter did not respond directly to the statement of complaint, but enclosed the pleadings and skeleton arguments relied upon by the parties in the application for judicial review, together with copies of relevant witness statements.

52. Following consideration of the background to the complaint, my investigator wrote to Professor Hayward and the Chairman of ABCIFER to offer them interviews. Both accepted the invitation.

Interview with ABCIFER

53. The interview with the Chairman of ABCIFER took place on 24 April 2004. The Chairman explained that ABCIFER had assisted Government officials in making estimates of the number of former civilian internees who might qualify under an ex gratia scheme. The Association had had access to records of detainees in Japanese internment camps, and these records distinguished between different categories of those who were British at the time. For example, they distinguished between 'British British' and 'Australian British'. The Association had identified approximately 20,000 'British British' internees from the records before reaching an estimate (based on actuarial advice) of 2,500 to 3,000 survivors, not including widows. He stressed that this figure was for all civilian internees who had been detained as British subjects, and not for some more restricted group such as those with an added 'close connection' with the United Kingdom.

54. The Chairman went on to describe ABCIFER's dealings with the DWP and the MOD over the definition of British both for the purposes of an extra-statutory scheme for war pensions for former civilian internees and of the ex gratia scheme. He said that, in the course of the judicial review proceedings, the MOD had sought to draw an analogy between the two schemes. But in his view this analogy was false; in the discussions on the ex gratia scheme, the DWP had assured ABCIFER that this scheme would be interpreted more generously than the war pensions scheme.

55. The Chairman stated, moreover, that the definition of British for the purpose of war pensions had changed significantly in the period between the Ministerial announcement of 7 November 2000 and the rejection of Professor Hayward's application on 25 June 2001. He argued that, if the link between the two schemes had been made at the time of the announcement of the ex gratia scheme on 7 November 2000, it would have been clear then that few former civilian internees would have qualified for payment. That was because the qualification for a civilian war pension at the time of the announcement was that the claimant should have been born in the UK. The extension of war pensions to British civilians who had a parent or grandparent born in the UK had only been agreed in May 2001 and applied from 25 June 2001.

56. The Chairman stressed that many of those former British civilian internees who had been refused an ex gratia payment by the MOD were distressed and outraged. It was not so much a matter of money – although the money was important to some of the claimants, all of whom were elderly. It was more the insult arising from the suggestion that they were not sufficiently British to receive payment, despite the fact that they had been interned as British and many had since maintained close links with this country, in

some cases giving many years of public service. The Prime Minister had recognised the wrong done to British civilian internees and had announced in 2000 that the wrong would be righted. The Chairman said that it was his view that it was indefensible that administrative arrangements should then arbitrarily reduce the number who should be compensated.

57. The Chairman went on to allege that there had been a great deal of inconsistency in the application of the ex gratia scheme to former civilian internees and gave some examples. He said that the WPA had made a large number of ex gratia payments in February 2001, and the recipients must have included a significant number of former British civilian internees who did not have a parent or grandparent born in the UK. That was because the requirement that a civilian claimant should have a parent or grandparent who was born in the UK had not been introduced until some months later. ABCIFER did not know how many claimants fell into this category, and those who did were understandably reticent for fear that the government might demand that the compensation be repaid. But ABCIFER estimated that approximately one-sixth of the former civilian internees who had received ex gratia payments by March 2001 did not meet the criteria that were introduced in June 2001.

58. Another anomaly that the Chairman understood had arisen was that payment had been made to civilian claimants who had not, strictly speaking, been interned. He believed that this may have included some diplomats who had been held under house arrest and some civilians who had been under the care of the Red Cross. He said that ABCIFER was aware that payments had been made to some claimants who had a parent or grandparent born in this country, but who had not been a British subject at the time of their internment. ABCIFER subsequently provided

my Office with copies of a number of relevant documents.

59. The information and documents supplied by ABCIFER – and the Chairman’s views as to the way in which the scheme was operated – are not evidence on which I could rely in coming to a determination of whether the scheme was operated without maladministration. However, they helped me to set the complaint by Professor Hayward in a wider context.

Interview with Professor Hayward

60. My investigator interviewed Professor Hayward at Hull University on 29 April 2004. He was able to provide a great deal of background information, which has been incorporated in this report. He stressed that money was not his prime consideration in making a complaint: it was the insulting implication that he was not considered sufficiently British to receive payment.

61. In Professor Hayward’s own words:

‘To be told retrospectively that I was a lesser British subject because, by implication, meanwhile Great Britain had become Lesser Britain was mean and disingenuous of the MOD and demeaning to me. An official apology for the insult involved and the injustice inflicted is called for.’

Request for information from MOD

62. I wrote to the Permanent Secretary of the MOD on 7 May 2004 to ask him for further information. I asked him to supply the original papers, including the papers of the meetings of what was described in the evidence submitted to the courts on behalf of the MOD in the judicial review application as the ‘Inter-Departmental Working Group’. I asked for copies of briefings to Ministers and of any advice given to the WPA about the definition of ‘British’ for the purposes of the ex gratia scheme. I also posed a number of

specific questions and asked for some statistical information.

63. The Permanent Secretary replied on 14 July 2004. I acknowledge that the MOD took considerable care with the preparation and presentation of the documentary evidence, for which I am grateful. The reply dealt both with the questions I posed in my letter and those in the letter from my Office on 25 June 2003.

What my investigation has shown

The events giving rise to Professor Hayward’s complaint

64. When the Japanese invaded south-east Asia in the Second World War, they captured approximately 50,000 prisoners of war and a number of civilians. These internees were held in appalling conditions. The number of civilian internees is variously estimated at between 16,500 and 20,000. Many of these civilians were British subjects under the terms of the British Nationality and Status of Aliens Acts 1914 to 1943, the relevant legislation at the time. Section 1(1) of the Acts provided that any person born within His Majesty’s Dominions and allegiance was deemed to be a natural-born British subject. The definition of what constituted ‘British’ was therefore much wider then than it is today.

65. The circumstances of the interned British civilians also differed widely. Some had been born in the UK and had gone out to the Far East on colonial service or business with a view to retiring back in this country. Others belonged to old colonial families who had given generations of service to the British Empire overseas. Often, successive generations were born in British colonies, were educated in the UK, and later retired here. There were also those who were then British subjects by virtue of the fact that they had been born in a British colony, who had

had no close link with the UK itself or who had never visited this country, but who had since become nationals of other countries. But whatever the nature of their connection with the UK, they were subjected to the same deprivations, as well as to the same risk of brutality. It is estimated that about 1,000 died in captivity.

66. There was a change in the definition of British with the passing of the British Nationality Act 1948, and many former British internees at that time or thereafter became citizens of independent countries such as Australia, Canada and Pakistan. However, a bloodlink was not an essential criterion for determining British nationality. The law changed with the British Nationality Act 1981.

67. Modest payments of compensation for some of those who had been imprisoned or detained by the Japanese were made in the 1950s, following the ratification of the 1951 San Francisco peace treaty. £76.50 was paid to former prisoners of war (under article 16 of the treaty) and £48.50 was paid to civilians (following a decision by the British Government to use money received under the treaty in this way). The money came from the sale of Japanese assets.

68. However, a civilian did not qualify for the payment unless he or she had been a British national normally resident in the UK before internment who had since returned to take up residence in the UK and was over the age of 21 on 8 December 1941. Approximately 8,500 civilian internees received payments under this scheme. Professor Hayward was not aware of these payments and would not have qualified for one because he was not normally resident in the UK before he was interned and as he also did not meet the minimum age requirement at the relevant time.

The campaign for compensation

69. The British government continued to pursue the matter of additional compensation, but the position of the Japanese government remained that the issue of compensation had been settled under the 1951 treaty. Former British captives and their representative bodies also continued to pursue the matter with the government. The former prisoners of war were often represented by the Royal British Legion, and the former civilian internees by ABCIFER. I understand that Professor Hayward is not a member of ABCIFER but he has a sister who was a member. She, too, has lived in England for many years.

70. The issue of compensation – or of some form of recognition – for the suffering endured both by prisoners of war and by civilian internees of the Japanese became the subject of Parliamentary debate and public discussion, especially in the period after 1995 when the topic was the subject both of many adjournment debates in the House and also of questions to Ministers in both this Government and its predecessor. Key debates in the House of Commons were held on 10 May 1995, 4 December 1996, 29 April 1998, 9 March 2000 and 6 June 2000. In the first three debates, the campaign by ABCIFER for recognition of the position of civilian internees was specifically mentioned; in all the debates the wider question of compensation was discussed.

71. Following continued pressure from the Royal British Legion, the Prime Minister and Dr Moonie met its General Secretary on 10 April 2000. At the meeting, the Prime Minister undertook to look again at the question of compensation for prisoners of war. In the absence of any decision, on 28 September 2000 the Royal British Legion wrote to the Secretary of State for Defence to complain of delay in concluding the review and to threaten a mass lobby of MPs. Ministerial answers to parliamentary questions – for

example in response to John Cryer MP on 6 July 2000 – continued to report that the concerns of Members would be drawn to the relevant Minister’s attention as he was considering the matter.

