

Injustice unremedied: the Government's response on Equitable Life

Injustice unremedied: the Government's response on Equitable Life

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Introduction and background

- 1 On 16 July 2008, I laid a report concerning the prudential regulation of The Equitable Life Assurance Society before both Houses of Parliament. My report, *Equitable Life: A Decade of Regulatory Failure*, was published the following day.
- 2 That report contained the results of a four-year investigation into complaints that the prudential regulators and the Government Actuary's Department had failed for longer than a decade properly to exercise their powers when regulating the Society during the period prior to 1 December 2001.
- 3 Following perhaps the most complex investigation ever undertaken by my office, I made ten findings of maladministration and determined that this maladministration had led to injustice to those who had complained to me. That injustice took the form of:
 - financial loss, where that had occurred;
 - lost opportunities to make informed savings and investment decisions; and
 - a justifiable sense of outrage on the part of those who had complained to me.
- 4 In line with my general practice where injustice to those who complain to me has resulted from maladministration on the part of a body within my jurisdiction, I made recommendations which aimed to provide an appropriate remedy to put right that injustice.
- 5 My report thus contained two recommendations, namely:
 - that, in recognition of the justifiable sense of outrage felt by those who had complained to me, the Government should apologise to those people for the serial regulatory failure which had occurred and which I had found to constitute maladministration; and
 - that the Government should establish and fund a compensation scheme, with a view to assessing individual cases and, where appropriate, providing compensation.
- 6 In making these recommendations, I recognised that it would not be appropriate for compensation to be paid merely for losses associated with the stock market or where no injustice to an individual had arisen from maladministration. I also had regard to the fact that there is some evidence that policyholders with other companies suffered losses at around the same time.
- 7 Accordingly, I explained that the aim of such a compensation scheme should be to restore anyone who had suffered a greater loss, relative to that which they would have suffered had they invested in a comparable scheme with another company, to the position they would have been in had no maladministration occurred.
- 8 In my report, I also recognised that my recommendations raised issues related to the public interest and to the potential impact that acceptance of the recommendation to establish a compensation scheme might have on the public purse.
- 9 Decisions as to whether such a compensation scheme would be in the public interest and as to how public resources should be spent are matters for Parliament and Government and not for me. I therefore invited them to consider further the issues that were raised by my report and by my recommendations.

- 10 However, I gave guidance within my report as to the timescales within which I considered it would be reasonable to expect any such scheme both to be established and to conclude its work. I also set out some principles – independence, transparency, and simplicity – that I considered should guide the operation of such a scheme.
- 11 Following the publication of my report, the Public Administration Select Committee of the House of Commons conducted an inquiry into the issues raised by my report and by its recommendations. I gave both oral and written evidence to assist the Committee in the conduct of that inquiry.
- 12 On 11 December 2008, the Committee produced a report, *Justice delayed: The Ombudsman's report on Equitable Life*, which endorsed the two recommendations I had made in my report.