72. On 25 October 2000, in response to a question in the House of Commons from David Winnick MP, the Prime Minister indicated that the review would be brought to a conclusion by 8 November 2000 in the pre-Budget process. The same day, the Prime Minister’s Office asked the Cabinet Office to convene an early meeting of interested departments with a view to providing advice to Ministers.

The development of the ex gratia scheme

73. The first meeting of a group of officials from interested departments took place two days later, on Friday 27 October 2000. The group’s terms of reference were to provide advice to Ministers by 1 November 2000 on the options for an ex gratia scheme. A Cabinet Office official chaired the meeting, which was attended by officials from the MOD, the DWP, the Foreign and Commonwealth Office, the Treasury and the Inland Revenue. Following the meeting, the Cabinet Office asked departments for contributions to a draft paper by 2pm on Monday 30 October 2000, with a view to discussion at a meeting of officials at 9am the following day.

74. The draft paper drawn up by officials offered Ministers four options, including resisting ex gratia payments, delaying a decision, and two variants of an ex gratia scheme. The first variant involved payments of £10,000 to former prisoners of war, former British civilian internees, former members of the Merchant Navy who were captured and imprisoned, and the surviving spouses of all three categories. The amount was chosen as being the same as that recently paid by the governments of Canada and the Isle of

Man. The second ex gratia option involved in addition the extension of the scheme to former prisoners of war in the European theatre.

75. An early draft of the paper stated that ABCIFER estimated that approximately 2,500 former civilian internees were still alive, to which the DWP added an estimate of 1,200 widows; this information was included in the final version of the paper.

76. In the course of exchanges between departments while the paper for Ministers was being put together, the DWP urged that any announcement about an ex gratia scheme should be couched in general terms because:

‘There has not been sufficient time to work up detailed entitlement criteria that can withstand challenge and criticism from MPs, the press and [former prisoners of war]’.

77. In addition, in a manuscript note to the Secretary of State for Defence on 30 October 2000, one of his Private Secretaries commented,

‘There is, on eligibility, a rather alarming degree of imprecision which, if we do not get it right will doubtless result in a raft of complaints and adverse stories in the media from those who do not qualify.’

78. A further parliamentary debate was held on 31 October 2000. In response to the debate, Dr Moonie said

‘The issue of further compensation for those held as prisoners of war in the far east during the second world war involves several Departments. Those Departments have been considering the question of an ex gratia payment...

‘I assure honourable Members that the case put forward for an ex gratia payment has been subjected to the most careful and sympathetic consideration during the past few months...

‘Work is currently in hand that will lead to an announcement being made soon...’

79. An agreed paper was submitted to Ministers on 2 November 2000. It described the option of resisting ex gratia payments as ‘politically difficult, given that expectations have been raised’. It described the option of deferring a decision as ‘politically difficult, if not impossible, for the same reason’. It went on to set out reasons why those who had been imprisoned and interned by the Japanese could be treated as a special case. It made no firm recommendation.

80. The paper considered the risks of a successful legal challenge from those excluded by whichever eligibility criteria were chosen and stressed the importance of defining such criteria carefully. It also raised the question of two groups of ex-servicemen – members of colonial forces and ‘certain members of the Indian Army and Burmese armed forces’ who might be potentially excluded from the scheme but who had been eligible under the 1951 scheme.

81. The paper suggested that if a scheme were adopted which included payments to civilians, it should extend ‘to surviving civilians **who are UK nationals** (my emphasis) and were interned by the Japanese in the Far East during the Second World War’. It noted that although it would be desirable to make any payments as quickly as possible, no payments could be made before the end of January 2001 if it were decided to make Regulations disregarding them for the purpose of benefits payments, as such Regulations would require Parliamentary approval.

82. The Private Secretary to the Secretary of State for Defence wrote to the Prime Minister’s office on 3 November 2000 to record ministerial support for the option, described as ‘a comprehensive ex gratia scheme’, that included former prisoners of war, merchant seamen, civilian internees and surviving spouses. In

relation to the position of certain members of colonial forces, the Indian Army and the Burmese armed forces, it was said that the Secretary of State believed ‘on balance, that if these groups were sufficiently associated with the UK in the 1950s to be included alongside UK service personnel, then the same should apply today’. This was subject to DSS agreement that such inclusion would not compromise the arrangements for war pensions. The letter also recorded that the MOD and DSS had agreed to a division of responsibilities in relation to the administration of the scheme.

83. On 6 November 2000, the Prime Minister agreed to the establishment of a non-statutory ex gratia payment scheme, to be administered by the WPA. It was also decided to make Regulations to ensure that no recipients lost eligibility for social security benefits merely because they received a payment under the scheme.

The announcement of the scheme

84. Dr Moonie announced the introduction of the scheme the following day in a statement in the House of Commons. He began by saying,

‘The review took some time to conduct because of the issues involved, but it has now been completed.’

85. He went on to say that a single ex gratia payment of £10,000 would be made

‘to each of the surviving members of the British groups who were held prisoner by the Japanese during the Second World War, in recognition of the unique circumstances of their captivity’.

86. As regards eligibility, the Minister said:

‘Those who will be entitled to receive the payments are former members of Her Majesty’s armed forces who were made prisoners of war, former members of the Merchant Navy who

were captured and imprisoned, and **British civilians** (my emphasis) who were interned. Certain other former military personnel in the colonial forces, the Indian Army and the Burmese armed forces who received compensation in the 1950s under United Kingdom auspices will also be eligible. As I said earlier, in cases in which the person who would have been entitled to the payment has died, the surviving spouse will be entitled to receive it instead’.

87. The ministerial statement concluded with the following words:

‘The government recognise that many **UK citizens** (my emphasis), both those serving in the armed forces and civilians, have had to endure great hardship at different times and in different circumstances, but the experience of those who went into captivity in the Far East during the Second World War was unique. We have said before that we believe the country owes a debt of honour to them. I hope that I am speaking for everyone here when I say that today something concrete has been done to recognise that debt.’

Events subsequent to the announcement of the ex gratia scheme

88. After the announcement of the ex gratia scheme in Parliament on 7 November 2000, the WPA published a leaflet entitled ‘Ex gratia payment for British groups who were held prisoner by the Japanese during World War Two: Notes for Guidance’. The leaflet identified five categories of persons who were entitled to make a claim for payment, one of which was ‘surviving British civilians who were interned by the Japanese in the Far East during the Second World War’. Claims had to be made on a special form which contained the following words: ‘You may be eligible for the ex gratia award if you are a surviving British civilian who was interned by the Japanese in the Far East during the Second World War’. There was no reference in the form to any

requirement for the applicant (or a parent or grandparent) to have been born in the United Kingdom.

89. In commenting on an earlier draft of the WPA leaflet, an official had, in an unsigned manuscript note on a fax dated 6 November 2000, suggested the removal of the phrase ‘UK citizens’ from the publicity because it was:

‘clear that we’re dealing with payments to “surviving members of British groups” so that should suffice. We can interpret “British” as we want!’

90. On 10 November 2000, an official in the MOD wrote to a number of officials in the MOD, DSS and the Foreign and Commonwealth Office to clarify a ‘misunderstanding’ about the Ministerial announcement. This related to the position of certain members of the colonial and Burmese forces and those of the Indian Army who it had been announced would be eligible for the scheme. The official said that ‘only those who received compensation in the 1950s under UK auspices are eligible [for the current scheme]. This last group... de facto covers only “Europeans”’.

91. On 15 November 2000, the WPA met bodies representing those imprisoned or interned, including ABCIFER. A number of issues concerning eligibility were raised, including nationality, where the issue was described as ‘what constituted “British” and what is the impact of any change in nationality since imprisonment’. After the meeting, the DWP confirmed to ABCIFER that a change of citizenship subsequent to internment would not have an impact on eligibility for an ex gratia payment.

92. The group of officials met again on 22 November 2000, when it decided that UK nationals should be defined as ‘those civilian internees who were British at the time of their

incarceration; those who became British citizens only subsequently would not be eligible for payment'. There was no other discussion of the definition of 'British' for the purpose of the scheme and it was agreed that there would be no further meeting of the group unless the need arose.

93. In a minute to the Cabinet Office dated 15 December 2000, a DSS official wrote to 'place on record our intentions regarding the interpretation of "British" in relation to civilian internees'. He recognised that 'nowhere do we define what we mean by "British"' and noted the definition of UK national that had been agreed at the meeting of officials on 22 November 2000. Before asking for views on the contents of the note, he said:

'In many cases, claimants will have been born in the UK, worked in Malaysia for example for a few years, imprisoned by the Japanese, returned to the UK on release and lived here ever since. Their "Britishness" is not in doubt. However, claims are being received from people who were children or young adults when captured by the Japanese. Some of these people, although "British subjects", would not have been born in the UK but would reasonably consider themselves to have very strong links with this country in view of the birthplace of, for example, their parents... We intend making ex gratia awards in these circumstances.'

94. Another issue raised in the note was whether payments should be made to qualifying British civilians who were resident overseas, and, on 29 December 2000, the Cabinet Office agreed that such payments should be made provided the Treasury gave its authorisation.

95. On 12 January 2001, the WPA reported that it was encountering some problems dealing with claims from former civilian internees who had not received payments of compensation in the

1950s, but the WPA said it was working with ABCIFER to resolve these problems. On 25 January 2001, it reported that the number of claims of all kinds was likely to exceed the original estimate, although it was not in a position to estimate by how much.

96. On 1 February 2001, Parliament approved new Social Security Regulations which enabled the payments to be disregarded for the purposes of means-tested eligibility for social security benefits. The WPA immediately paid some 14,000 claims. In the case of former prisoners of war, it made payments based on its records of military prisoners of war. In the case of applications from civilians, it made payment on receipt of proof that the applicant had received compensation in the 1950s. In the press notice announcing the payments, the WPA again referred to 'British civilians who were interned' as being eligible for payment, without further qualification.

Further discussions about eligibility

97. A further meeting of the group of officials was arranged for 13 February 2001, presumably because of the need to resolve the issues identified by the WPA. The day before the meeting, the WPA circulated a paper dealing with a number of these issues, including the definition of British for the purpose of the ex gratia scheme. It noted that there were difficulties in obtaining records about civilian internee applicants who had not received compensation in the 1950s, and concluded: 'we therefore need to establish appropriate guidelines on the question of nationality.'

98. I understand that there are no minutes of the meeting on 13 February 2001, but following the meeting the WPA wrote to the Cabinet Office to note that it had agreed to write to suggest an approach to nationality. That suggested was that:

‘for the purposes of this scheme the definition of ‘Britishness’ is defined as either being born in the British Isles or being born of one or more parents who were themselves born in the British Isles... We would not propose to add any further qualifying criteria such as return to the British Isles.’

99. However, later the same day the WPA submitted a further paper prepared by the DWP suggesting that the criteria be extended to include civilian claimants who had a grandparent who was born in the British Isles. It was argued that this would bring the ex gratia scheme into line with what was being proposed for the non-statutory war pensions scheme for former civilian internees.

100. On 21 February 2001, the Cabinet Office sent out a note asking Cabinet Office, MOD and DWP lawyers to ‘get their heads together’ and work through the options for defining the nationality criteria for civilian internees. DWP officials consulted their own lawyers, and one said in reply: ‘I am puzzled as to why we are uncertain now as to the meaning of ‘British’ for the purposes of the policy announced in November last year’. She went on to stress that ‘in terms of risk of challenge to the scheme, the key is to ensure that “British” is based on the legislation at the time’. DWP lawyers subsequently consulted a legal adviser in the Cabinet Office and Central Advisory Division of the Treasury Solicitor’s office (CAD).

101. On 8 March 2001, the Chairman of ABCIFER wrote to the WPA to say that some of his members were asking why they had not received payments while others had already been paid. He noted that staff of the WPA had indicated that verification of nationality was a problem. He explained that some former civilian internees who had not been born in the UK were feeling that some form of discrimination existed: he

stressed that this was a sensitive area that required early action before it caused more distress. He went on:

‘I believe you may be trying to get clarification of nationality questions from the policy makers so that you can progress blocks of claims rather than ask individuals for proof which they may find difficulty in obtaining. This sounds sensible, but it does not deal with the growing concerns of people some of whom are elderly and who have heard nothing further from you since the initial acknowledgement of their claim.’

102. The Chairman of ABCIFER went on to suggest that the WPA might write to those affected to inform them of the position and to ask them to provide evidence of nationality where it existed.

103. The Cabinet Office and CAD legal adviser replied to DWP lawyers on the question of nationality on 13 March 2001, proposing criteria based on the British Nationality Act 1981. Based on this advice, the DWP wrote to the Cabinet Office on 15 March 2001 to propose again that payment should be made to former civilian internees who could show that they had a parent or grandparent who was born in the UK (the ‘bloodlink criterion’). The writer drew an analogy with the non-statutory war pensions scheme for civilians and said; ‘this is a proposal which I am reasonably confident would be acceptable to ABCIFER.’

104. On 21 March 2001, the Cabinet Office said it had no difficulty with the DWP proposal, subject to DWP legal advisers being content. I have seen no evidence of any further correspondence on the matter.

The eligibility questionnaire and ABCIFER concerns

105. As a consequence of this decision, the WPA wrote to former civilian internees whose claims were still being considered, sending them a

questionnaire asking for additional information to ‘assist us to confirm eligibility within the entitlement criteria set’. The WPA asked for details of the claimant’s parents and grandparents, including place of birth. One of the recipients of this letter was Professor Hayward, who returned the questionnaire to the WPA on 28 March 2001.

106. This questionnaire produced a further letter to the WPA from the Chairman of ABCIFER, who noted that the letter to claimants appeared to be seeking to identify ‘a bloodlink of claimants to the UK not apparent from the original claims submitted’. He said that this had caused concern and distress to a number of ABCIFER members who were unable to provide the information requested, but who were regarded as British by the Japanese and interned as such. He went on:

‘At the time of the 7 November [2000] announcement of the ex gratia [scheme], it was not possible to foresee every aspect which might arise in dealing with claims. But the underlying theme was to recognise the unique experience and suffering of British nationals at the hands of the Japanese, and we look to the continuation of a generous interpretation of this intent.’

107. The Chairman of ABCIFER wrote to the WPA again on 9 April 2001 to say that a number of the Association’s members would not meet the criteria of having a parent or grandparent born in the UK. He urged that the criteria for eligibility should not lead to ‘discrimination between British nationals’. Nine days later he submitted a paper dealing with the eligibility of former civilian internees. In referring to those who did not satisfy the birth criteria, the paper distinguished between two categories, those who had settled in the UK immediately or shortly after the war, and those who had not done so.

108. In relation to the claimants who had settled in the UK after the war, the ABCIFER paper

argued that payment of their claims would not create a precedent for others who claimed to have been British subjects but who were overseas. It argued that the rejection of their claim by the UK would mean that they had no other country to turn to for recognition of their suffering and loss. ABCIFER acknowledged that the claims of those who had not settled in the UK after the war might have to be assessed on a different basis, including how strongly and consistently they had demonstrated their claim to be British. The paper concluded as follows:

‘It appears that the intention of the British government in granting recognition of suffering by means of the ex gratia [scheme] was to be generous. The interpretation of British nationality will be the test of the extent of the generosity of the government’s ex gratia [scheme]. It is a sensitive area for those affected and will be regarded as discriminatory by those excluded. This point is now being made and is causing distress. Decisions which impose a cut-off point are by their nature discriminatory. It should be said that the Japanese did not discriminate when interning them, together with those for whom a bloodline link to the UK now assumes importance, and that their action would have been based on what was accepted as “British at the time”’.

109. The WPA also began to have concerns about the practical effect of the proposed criteria, and, on 10 April 2001, its then Acting Chief Executive wrote to the Cabinet Office to voice his concerns. His letter included the following:

‘When [DWP sent their note of 15 March 2001] the expectation was that the proposed definition of eligibility would allow the bulk of outstanding cases to be paid. It now appears that if we apply the eligibility criteria we will be left with some 800 which do not qualify.

Not only will this result in a much larger number of rejections than expected but the individual

circumstances of many of these cases will be hard to defend. Many of the individuals, now “fully naturalised British citizens” have lived in the UK for over 50 years and would be deemed by the general public to be wholly “British”. Most importantly for presentational purposes, they were interned solely because the Japanese deemed them to be British.’

‘Despite previous concerns at expansion of the eligibility we are now firmly of the belief that the evidence of individual cases suggests that the present stance will be impossible to defend on grounds of fairness and logic. It does not seem that the rejection of these cases will be in keeping with the original intent and spirit of the scheme. I have a real concern that rejecting claims on the current “nationality” criteria could very quickly put the whole scheme into prominence as a “bad news” story.’

110. The WPA went on to call for an urgent meeting of the group of officials. It also continued to liaise with ABCIFER in relation to claims from former civilian internees. According to a note of a meeting with ABCIFER on 24 April 2001, the WPA agreed to make a submission to the Government about ‘other categories of Nationality for instance returning to live in the UK or working in an official capacity for the UK Government.’

111. Following this meeting, the WPA submitted a paper to the Cabinet Office on 4 May 2001 about ‘the need for extension of criteria’. The papers divided applications from former civilian internees into five categories, one of which was:

‘Neither applicant nor parent/grandparent born in the UK but applicant is now a “British citizen” (which we assume is defined as holding/entitled to a British passport) and is “permanently” resident in the UK.’

112. In relation to this category, the WPA said:

‘There are people within this category who underwent considerable suffering and who “the man in the street” would consider to be wholly British. It may therefore be deemed appropriate to introduce further criteria of eligibility that would allow payment to this group.’