The Government's response to my report

- 13 On 15 January 2009, the Government provided their response to my report by way of an oral statement to both Houses of Parliament. Later that day, the Treasury also published a Command Paper (Cm 7538), *The Prudential Regulation of the Equitable Life Assurance Society: the Government's response to the Report of the Parliamentary Ombudsman's Investigation*, which contained the detailed response of the Government to the findings and recommendations contained in my report.
- 14 Ministers told the House that the Government accepted some, but not all, of my findings and apologised to the policyholders of the Society for the maladministration which the Government accepted had occurred.
- 15 In addition, in their published response Ministers said that they had given careful consideration to my central recommendation – that the Government should establish and fund an independent, transparent, and speedy compensation scheme which would restore those relative losses sustained by policyholders – but that they had decided not to accept that recommendation.
- 16 This rejection was said to be founded on three factors – the need to take into account:
- the degree of responsibility of the Society when designing a compensation scheme;
 - the public purse and the wider public interest; and
 - that *'Parliament has accepted that it is not generally appropriate to pay compensation even where there is regulatory failure'*.
- 17 The Command Paper explained that, notwithstanding the above, the Government believed that action on their part was warranted and that, in the circumstances of the case in which it was said that some people had suffered *'disproportionate impact'*, some *ex gratia* payments should therefore be made.
- 18 In order to achieve this, the Government set out what they described as an *'alternative proposal'*. Ministers had decided to ask Sir John Chadwick, a former judge of the Court of Appeal of England and Wales, to advise the Government on four issues. Those issues were:
- the extent of relative losses suffered by Equitable Life policyholders;
 - what proportion of those losses could be attributed to the maladministration accepted by the Government and what to the actions of the Society and of other parties;
 - which classes of policyholder had suffered the greatest impact; and
 - what factors arising from this work the Government might wish to take into account when reaching a final view on determining whether the impact that had been suffered was disproportionate.
- 19 The Command Paper also published the Terms of Reference within which Sir John will undertake this work. Sir John was required:
- to accept as correct and consider my findings only in so far as those findings had been accepted by the Government and to disregard findings which had not been accepted;

- to accept as definitive my account of the events as those were recited in the narrative and chronology sections of my report;
 - to make such other findings of fact (if any) as he may think necessary in the light of the evidence contained in the other publicly available reports produced to date, including the Penrose Report and the Government's response to my report;
 - to review additional evidence should this be necessary to fulfil the terms of reference, but having regard to the need, so far as possible, for an expeditious process; and
 - to seek written representations as appropriate from interested parties if he deems it necessary.
- 20 The Command Paper contained no timetable for the completion of this work, although it said that Sir John would produce his final advice as soon as he is able to do so and will provide interim reports to the Government on an ongoing basis.
- 21 Following the publication of the Government's response, the Public Administration Select Committee took further evidence from a range of interested parties and published another report, *Justice denied? The Government's response to the Ombudsman's report on Equitable Life*. I appeared before the Committee and also provided further written evidence to assist it. This evidence focused on my assessment of the Government's response to my findings and recommendations.

My assessment of the Government's response: findings

- 22 I have explained in paragraph 14 above that the Government accepted some but not all of my findings of maladministration and of injustice resulting from such maladministration.
- 23 Five of my findings of maladministration were accepted in full, with four being accepted in part. One was rejected. The Government accepted that injustice had occurred – or, depending on the circumstances of individuals, was capable of having occurred – in relation only to the minority of the findings of maladministration which I had made.
- 24 It will be clear to any reader of the evidence which I have given to the Select Committee that I was deeply disappointed that the Government chose to reject many of the findings that I had made, when I was acting independently on behalf of Parliament and after a detailed and exhaustive investigation.
- 25 I was also entirely unpersuaded by the basis for those rejections which was set out within the Government's published response to my report. In particular, that response:
- was based on an extremely limited and unevidenced view of the nature of the regulatory regime relevant to the events covered in my report and of the responsibilities of the regulatory bodies whose acts and omissions I had investigated;
 - failed to address the whole basis on which I had found maladministration to have occurred when rejecting such determinations of maladministration; and
 - contained commentary, the status of which is unclear, which appeared to limit and/or re-interpret the findings I had made – thus calling into question whether the acceptance of such findings had full effect.
- 26 The lawfulness of the Government's response is of course a matter for the courts. During April 2009, I was served as an interested party with papers related to an application for permission to seek judicial review of the Government's response to my report. That application has been made by those acting on behalf of the lead complainants during my investigation and on behalf of others affected by the events at Equitable Life.
- 27 I have told the court and the parties to the complaints that it is not my present intention to take an active part in the proceedings, although I reserve the right to take part in the event that I consider it appropriate to do so in the light of submissions made on behalf of the Claimants and/or the Defendant.
- 28 I have reviewed very carefully the Government's oral and published response to my report, the evidence given by Ministers to the Select Committee concerning that response, and the papers giving further information about its basis which are contained within the court papers. I have also seen the exchanges in the House that have occurred on this subject.
- 29 Nothing that I have seen when reviewing any of these sources persuades me that my findings of maladministration and injustice were mistaken or that the Government have provided a sufficient basis for rejecting many of those findings. Nor am I persuaded that their response has properly and fully addressed the basis on which I made the findings that have been rejected.