113. In an internal note dated 9 May 2001, a MOD official expressed reservations about this proposal on the ground that it could extend eligibility to the members of the former Indian Army. The writer recognised that such claimants would be ruled out on other grounds (i.e. because they were not members of the British armed forces when imprisoned by the Japanese) but commented that ‘the man in the street’ might consider at least the Gurkhas ‘British’.

The working group meets again

114. There was a further meeting of the group of officials on 21 May 2001. Once again, there are no minutes, but following the meeting the Cabinet Office wrote to those who had attended to record the main points to emerge. In respect of the definition of British civilians, the letter said:

‘This had been defined subsequently as those British subjects who had been born in the UK, or whose parents or grandparents had been born here. There had never been any intention on the part of Ministers to open up the scheme to anyone without a direct link to the UK. It was agreed therefore that it would not be appropriate to extend the scheme to those internees who subsequently settled in the UK or who were British citizens abroad.’

115. On 8 June 2001, responsibility for the WPA passed to the MOD and it was renamed the Veterans Agency.

116. On 12 June 2001, MOD officials put a submission to Dr Moonie inviting him to ‘note’ the definition of British being used for the

purposes of the ex gratia scheme. The submission contained the following statement:

‘Many have applied who could have been defined as British subjects during the war or have since settled here and become British citizens but it was never the intention of the scheme to include those who have no close connection by birth with the United Kingdom.’

117. I am told that, following receipt of this note, the Minister asked for further information and MOD commissioned further briefing from the Veterans Agency in order to provide this information. The following day, the Veterans Agency sent the MOD a note describing the circumstances of some ten civilian claimants whose claims stood to be refused. The note ended:

‘You will see from the above that the contrast is as wide as a current British citizen not being paid against a lifetime foreign national receiving payment. Any line drawn in the sand will disentitle some applicants; however it is right that we should be aware of the potentially embarrassing contradictions arising out of the current definition. These could be exploited by the press and the fact that, in the eyes of the public, we are denying those who they perceive to be British, in favour of those they may consider are not.’

118. A second submission, based in part on the further information provided by the Veterans Agency, was made to the Minister on 14 June 2001. It provided an excellent summary of the background, and enclosed details of the ten cases identified by the Veterans Agency before recommending that the criteria should remain unchanged. The Minister’s decision is recorded in a note dated 19 June 2001. It noted that the Minister recognised that the decision was contentious, and would probably attract criticism, but;

‘It is accepted that the term “British” needed further clarification, and that this measure has been adopted to avert the potential abuse of the ex gratia payment scheme.’

The rejection of claims

119. The Veterans Agency wrote to a number of former British civilian internees on 25 June 2001 to reject their claims for compensation on the ground that they were not (or did not have a parent or grandparent who had been) born in the UK. As I noted above, one of these claimants was Professor Hayward.

120. Dr Moonie replied on 11 July 2001 to a question from Sir Nicholas Winterton MP, who had asked what changes had been made to the definition of ‘British’ when applied to civilians for the purposes of the ex gratia payments. The reply was as follows;

‘The ex gratia payment announced on 7 November 2000 is being made to the various British groups who had been held prisoner by the Japanese during the Second World War. The eligibility criterion for civilian claimants has recently been clarified, but there has been no change in the intended scope of the scheme. British subjects whom the Japanese interned and who were born in the United Kingdom, or had a parent or grandparent born here, are eligible for the payment’.

121. The Minister’s Assistant Private Secretary wrote to the Chairman of ABCIFER about this announcement on 20 July 2001. The letter included the following:

‘On the matter of the definition of “British”, I should point out that we have not changed the definition: no definition was given by the Minister in Parliament on 7 November, nor, I believe, was one set out by officials at your meeting with the WPA later the same month.

The definition set out recently has been issued to provide necessary clarification of the meaning of the term “British” in the context of civilian claimants under the scheme. The government’s intention has always been that the eligibility for this group should be dependent on a direct link to the United Kingdom at the time of captivity by birth or by parentage.’

ABCIFER’S application for judicial review

122. Following this announcement, ABCIFER made an application for judicial review of the legality of the decision to introduce the bloodlink criterion.

123. Mr Justice Scott Baker rejected the application on 18 October 2002. His judgment included the following words:

‘It is a great pity that the government’s intention as to those who should qualify for the payment was not expressed at the time with greater clarity. The hopes of a significant number who were interned by the Japanese have been raised only to be dashed, and considerable distress has been caused as a result. I can well understand the feeling of those who were “British enough to be interned but not British enough to receive the payment”. This is of particular poignancy when seen in the context that the payment was not expressed as compensation but as recognition of a debt of honour owned by this country to the British people who were detained by the Japanese during the Second World War. The question is not, however, whether the decision to define British as requiring birth in this country or a blood link with it is unjust but whether it is **unlawful**’ (my emphasis).

124. The case went to the Court of Appeal and a hearing took place on 17 and 18 March 2003. The Court handed down its judgment on 3 April 2003. It concluded as follows:

‘Naturally, we feel very great sympathy for all those who suffered appalling ill-treatment at the hands of the Japanese during their captivity. We also well understand that many civilians had their hopes of receiving compensation raised by Dr Moonie’s announcement of 7 November 2000, and that they have been extremely disappointed, and indeed angered, by what they see as a subsequent and unfair change of heart on the part of the Government. But anyone who seeks to challenge as unlawful the content of a non-statutory *ex gratia* compensation scheme faces an uphill struggle. We do not think that the introduction of this scheme was well handled by the Government. But for the reasons that we have given, the applicant has failed to satisfy us that the scheme was unlawful. The appeal must therefore be dismissed’.

125. The Court thus rejected contentions made on behalf of ABCIFER that the introduction of the bloodlink criterion was unlawful. However, in giving its reasons, the Court made a number of criticisms. It concluded that the Minister’s announcement of 7 November 2000 had been ‘less clear than it should have been’. It also concluded that there had ‘been nothing [in the announcement] to suggest that the Government was intending to introduce a qualification which would exclude a significant number of persons who would otherwise be eligible to receive payment’.

126. However, having made these criticisms, the Court went on to conclude:

‘anyone reading the announcement and the specimen claim form carefully should have realised that the scheme did not, or might not, entitle all those who were British subjects at the time of their internment to compensation without qualification’.

127. The Court also stated that:

‘Despite the fact that, unwisely, Dr Moonie said [in his announcement of 7 November 2000] that the review had been completed, it was apparent that the details had still to be worked out’.

Further criticism of the scheme

128. Subsequent to the judgment of the Court of Appeal, Members of Parliament and ABCIFER continued to press the MOD to change its position in relation to the bloodlink criterion in the light of the injustice they felt was being inflicted on those civilian internees who were thereby excluded from receiving the ex gratia payments. The MOD told both MPs and ABCIFER that there was no question of acceding to this request as the courts had determined that the MOD had acted legally. At the time of writing, that continued to be the Government’s public position.

The courts and my role

129. I accept that the MOD did not act unlawfully insofar as the matters considered in the ABCIFER proceedings are concerned. I note that other proceedings found the scheme to be unlawful in relation to its treatment of certain military internees, although those proceedings are not relevant to the subject matter of this report. I am also aware of other legal proceedings related to the treatment of civilian applicants – primarily related to whether the scheme is unlawful on the grounds of racial discrimination – on which the High Court has just passed judgment.

130. As I understand it, that judgment finds that the bloodlink criterion constitutes unlawful indirect racial discrimination for which no justification exists; and that the MOD is in breach of its general race equality duty. Other contentions as to the legality of the scheme were dismissed by the court. I do not know whether this judgment will be the subject of appeal.

131. Questions of legality are for the courts to decide and I do not seek to question or comment on their findings. It is questions of maladministration which are for me to decide.

132. In relation to my role and that of the formal legal process, the courts have elsewhere held that, although there is a substantial element of overlap between maladministration and unlawful conduct, these concepts are not synonymous. There is no reason in principle why the considerations which determine whether there has been maladministration should, necessarily, be the same as those which determine whether conduct had been unlawful.

133. There is therefore no reason why, when exercising my power to investigate and report on complaints of maladministration, that I should necessarily be constrained by the legal principles which would be applicable if I were carrying out the different task (for which I have no mandate) of determining whether conduct has been lawful.

134. My findings which follow are thus confined to determining whether the MOD acted with maladministration (falling short of unlawfulness).

Findings

135. I now turn to an assessment of the facts set out above which have been disclosed by my investigation. Before doing so, I will set out my understanding of the effect of the adoption of the eligibility criterion.

The effect of the bloodlink criterion

136. In the paper of 2 November 2000, the group of officials estimated that there would be a total of about 16,700 claims under the ex gratia scheme, including about 3,700 claims from former civilian internees or their surviving spouses. In response to my enquiries, the MOD informed me that, as at 28 June 2004, a total of 29,094 claims had been received, of which 23,852

have been paid. By 10 February 2005, the number of claims received had risen to 29,288 and 23,963 payments had been made. These figures are considerably in excess of the original estimate.