³⁰ Within the scheme governing the operation of my office as Parliament has established it, whether the response of the Government to my report is adequate or whether instead it constitutes an inappropriate attempt to act as judge and jury in its own cause is now a matter for Parliament to consider and debate.

My assessment of the Government's response: recommendations

31 But what of the Government's response to my recommendations, containing as it does an *'alternative proposal'* initiating what has been called the 'Chadwick process'? I have three concerns about that proposal which I should draw to Parliament's attention.

Breaking the link between injustice and remedy

32 My first concern is that the Government in their response have broken the link between injustice resulting from maladministration and the provision of any remedy.

33 Leaving aside the extent to which the Government in their response accept that maladministration occurred and that injustice resulted from such maladministration, the Government have asserted that financial regulation is a special case and that it is never appropriate for financial compensation to follow directly from regulatory failure constituting maladministration, regardless of the consequences for individual citizens of that failure.

34 The Government's alternative proposals therefore proceed on an approach which does not accept the moral or any other imperative to provide an effective remedy for wrongs committed in the course of financial regulation.

35 This approach will limit eligibility for any future payment to those who have suffered *'disproportionate impact'* and will limit the 'liability' of the regulators (and thus the amount of the *ex gratia* payment to be made) to the proportion of responsibility for any losses subject to an eligible claim that are deemed to be due solely to the acts and omissions of those regulators.

36 I do not accept the basis of this approach – and I dealt extensively with it within Chapter 14 of Part 1 of my report.

37 The regulators whose actions I investigated did not have statutory immunity at the relevant time. Parliament had not qualified my jurisdiction to exclude the acts and omissions of the relevant bodies. Indeed, Parliament clearly intended when it established the regulatory regime covered in my report that I should investigate those actions and, where injustice occurred, that I should seek a remedy in line with my normal practice.

38 I therefore see no basis on which it can be said that Parliament has approved the approach adopted by the Government. Nor is it the case, as the Minister claimed in the House on 26 March 2009, that the Government:

'... have said all along that it is not normal practice for the Government to compensate for regulatory failure, and that is not the response just of this Government – it has been the response of successive Governments.'

39 That there was never any prospect of a financial remedy (which was that primarily sought by those who complained to me) if I found that injustice had resulted from maladministration was not explained by the Government at any time before or during my investigation, such as:

- in their representations made to me in May 2004 when I was consulting on whether to initiate the investigation which led to my report;
- in March 2005 in response to the complaints made about the actions of the regulators,

when asked to comment on the allegations contained in those complaints;

- in July 2005 when commenting on the remedy sought by complainants;
 - when providing, in November 2005, a view on what policyholders and annuitants could expect from the system of regulation relevant to the events recounted in my report; or
 - during any of the regular meetings held with my investigation team between September 2004 and January 2007.
- 40 As the Public Administration Select Committee reported, *'this argument began to emerge, by the Economic Secretary's own admission, only in 2007, when the Ombudsman's investigation was nearing completion'*. Indeed, that argument was only first put to me after the public bodies had seen my provisional findings in draft.

Lack of clarity about the Chadwick process

- 41 My second concern relates to the Chadwick process itself. I have already explained that the Government's response to my report contained no timetable for the conclusion of his work. This is particularly unfortunate given the very extensive time that has already been taken by the series of inquiries, investigations and other proceedings which have marked the Equitable affair.
- 42 This is reinforced by the fact that at least part of the work to be undertaken by Sir John – the attribution of relative blame to the various parties – could have been undertaken many years ago if the Government had set up the

comprehensive inquiry that I explained in the Foreword to my report should have been established.

- 43 There are other aspects of the Government's alternative proposal which are of concern to me. Those who have been waiting a very long time for the resolution of their claims for compensation have not been provided with any detail about the process which is now to be undertaken.
- 44 Although Sir John has been asked to assign blame between a number of parties, it is not clear how this is to be done and what safeguards there are to be to protect the interests of those, such as the Society and its former directors and actuaries, who are presumably to be the possible subject of adverse findings of fact.
- 45 It may be, although it is also not clear, that there is now to be an adversarial or hearings-based approach. If that is so, it is not clear how such a process will ensure the 'equality of arms' between the participants.
- 46 Those who complained to me (and some others among the relevant parties) are in the main unable to fund professional representation – and I have seen no convincing basis for them being asked so to do. They came to the Ombudsman established by Parliament to adjudicate on their complaints. Parliament intended that this service would be free and would lead to the effective resolution of such complaints. Any approach which now required a complicated, legal process would undermine this intention.

The use of the Penrose Report

- 47 This brings me to my final concern. In my evidence to the Select Committee, I drew the attention of the Committee to the highly selective use of the Penrose Report within the Government's response.
- 48 In particular, one of Lord Penrose's conclusions – that the Society was principally the author of its own misfortune – was central to the Government's response even though it was quoted only in part and without any regard to the rest of the relevant sentence. None of his other conclusions, several of them critical of the regulators, was cited. That was misleading.
- 49 In other respects, the reliance of the Government on the Penrose Report also appears to be selective.
- 50 For example, the Government rejected my finding that the failure to insist on the splitting of the Society's 'dual role' (in which one person held both the posts of Chief Executive and Appointed Actuary) or otherwise to undertake a closer scrutiny of its affairs constituted maladministration. And yet the Penrose Report, in paragraph 227 of Chapter 19, expressed very similar concerns to mine, saying:

'The joint holding of these offices ... increased the responsibility of the regulators to check independently and objectively the validity of the assumptions underlying the calculation of mathematical reserves, implicit items and PRE. However, challenge was ineffective.'

- 51 Nor is it clear on what basis the Penrose Report can be said to enable the making of adverse findings of fact when assessing the relative

culpability of the various actors, as Sir John has been asked to do.

- 52 As Lord Penrose made clear, his report did not seek to form the basis for the allocation of blame. This was, indeed, brought to my attention by the then Financial Secretary of the Treasury, who told me in May 2004 in response to my consultation on whether I should conduct an investigation:

'Lord Penrose's report presents a narrative of the events at Equitable Life over many years. His purpose was to discover what had led to the situation of the Society as at 31 August 2001 so as to learn lessons for the future. As he makes clear in the postscript to his report he was not seeking to provide answers to the questions of "who is at fault for the problems encountered by the Society, and who deserves redress as a consequence?"'

Summary

- 53 In summary, the Government's alternative proposal:
- does not maintain a direct link between the injustice sustained and a remedy for the wrongs which caused that injustice;
 - is unclear in many respects as to how the process will proceed, what it will take into account and how it will do so; and
 - depends on a highly selective use of the content of the Penrose Report to justify the Government's position.
- 54 It is in this context that I must assess whether the Government's response constitutes

compliance with the recommendations which I made in my report and which have been endorsed by a Parliamentary committee.

Compliance with my recommendations?