137. The MOD also informed me that 3,650 claims had been received from former civilian internees (excluding spouses) by 28 June 2004. By 10 February 2005, this had increased to 3,664. Again, these figures are significantly in excess of the original estimate which, in that case, was provided by ABCIFER. The MOD was unable to provide a figure for the number of claims from surviving spouses of former civilian internees. They explained that the figure could only be obtained by examining all of the claims from spouses of all categories of claimant, which had totalled over 15,000.

138. I asked the MOD for the total number of claims from former civilian internees that were rejected solely on the ground that the claimant was not born (or did not have a parent or grandparent born) in the UK. The MOD was unable to provide an exact figure, but they told me that some relevant figures had been extracted and given in an answer to a Parliamentary Question on 8 April 2003. That answer had stated that approximately 800 claims from former civilian internees, including surviving spouses, with addresses abroad had been rejected on the 'bloodlink' criterion. Approximately 300 claims from former civilian internees, including spouses, with United Kingdom addresses, were rejected on the 'bloodlink' criterion. The MOD also pointed out that some of these claims might have failed on other grounds.

139. I also asked the MOD how many claims from former civilian internees had been paid by virtue of the fact that the claimant had received compensation in the 1950s, and how many of that total were not (or did not have a parent or

grandparent) born in the UK. The MOD was unable to provide figures, but told me that, from the memory of those involved, the number in the latter category was 'minimal'.

140. I am aware that ABCIFER and others believe that the scheme was operated in such a way as to lead to the inconsistent treatment of those whose applications were determined prior to and following the introduction of the bloodlink criterion. As I have said above, the allegations made by ABCIFER are not evidence on which I have relied and they are not material to my findings which follow.

141. The MOD says that, without sight of individual cases provided by ABCIFER or others where it is alleged that inconsistencies in payments under the scheme occurred, it is unable to comment on or respond to such allegations. That may be the case, but the question for me, in the light of the inability of the MOD to provide the information I requested above, is that there is little evidence through which to ascertain exactly how the scheme was operated prior to the introduction of the bloodlink criterion to assist me to determine whether it was operated without maladministration. I note also that the MOD has also been unable to provide information about the categories of applicant to whom payments were made during the early operation of the scheme.

The questions I have asked

142. In assessing the evidence uncovered by my investigation in the context of my statutory remit, I have considered two questions: first, did the actions of the MOD in relation to the development, announcement and operation of the scheme constitute maladministration? Secondly, if so, did that maladministration cause an unremedied injustice to Professor Hayward and to others like him?

Maladministration

143. In relation to the first question, I have considered three aspects of the events described above. First, whether the way in which the scheme was devised was in accordance with good administrative practice. Secondly, whether the manner in which the scheme was announced was satisfactory. Finally, whether the operation of the scheme, including the introduction of the bloodlink criterion, constituted maladministration.

144. In relation to the final question, I have considered the fairness of the bloodlink criterion and four elements of the operation of the scheme: the first payments made under the scheme; the equal treatment of applicants; whether applicants were properly informed of the clarified scheme eligibility criteria; and responses to criticism of the scheme.

The origination of the scheme

145. Did the manner in which the ex gratia scheme was developed constitute maladministration? I consider that it did.

146. As explained above, the issue of whether to make an ex gratia payment to the different groups of British people interned by the Japanese had been a matter of Parliamentary debate for at least five years prior to the eventual announcement of the scheme in November 2000. The wider issues had been the subject of public campaigns for much longer.

147. The Prime Minister had agreed to consider the question of compensation for former prisoners of war on 10 April 2000. It is therefore surprising that officials were only asked to draw up options – for making a decision on whether such a scheme was appropriate and, if so, what the conditions of eligibility should be – on 25 October 2000. This was only two weeks prior to the eventual announcement of the scheme and this occurred on the same day as the Prime Minister informed the House of the Government's impending decision.

148. I am also concerned that officials were given only a few days to complete their task – one that, it should be remembered, on the Government's own admission required decisions on sensitive issues that involved many Departments and entailed a departure from the policy pursued by previous administrations.

149. The Cabinet Office was asked to convene a meeting of interested Departments on Wednesday 25 October 2000. The first meeting of the resulting working party was held on Friday 27 October 2000. Departments were asked to produce contributions to a draft paper, for submission to Ministers, by 2pm on Monday 30 October 2000 – effectively one working day (or three calendar days) after the initial discussion by the working party. The paper and a covering note were finalised on Thursday 2 November 2000 and Ministers agreed the scheme on Monday 6 November 2000, one day prior to the Parliamentary announcement.

150. I make no criticism of the officials involved in drawing up the paper, who had to work quickly within the timetable imposed on them. But it should have been apparent that drawing up an ex gratia scheme in such a short space of time gave no opportunity for the details to be worked out properly and that this inevitably would lead to a lack of clarity.

151. I accept that, on some occasions, policy decisions and the administrative schemes to implement them need to be taken and devised in very short timescales due to special circumstances such as emergencies. However, that does not appear to me to have been the case here.

The announcement of the scheme

152. The result was that the scheme was announced to Parliament before all of the implications of the eligibility criteria had been thought through. I note that the Court of Appeal

said that it was ‘unwise’ for the Minister to say that the review had been completed when it ‘was apparent that the details still had to be worked out’; and that it was ‘unfortunate that he did not articulate what had been finally determined and what still remained to be worked out’ which gave rise to ‘scope for misunderstanding’.

153. The Ministerial announcement gave rise to a number of problems, including:

- that a misleading impression was given to prospective applicants by the terms of the announcement that the review – and thus the terms of the scheme including the eligibility criteria for it – had been completed. That was not the case;
- that the reference to the review having taken time to conduct carried the misleading implication that the scheme had been worked out over some time and that eligibility for an ex gratia payment would be based on the terms of the announcement, which had made no mention of the requirement for a bloodlink to the UK. This also was not the case; and
- that, by referring to ‘British groups that were held prisoner by the Japanese’ as being eligible for the scheme ‘in recognition of the unique circumstances of their collective captivity’, and also by reference within the same statement to ‘UK citizens’ and to ‘British civilians’, the Minister did not make any reference to the need to demonstrate any other link with the UK, whether by bloodlink or otherwise. This did not accurately describe the position. One can be, like Professor Hayward, currently a citizen of the UK and have been interned as a ‘British civilian’ by the Japanese during the war but still have no bloodlink to the UK.

154. The Courts have determined that the form and content of the announcement made by the

Minister in the House of Commons on 7 November 2000 did not in itself lead to a situation in which those later refused payment (because of the introduction of the bloodlink criterion) were frustrated in a legitimate expectation. The Courts so concluded because the statement was sufficiently imprecise so as not to constitute ‘a clear and unequivocal representation’.

155. However, in my view, it is precisely that lack of clarity which represents such a significant departure from standards of good administration to the extent that it constitutes maladministration. As an official in the Secretary of State’s Private Office recognised, there was an ‘alarming degree of imprecision’.

156. As the Court of Appeal stated in its judgment, the Ministerial announcement ‘was less clear than it should have been’ and ‘many civilians had their hopes of compensation raised by Dr Moonie’s announcement’ only to be ‘extremely disappointed, and indeed angered’. This echoed the High Court’s view that ‘it is a great pity that the government’s intention as to who should qualify for payment was not expressed at the time with greater clarity’.

157. I recognise the good intentions of Ministers and officials but I criticise the lack of clarity with which the announcement was made and the misleading impression that it created. In my view, this constituted maladministration.

158. The misleading impression was compounded by the later DSS press release, issued on 1 February 2001, which referred to ‘British civilians who were interned’ as being eligible for payment without further qualification. A press notice using similar language was issued by the Scotland Office the following day; this also said that payments had been made to 1,092 people living in Scotland – 443 former prisoners of war and 649 widows.

159. Good administration of extra-statutory schemes requires clearly articulated entitlement criteria to ensure that those potentially covered by the scheme are not put to unnecessary distress or inconvenience by uncertainty or conflicting information. Such a need is all the more essential when the relevant issues are sensitive, as is clearly the case here.

The fairness of the bloodlink criterion

160. Some of the explanations that I have seen in official papers of the rationale for the need to clarify the eligibility criteria or surrounding the discussions about why scheme eligibility could not be widened beyond the bloodlink criterion do not appear to me to be persuasive. For example, it is unclear to me why the bloodlink criterion would be necessary to discourage applications from members of the Indian Army, as that criterion was to apply only to civilian applications. However, the decision to introduce the bloodlink criterion was a discretionary decision that the Government was entitled to take.

161. Whatever the rationale for the introduction of the bloodlink criterion, I would echo the view of the DWP lawyer, who was ‘puzzled’ as to why ‘the meaning of “British”’ was discussed for the first time several months after the scheme was announced and some weeks after the first payments were made under it.