- 55 I have no power to compel a body within jurisdiction to provide an appropriate remedy for any injustice I have found resulted from maladministration on its part.
- 56 However, seeking the provision of such a remedy and the taking of action on the part of such a body to prevent future problems of the same nature has been an integral part of the role of my office since it was created. In general, I do this through the making of recommendations for redress and for remedial action, acting in line with the Principles for Remedy that my office has published.
- 57 Where, as here, I have made such recommendations, it is my practice after the conclusion of the relevant investigation and the production of my report to monitor the provision by such bodies of the remedies which I have recommended. Ensuring compliance with my recommendations enables me on Parliament's behalf to ensure that the Ombudsman scheme delivers effective administrative justice.
- 58 It will be clear from all of the above that the nature of the Government's response to my report calls into question whether on this occasion I can report to Parliament that my recommendations have been complied with.
- 60 While I recognise that the exact scope of the maladministration which occurred has been disputed by the Government, the apology made by Treasury Ministers in the House to those affected by maladministration is a positive step.
- 61 Indeed, I welcome the fact that, for the first time, the Government have accepted that maladministration occurred in the prudential regulation of the Society during the period covered in my report – and that this maladministration led to injustice to the Society's policyholders.
- 62 I also welcome the fact that the Government have accepted that at least some people have been adversely affected by such regulatory failure and that action on the part of Government, including the possible provision of financial redress, is warranted.
- 63 The apology which has been given reflected that acceptance. I therefore find that the provision of an apology in such circumstances constitutes substantial compliance with my first recommendation.

Compliance with my first recommendation

- 59 With respect to my first recommendation – that an apology should be made to those who had sustained injustice due to maladministration – I consider that the Government have complied with this recommendation.

Compliance with my second recommendation

- 64 I cannot say the same in relation to my second recommendation. Whatever the outcome of the work that Sir John Chadwick will undertake, it is clear that the injustice I have found to have resulted from maladministration will not be remedied.
- 65 Not all of my findings of maladministration have been accepted by the Government. Many of my findings of injustice, based on an assessment of what the consequences were of the

maladministration I had found to have occurred, have similarly been rejected.

- 66 This greatly limits the scope of the injustice which it is accepted by Government has occurred. Furthermore, as explained above the link between my findings and the remedy to be provided has been broken by the nature of the Government's alternative proposals on redress.
- 67 Most importantly, it is clear from Sir John's terms of reference that only some people – those deemed to have suffered '*disproportionate impact*' – will be eligible for any future *ex gratia* payments. Other eligibility questions – such as whether the cases of those who are not UK citizens will be considered – remain unresolved.
- 68 Furthermore, even those who are determined to be eligible for such a payment appear unlikely to receive the full amount of their claim, given the work to be done to apportion blame among a range of parties and to assign only a proportion of the 'liability' to the maladministration accepted by the Government.
- 69 In such circumstances, I am unable to conclude that the Government's proposals comply with the recommendation for the establishment of a compensation scheme which I made in my report.

Conclusion

- 70 When I conclude any investigation, my role is limited. As explained above, I will monitor compliance with any recommendations for appropriate redress that I make in relation to a complaint which I have upheld. I will also, as I have done in this case, do what I can to assist Parliament in its consideration of the issues raised by my reports.
- 71 Section 10(3) of the Parliamentary Commissioner Act 1967, from which I derive my powers, provides that if, after conducting an investigation, it appears that injustice resulting from maladministration has not been or will not be remedied I may lay a special report before Parliament if I think fit, drawing its attention to this situation. Before now, this has only occurred on four occasions since my office was established in 1967.
- 72 In this case, I am satisfied that the injustice I found in my report to have resulted from maladministration on the part of the public bodies responsible for the prudential regulation of the Society has not so far been remedied. I am also satisfied, for the reasons I have given above, that it will not be so remedied whatever the outcome of the work yet to be done by Sir John Chadwick.
- 73 I consider that it is appropriate to draw this to Parliament's attention, given the scale of the injustice I have found and the nature of the Government's response – which means that this injustice will not appropriately be remedied.
- 74 As I informed all Members of Parliament on 20 March 2009 I would do, I have therefore laid this report before both Houses of Parliament pursuant to section 10(3) of the 1967 Act.
- 75 I hope that Parliament will find this report useful when considering the issues raised by my report and by the Government's response to it.



Ann Abraham

Parliamentary and Health Service Ombudsman

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