162. The then Acting Chief Executive of the WPA considered that the decision to introduce the bloodlink criterion was ‘impossible to defend on grounds of fairness and logic’. However, the courts addressed the question of whether the bloodlink criterion – that to be eligible a surviving internee had to be born in the UK or had to have a parent or grandparent born in the UK – was irrational or in some other way unlawful. The courts have also now considered whether the scheme breached race

discrimination legislation. The most recent judgment may be subject to appeal.

163. In the circumstances, it is not for me to address the aspect of the complaints I have received which relates to the fairness of the specific criterion. I will go no further than to say that it is perhaps surprising that this particular criterion was chosen as being the means to repay ‘a debt of honour’ to those interned as British civilians by the Japanese. And that, to echo the judgment of the High Court, I have great sympathy ‘for those who were British enough to be interned by the Japanese in the second world war because they were British citizens at the time... but do not have a sufficient blood link connection to qualify for an ex gratia payment under the scheme’.

164. My role in these matters is limited to determining whether the administrative acts of the MOD in operating the scheme constituted maladministration. I now turn to consider aspects of the operation of the scheme.

The operation of the scheme – the first payments under the scheme

165. The scheme was, as explained above, announced to Parliament on 7 November 2000. In the press statement issued on 1 February 2001, the Minister then responsible for the WPA announced that over 14,000 payments would be made to applicants to the scheme. The press release congratulated WPA staff for having done ‘a brilliant job contacting [potential applicants] and processing their claims in just over two months’.

166. It appears that these payments were based to a significant extent on evidence of payment of compensation under the 1951 scheme. However, as it was later recognised in official correspondence – including in a minute dated 25 May 2001 from the WPA to the Cabinet Office – eligibility for payments under the 1951 scheme

had been widened during the 1950s to include persons who had been married to British citizens, wherever the spouse had been born. There was therefore in early 2001 no way of knowing without detailed scrutiny of all of the papers in each case whether a recipient under the 1951 scheme had a bloodlink to the UK for the purpose of making payments under the current scheme.

167. Furthermore, eligibility for the 1951 scheme was based on being a British national normally resident in the UK prior to internment who had also returned to live in the UK after the war. However, under the legislation then in force, being a **'British national'** at that time and being **resident** in the UK (both prior to the outbreak of the war and after its end) could not in itself determine whether that person had a **bloodlink** to the UK.

168. Thus eligibility for the 1951 scheme was, without a full review of each case, an insufficient basis on which to assess whether an applicant had a bloodlink to the UK, although the MOD has recently told me that it was possible to ascertain the place of birth of recipients of compensation in the 1950s through scrutiny of their individual records.

169. The MOD also recently drew my attention to the note of 15 December 2000, which set out a proposed way to deal with applicants who had been children or young adults when they were interned.

170. However, I have seen nothing to persuade me that such a proposal was consistently applied as a bloodlink criterion in relation to all applicants at that time. It may have been the case – in the absence of evidence I do not know – that applications from former child internees in the position described in the note were approved and paid prior to the introduction of the bloodlink. However, that (and the other

content of the note) does not assist me to determine the policy applied to other applicants – such as those who received compensation under the 1951 scheme but who had no bloodlink to the UK or those who were surviving spouses of civilian internees without such a link.

171. Neither am I persuaded that any check would have been made to establish whether every civilian internee claimant who had received compensation under the 1951 scheme was born (or had a parent or grandparent who had been born) in this country because, at the time that the first applications to the current scheme were considered, such a requirement did not exist.

172. The first time that officials were asked to discuss and define what constituted 'British' for the purposes of the scheme was on 21 February 2001 – approximately three weeks **after** the first payments had been made – although it appears that it had been agreed that such a definition was necessary at a meeting on 13 February 2001. The bloodlink criterion, however, was not agreed in correspondence among officials until approximately 21 March 2001, this decision was not confirmed until a meeting of officials in May 2001, Ministers were not consulted about the decision until 12 June 2001, and the criterion was not made public until 11 July 2001.

173. Those determining the first batch of claims would therefore have done so without knowledge of the information that they would later need to acquire in order to apply the bloodlink criterion – at the time those applications were determined, that criterion had not even been discussed, let alone been agreed.

174. I am also not persuaded by the MOD's reliance on the note of 15 December 2000 as demonstrating that early applications were determined in accordance with what later became known as the bloodlink criterion.

175. Its recent position does not appear to sit easily with:

- the WPA request for clarification of the nationality criterion almost two months after the note was written, on the day prior to the meeting on 13 February 2001. The WPA said that there was (my emphasis) a ‘need to establish appropriate guidelines on the question of nationality’ to assist them to determine civilian applications. This would appear to suggest that they were at that time not sure how to determine the ‘British’ question and that no guidelines existed to assist them to do so; or
- the DWP lawyer’s advice in February 2001 that ‘British’ should be based on the legislation at the relevant time (i.e. in the 1940s) – again, citizenship under that law was not consistent with the bloodlink criterion. As legal advice was at that time being sought and given to inform the development of an agreed definition of what constituted ‘British’, this would not appear to suggest that such an agreed definition was already in place.

176. If things were settled in mid-December 2000, as the MOD’s recent submission appears to argue, I am puzzled as to why either of the above should have happened.

177. But most significantly in my view, the MOD’s recent explanation appears to be inconsistent with their contemporaneous explanations of the rationale for the introduction of the criterion.

178. As I have noted above, in agreeing the bloodlink criterion in June 2001, Dr Moonie was reported to have said that it had been ‘adopted to avert the potential abuse of the ex gratia payment scheme’. When later announcing the clarification in Parliament, the Minister also referred to the criteria having been clarified ‘recently’.

179. Nor would the Government’s recent explanation seem consistent with the statement in July 2001 by an official in the Secretary of State’s Private Office, also referred to above, that ‘no definition was given by the Minister on 7 November [2000], nor, I believe, was one set out by officials’ (at their meeting with ABCIFER and others later that month). In that statement, the official continued (my emphasis):

‘the definition set out **recently** has been issued to provide clarification of the meaning of the term “British” in the context of civilian claimants under the scheme’.

180. Albeit that the MOD position is not persuasive, I do not consider that the facts as to what policy was applied prior to the introduction of the bloodlink criterion are wholly clear. These could only be clarified by a thorough review of the early operation of the scheme.

181. Similarly, the events surrounding the payment of the first claims in February 2001 could only be properly established through such a review.

182. As noted above, in that batch 14,000 payments were made. The Government has only been able to provide aggregate information about the particular status of the people to whom payments were made at that time, although we know at least that 649 payments were made to widows resident in Scotland.

183. It is reasonable to assume that payments to surviving spouses were among those made in February 2001 to people not resident in Scotland. Many of these payments (both in Scotland and elsewhere) would have been made in respect of their deceased spouse’s internment as a prisoner of war and therefore the bloodlink criterion would have been immaterial.

184. That said, if **any** of the first batch of payments were made to the surviving spouses of civilian internees, such payments would have been made on the basis of an application form that did not ask for the information required to apply the bloodlink criterion or on the basis of eligibility for compensation under the 1951 scheme, which also would not in itself have provided sufficient information. They would also have been determined, as I have shown above, at a time when the relevant criterion had not yet been discussed.

185. The MOD has not been able to provide me with evidence to assist me to establish what did occur. That is of concern to me.

186. I would expect a system designed in accordance with principles of good administration to be transparent, to produce consistent outcomes and not to be designed in such a way as to produce inconsistent outcomes. That this is the case should also be demonstrable.

187. I recognise that the existence of administrative errors does not necessarily render a scheme unlawful. Such errors do, however, raise questions as to whether a scheme has been operated without maladministration.

188. I cannot establish whether ABCIFER's contention – that approximately one-sixth of the first batch of payments to civilian internees was made to individuals who did not meet the bloodlink criterion – is true. The MOD told me that the relevant records can only be searched in very limited ways and that the only way to provide the information I requested to enable me to determine this was by means of a manual search of all claim files. It is said that this would have been an 'enormous undertaking'.

189. In the absence of a full review of the MOD's files, it cannot therefore be known the extent to

which, if at all, payments were made prior to the introduction of the bloodlink criterion to people who would not have qualified had their application been determined after its introduction.

190. I note the Government's position that such payments were made only as the result of administrative error and not in consequence of the introduction of the bloodlink criterion or because those determining applications prior to that introduction had no agreed guidelines in place to assist them to identify what definition to apply.

191. However, it is unclear to me on what basis it knows this in the absence of detailed information about the payments made at that time – which the MOD has said it cannot provide without a thorough review of their files, which has not yet been undertaken.

192. In any case, I also note that the Government does not intend to seek to reclaim payments made in error or beyond the scope of the scheme. That intention seems to me to be entirely appropriate.

The operation of the scheme – equal treatment

193. The Government chose to introduce the bloodlink criterion many months into the operation of the scheme. As I have said above, that was a discretionary decision that it was entitled to make.

194. However, as this was done some weeks after the first payments were made under the scheme, in my view it was incumbent on the MOD at that time to satisfy itself that the late introduction of an eligibility criterion would not lead to the inconsistent treatment of applicants or to other administrative anomalies. They did not do so. I consider that this failure constitutes maladministration.

195. The Government has also not been able to provide me with evidence to assure me now that applications from people in the same situation for the purposes of the scheme's eligibility criteria were not decided differently.

196. In this context, I am not satisfied that Professor Hayward (and those others whose applications were determined after the introduction of the new criterion) was afforded treatment equal to those whose applications were determined prior to the introduction of the bloodlink criterion.

The operation of the scheme – informing applicants

197. I also criticise the failure to explain the 'clarification' of the eligibility criteria to those who, like Professor Hayward, were issued with a questionnaire in March 2001. This supplementary form was designed to elicit the new information needed following the introduction of the bloodlink criterion. The opportunity to inform applicants and potential applicants that the eligibility criteria for the scheme had been clarified was sadly missed. Those adversely affected by the clarification of the criteria did not have the position explained to them until their application was refused. This failure did not meet the standards of administration that citizens are entitled to expect from public bodies.

The operation of the scheme – criticism and review

198. I am also concerned that the MOD failed to undertake a review of the ex gratia scheme subsequently, following criticisms of the handling of the announcement and of the administration of the scheme contained in both the High Court judgment and that of the Court of Appeal. Such criticisms were also repeated in both Houses of Parliament and in correspondence with ABCIFER and others. While the decision as to the policy to be applied remained with Ministers (subject to

Parliamentary sanction), the failure to review that policy in the light of the criticisms made by the courts and others is a matter of concern.

Summary of findings

199. I have made four findings of maladministration. These are:

- (i) that the way in which the scheme was devised constituted maladministration in that it was done overly quickly and in such a manner as to lead to a lack of clarity about eligibility for payments under the scheme;
- (ii) that the way in which the scheme was announced constituted maladministration in that the Ministerial statement was so unclear and imprecise as to give rise to confusion and misunderstanding;
- (iii) that, at the time when the bloodlink criterion was introduced, the failure to review the impact of that introduction to ensure that it did not lead to unequal treatment constituted maladministration; and
- (iv) that the failure to inform applicants that the criteria had been clarified when they were sent a questionnaire to establish their eligibility constituted maladministration.

200. In addition, I am also concerned about the following two aspects of the operation of the scheme:

- (v) that the Government has been unable to provide evidence of the basis on which the early payments under the scheme were made and that thus I have been unable to determine whether the scheme was operated properly; and
- (vi) that no review of the scheme was undertaken in the light of criticisms of it by the courts, in Parliament, and elsewhere.

Injustice

201. I have found that, to the extent indicated above, the way in which the ex gratia scheme was devised, announced and operated constituted maladministration. I now turn to the question of whether such maladministration caused an injustice to Professor Hayward (and to others in a similar position to him).

202. In coming to my determination of this question, I first considered whether those affected suffered an injustice, before considering whether any such injustice was in consequence of the maladministration I have identified in this report.

203. In considering the first question, I was struck by the fact that it was not the failure to receive a payment under the scheme that most outraged Professor Hayward. In that sense, while he has not received the financial sum that some others in his position may have received, the principal form of injustice he has suffered is not financial.

204. Rather, Professor Hayward was most outraged by the implication that he was not sufficiently British to receive a payment – expressed as being in recognition of ‘a debt of honour’ – under a scheme whose administrators had made no attempt to explain that he would not be eligible to receive such a payment until his application was refused. Had he known the terms of the scheme, it is reasonable to assume that Professor Hayward would not have applied for a payment under it and therefore he would not have suffered the distress of having his application subsequently refused.

205. In the course of this investigation, I have come across other examples of claimants whose applications have been refused as a result of the introduction of the bloodlink criterion. These include:

- Squadron Leader X, who was also repatriated to the United Kingdom shortly after release from internment and was conscripted for national service. He decided to pursue a permanent career in the Royal Air Force and retired at the age of 55; and
- Doctor Y, who spent the whole of his working life at the Government’s Royal Aircraft Establishment in Farnborough. He has been elected a Fellow of the Royal Society.

206. These are people who have given public service to the UK. Many others who are ineligible under the clarified terms of the scheme can also demonstrate a close link with the UK: by having taken up UK citizenship, through long residence here, or by having brought up a family here. Those who have demonstrated such a commitment have told me that they feel a sense of injustice.

207. It is therefore clear to me that many people in Professor Hayward’s position have suffered outrage at the way in which the scheme has been operated and distress at being told that they were not ‘British enough’ to qualify for payment under the scheme. That outrage and distress constitutes an injustice.

208. The question for me, however, is whether the maladministration I have identified **caused** the injustice suffered by Professor Hayward and others in a position similar to him.

209. I consider that he and others were entitled to expect that the scheme would be devised properly, with clearly articulated eligibility criteria. They were also entitled to expect that they would be provided with pertinent information and that the scheme would be operated properly.

210. Given what I have said above in relation to my findings about the origination, announcement and operation of the scheme, and having regard

to what Professor Hayward and others have told me, I am satisfied that the maladministration which I have found caused injustice in the form of a sense of outrage to Professor Hayward and to others in a similar position to him.

Recommendations

211. Having found that the manner in which the ex gratia scheme was devised, announced, and operated constituted maladministration causing injustice to Professor Hayward and to those in a position similar to him, I now turn to make recommendations to remedy that injustice.

Recommendations specific to this investigation

First recommendation

212. **First, I consider that the MOD should review the operation of the ex gratia scheme.**

213. The acknowledged inability of the MOD to provide evidence from their records – without a full review – in relation to indications that the late introduction of the bloodlink criterion may have led to unequal treatment is sufficient in my view to warrant such a review. The need for a thorough review of the scheme is reinforced by the failure to conduct such a review at the time the bloodlink criterion was introduced and also, as no such review had been undertaken, in the light of the later criticisms made of the scheme by the courts and in other places.

Second recommendation

214. **Secondly, I consider that the MOD should fully reconsider the position of Professor Hayward and those in a similar position to him.**

215. My investigation has shown that it is impossible to determine how many people in a similar position to Professor Hayward in relation to the bloodlink criterion received a payment because their application was determined prior to the introduction of the criterion. The

Government accepts that some mistakes did occur. If a thorough review of the scheme confirms that such payments **were** made prior to (and because of) the late introduction of the bloodlink criterion, I believe that the Government should fully reconsider the effects of that on those whose applications were determined subsequently.

216. What form such reconsideration should take is a matter for the Government. However, I consider that, in undertaking any review, no possible outcome should be ruled out arbitrarily. I would also expect to monitor such a review closely.

Third recommendation

217. **My third recommendation is that the MOD should apologise to Professor Hayward and to others in a similar position to him for the distress which the maladministration identified in this report has caused them.**

Fourth recommendation

218. **Finally, I recommend that the MOD should consider whether they should express that regret tangibly.**

The Government's response to my recommendations

219. I put these recommendations to the Permanent Secretary of the MOD on 18 January 2005. The Permanent Secretary replied on 24 February 2005. I met the Permanent Secretary on 8 May 2005 to discuss the implementation of my recommendations and I received further written representations from him on 22 June 2005, on 23 June 2005 and on 7 July 2005.

220. The Government's response is set out in the annex to this report. As can be seen, the Government has not accepted my recommendations in full but has only agreed to implement my third and fourth recommendations.

221. All of the points made by the Government in the annex are dealt with in the body of this report. It should be evident that I do not accept the MOD's submissions, although in previous correspondence I have sought (and been provided with) information from the MOD that has contributed to the final version of this report.

222. I am satisfied that my report is clear and comprehensive and that it is not necessary to deal with each part of the Government's response again here.

Other recommendations

223. In addition to the recommendations specific to this investigation, I wish to bring three more general recommendations to the attention of Parliament. These recommendations have been informed both by this investigation and also by the considerable experience of my Office in dealing with complaints about ex gratia schemes.

224. First, I consider that ex gratia schemes should be devised with due regard to the need to give proper examination to all of the relevant issues before the scheme is announced or otherwise advertised. It is wholly unacceptable for schemes – especially those that are designed to deal with sensitive issues – to be announced, and applications received, before decisions have been taken on key issues such as eligibility. That can only lead to disappointment and distress.

225. Secondly, once advertised and implemented, any changes to eligibility criteria, if such are needed, should be publicised and explained to those potentially affected by the changes. This can prevent individuals feeling that they have been misdirected or otherwise misled.

226. Finally, I wish to emphasise that, where schemes are the subject of large numbers of complaints alleging maladministration or of other criticisms from the courts or in Parliament,

I believe that it is good administrative practice to review the relevant scheme. An early recognition that lessons can be learned from complaints and other feedback can prevent systemic failure or a situation in which public resources are expended on remedial action, which would not have been necessary had a thorough review taken place at the appropriate time and had any corrective action been carried out proactively.

Conclusion

227. I have reached my findings in relation to Professor Hayward's complaint with a degree of regret.

228. The conception of the ex-gratia scheme had much to recommend it and the announcement of 7 November 2000 was widely welcomed. Both Ministers and officials were rightly intent on ensuring that claims were paid as quickly as possible in view of the age of many of the claimants, as was demonstrated by the 14,000 payments made by the WPA in February 2001. Those administering the scheme have paid many more claims than was originally estimated, and continue to meet such claims.

229. In those circumstances, it is a great pity that a comparatively small number of individuals should have been caused such distress as a result of the maladministration of what was, after all, a highly commendable attempt to recognise 'a debt of honour'. The number of rejected claims from former civilian internees living in this country would appear to be no more than about 300 and those living abroad total approximately 800. Some of those claims may fall to be rejected on grounds other than the bloodlink criterion. That compares with the nearly 24,000 claims that have been paid.

230. However, those for whom this scheme was supposed to offer a tangible expression of 'a debt of honour' – owed to them by this country

in recognition of the inhuman treatment and suffering they endured in the 1940s at the hands of the Japanese, who considered them to be British – were entitled to expect that the scheme would be devised, announced and administered without maladministration.

231. It is of considerable regret to me that this did not happen. It is also deeply disappointing that the Government has not accepted that it should properly remedy the injustice I have found was caused by maladministration.

Annex

The Government's response to my report

1. *This annex sets out the Government's response to my report. The MOD has confirmed that its response was submitted on behalf of all Government bodies concerned with the subject matter of the investigation.*
2. *What follows is in the words of the Permanent Secretary of the MOD (although some minor editing has been necessary).*

Principal findings and recommendations

3. Your findings of maladministration can be split into two sections. The first deals with the 'origination and announcement of the scheme'; the second deals with 'the operation of the scheme and the birthlink (birthlink) criterion'. These sections are addressed in turn:

Findings of maladministration in relation to the origination and announcement of the scheme

4. As Ministers have many times acknowledged in letters, given the need for boundaries to define eligibility for ex gratia schemes, those people falling outside the boundaries of such schemes feel real and understandable disappointment.
5. Nevertheless, you have found that the manner in which this ex gratia scheme was devised constituted maladministration on the ground that the scheme should not have been announced to Parliament before the eligibility criteria had been completely thought through. In addition, you have found that had Professor Hayward known the terms of the scheme, he would not have applied for a payment under it and therefore would not have suffered the distress of having his application subsequently refused by reason of the late introduction of a criterion which was not disclosed to Professor Hayward or to other disappointed applicants until after their applications were refused. You have also found that the eligibility criteria should have been explained to those issued with the questionnaire sent out in March 2001.

6. The Government accepts these particular criticisms and, further, accepts your recommendation that it should apologise to Professor Hayward and others in a similar position for the distress thus caused, which is profoundly regretted. Consideration will be given, in line with your recommendation, as to whether that regret should be expressed tangibly.
7. All the Departments concerned accept that, although in some areas a considerable amount of scoping work had been undertaken, the scheme was introduced very quickly. This was in line with the wish to have it – and the payments to be made under it – in place as soon as possible, particularly in view of the age of those concerned: as acknowledged in your report, it was being made very clear to Departments by those representing the former internees that time was of the essence in ensuring that claims were dealt with speedily.

Finding of maladministration in relation to the operation of the scheme and the birthlink criterion

8. However, you then go beyond your criticisms of the way in which the scheme was originated and introduced, and criticise the decision to introduce the birthlink criterion at a time when some 14,000 payments had already been made. (The majority of these payments had of course been made to former prisoners of war (i.e. personnel whose eligibility arose because they had been imprisoned when serving in the Armed Forces of the Crown), or to their surviving spouses, and who did not therefore need to demonstrate a close connection to the UK by birthlink.)
9. The Government has significant concerns about this section of your Report.
10. To the extent that Professor Hayward complains about the way in which the scheme was announced and introduced, his complaints were not capable of legal remedy because

(despite the fact that these matters were referred to in passing by the court), they did not give rise to any illegality. These were, in the true sense, complaints of maladministration falling short of illegality.

11. But there was another category of complaint: those which, if true, would have constituted grounds for judicial review. A complaint falling into this category would not be one of maladministration falling short of illegality, but one in which the maladministration alleged is an instance of illegality and, therefore, one in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law within section 5(2)(b) of the Parliamentary Commissioner Act 1967. You would therefore be precluded from investigating it, unless you were satisfied that in the particular circumstances it was not reasonable to expect Professor Hayward to resort or have resorted to the legal remedy.

12. In your report, you say that the Government has not been able to demonstrate that applications from people in the same situation for the purposes of the scheme's eligibility criteria were not decided differently. You also say that officials have accepted that payments were made prior to the introduction of the bloodlink criterion to individuals who did not qualify under this criterion.

13. If there were indeed such cases where the difference in treatment between those cases and subsequent cases in which payment was not made was attributable to a deliberate change in the eligibility criteria then that would be evidence of arbitrary and unlawful discrimination.

14. Indeed, this very point was advanced by ABCIFER in their case as a ground of unlawfulness and was dealt with by Scott Baker J who said:

“Wherever one draws the boundaries of a scheme of this kind, there are bound to be

anomalies and unfairness. But I accept the submission of Mr Sales [Treasury Counsel] that this cannot dictate the lawfulness or otherwise of the scheme. Nor is it in my judgment relevant that a few payments were made to those who did not qualify with the blood link. It seems to me that some errors were an inevitable consequence of trying to implement the scheme as quickly as possible.”

15. In your report, you have said that you do not consider it reasonable for Professor Hayward to have pursued a legal remedy, but your reasons for this conclusion are unsatisfactory, given that others, including another individual, have taken this route.

16. The fact that ABCIFER did in fact bring proceedings and that they did raise precisely the point on which you now rely indicates that Professor Hayward could have taken the point had he wished to do so.

17. The fact that Scott Baker J dealt with the point and found that “some errors were... inevitable” makes it inappropriate for you to consider the point afresh and reach a conclusion which, with respect, is frankly inconsistent with that of the learned judge.

18. Quite apart from any inconsistency with the judgement of Scott Baker J, it is unclear on what evidence you can base your conclusion that people in the same position as Professor Hayward were paid before the birthlink criterion was introduced apart from those paid by mistake. The papers discussing the criteria used demonstrate that the payments processed initially were in respect of those former civilian internees born in this country, or, for those interned as children who were born in the Far East, those whose parents were born here. These individuals met a criterion that was stricter than the later birthlink criterion and were not therefore in the same position as Professor

Hayward. Nor therefore do they constitute a precedent for Professor Hayward now.

19. These papers also indicate that the need to clarify civilian eligibility criteria was recognised early and that many claims were set aside pending this clarification. The introduction of the birthlink criterion actually represented a widening of the existing basis for payment to include those not born in this country but who had a parent or grandparent born here.

20. You have included in your report statements made by the Chairman of ABCIFER on inconsistencies in payments made under the scheme of which apparently he gave you examples. We however have not had the opportunity to identify and comment on these cases, or on the other evidence which he apparently supplied to you. This puts me at a disadvantage in responding to your findings on this point, although insofar as we can guess which cases he may be referring to, we do not believe that they necessarily support your findings.

21. You also cite examples of people who have been rejected as lacking the birthlink but who, like Professor Hayward, have established a close link with the UK since the War and in many cases made a considerable contribution in this country.

22. But the scheme is not designed to recognise links or contributions to the UK made since the War; it is the link at the time of internment which counts and to include people because of a link now would be to change the basis of the scheme and destroy its coherence, which change could effect many more than a few hundred people.

23. As you know, it was an important element of ABCIFER's challenge that those who came to this country after the War should be entitled to benefit from the scheme. The Court of Appeal

concluded however that "the failure to take account of the closeness of the links with the UK at the time of the claim for compensation is not a good reason for impugning the rationality of the birth criteria."

24. The differences you highlight in your report are, therefore, a result of the way in which the scheme criteria (whose legality was upheld) were framed.

25. Accordingly, it is not appropriate for these differences in treatment to appear under the heading "Injustice", which, as we understand it, is intended to identify injustice which has been caused by the maladministration you have found, rather than by the operation of the scheme as a whole.

Recommendation for a "thorough review of the scheme"

26. I trust that, in the light of the above comments, you will understand why the Government does not accept that a thorough review of the scheme is warranted.

27. The Government accepts in full your findings of maladministration in relation to the 'origination and announcement' of the scheme and will apologise for the distress which this maladministration caused to Professor Hayward and others in a similar position.

28. The Government will also consider expressing its regret tangibly. But we do not consider that these findings warrant a thorough review of the scheme.

29. The bloodlink criterion does, as both you and the courts have pointed out, create some apparent anomalies.

30. But, as the courts have recognised, such anomalies are inevitable when devising eligibility criteria for a scheme such as this. They do not make the scheme as a whole irrational or unfair.

31. Nor is the fact that some payments were made in error to people who are not eligible under the scheme a reason why others in whose cases the same error was not made should now be paid.

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