

The mismatch between “The Chadwick Process”, the Parliamentary Ombudsman’s recommendations and the coalition Government’s promises on Equitable Life

The Coalition Government announced on 12 May 2010:

“We agree to implement the Parliamentary and Health Ombudsman’s recommendation to make fair and transparent payments to Equitable Life policyholders, through an independent payment scheme, for their relative loss as a consequence of regulatory failure.”

Because of a total breakdown in trust of the Treasury, implementing the PO’s recommendation requires the independent Commission be the body to establish the loss arising from the PO’s findings of maladministration. It is then for Government and Parliament to make a possible reduction for public purse considerations. The Commission should also devise a fair scheme and oversee the swift distribution of compensation.

EMAG is now extremely concerned that - contrary to the above Coalition promise – that the Government intends to rely primarily on the advice from Sir John Chadwick, commissioned by the previous Government. There is a great gulf, a disconnect, between what the PO recommended and what Sir John has been doing to the Labour Government’s restricted brief for the last 18 months. We fear that in practice there will be little difference in outcome from the previous Government’s intentions.

The Parliamentary Ombudsman and Chadwick – the crucial differences

The Parliamentary Ombudsman made ten findings of maladministration leading to five findings of injustice. She recommended compensation for relative loss suffered from 1991 onwards. She also recommended creating a compensation scheme along the lines of a tribunal or adjudication panel of three members that would be **independent, transparent** and **simple**. She suggested that such a scheme could be set up within six months and complete its work within two years i.e. by the end of December 2010.

The last Government ignored these recommendations and took six months even to respond. In January 2009 it rejected in whole or in part five of the ten findings of maladministration and **accepting** only one major finding of injustice but with heavy qualifications. The effect was to confine any payment for relative loss to the period after 1st May 1999.

The highly politicised remit given to Sir John was to advise what should be awarded on this shredded version of the PO’s recommendations, with further discounts for any failings that could be blamed on Equitable itself, their accountants and actuaries. Lastly, payments were only to be made to those “disproportionately impacted”, which was not defined but suggested means-testing.

The Treasury said that Sir John was “independent” and it has dishonestly played upon this glaring ambiguity. The Treasury may be getting “independent” advice from Sir John but he cannot be regarded as “independent” in the sense of “impartial as between the Treasury and the policyholders”. He has proved his partiality to the Treasury in recent months, particularly with his third interim report in March.

The PO herself replied to the Government Response in her 10(3) final report to Parliament on 5th May 2009, spelling out the shortcomings of “The Chadwick Process”, concluding:

Para 64..... 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.

In the meantime EMAG had started judicial review proceedings. These led to a judgment (with costs) against the Treasury in October 2009, which compelled it to accept more of the PO’s findings of maladministration and injustice. The effect **should** have been to move back the date for calculating relative loss from 1999 to the PO’s 1991. Revised Terms of Reference were issued to Sir John in November 2009 and EMAG embarked on a period of engagement with Sir John in good faith.

However, the Treasury has NOT accepted all the findings of the Parliamentary Ombudsman and Sir John has taken the narrow literal view that because not all of the findings were accepted, the overall findings of injustice should be eviscerated by examining the consequences of each individual finding of maladministration in isolation. But the Parliamentary Ombudsman specifically rejected that approach in her explanatory letter to Sir John in August 2009, when she wrote:

“.....the approach I adopted in my report was cumulative. I said in my report that it would not be appropriate to take each matter in isolation. I remain of that view.

The conclusions set out in my report demonstrated failings which went to the heart of the responsibilities and obligations of the public bodies responsible for the prudential regulation of Equitable Life. I found that maladministration pervaded the exercise by those bodies of their functions throughout the period covered in my report - and that my findings were of such individual and cumulative significance that they demonstrated a general failure by the relevant bodies to discharge their statutory functions in a proper and effective manner.

In essence, the view expressed in my report is that, absent the serial maladministration I had determined occurred from July 1991 onwards, no reasonable investor would have joined or remained with Equitable Life throughout that period - going instead to another life insurance company."

Sir John has rejected this approach and has pursued a counterfactual and highly speculative analysis of how the Equitable saga might have developed. Effectively he is **retrying the case**, which has been addressed independently ad nauseam by Lord Penrose, the European Parliament inquiry and the Parliamentary Ombudsman. But this time, Sir John is doing it from the standpoint of one of the guilty parties – the Treasury.

The upshot is that Sir John is suggesting that relative loss should only be calculated in respect of losses after 1st May 1999 (what he calls "Head A"). For the earlier period from 1991 he looks set to recommend the most unfavourable possible comparison ("Head B"), based upon the speculation of actuaries instructed by the Treasury as to what Equitable might have done had the regulators done their statutory duty. "Head B" compares losses to a basket of the poorest performing companies – ones that would have been very unlikely indeed to have featured on Equitable investors' shopping lists for alternative providers.

EMAG has asked for access to the actuarial data - in particular "Head A" calculations - and been repeatedly refused. There is no **transparency** and the calculations in hand are certainly not **simple**. Effectively, this looks like the Treasury is covertly trying to circumvent the Judicial Review. This could yet lead to more litigation and more delays, as pensioners continue to die without justice.

On 26th June, Mark Hoban gave a written answer to Phil Woolas MP:

"Sir John Chadwick is advising the Treasury on the relative losses suffered by Equitable Life policyholders in relation to those accepted cases of maladministration resulting in injustice."

This simply does not comply with Sir John's strict Terms of Reference and **implies** that Mark Hoban agrees with the last Government's limitation of only addressing the recommendations that the Labour Government had chosen to accept - which is totally at odds with the coalition's unequivocal commitment to honour the PO's recommendation.

In summary, advice from Sir John will be on a completely different basis from the findings of the Parliamentary Ombudsman. His Terms of Reference have not been changed post-election and they address a charity hardship scheme, still ignore findings; use a totally different methodology and adopt pure speculation; add in discounts for the contributory negligence of others and will focus, as instructed, on those who have suffered "disproportionate impact".

The differences in the Chadwick terms of reference from what the Parliamentary Ombudsman recommended are:

- The rejection of the finding of maladministration by the regulators in allowing Roy Ranson to be both Chief Executive and Appointed Actuary.
- The rejection of the findings of maladministration and injustice in connection with the introduction of the Differential Terminal Bonus Policy subsequently declared unlawful by the House of Lords.
- The rejection of the findings of maladministration in part and injustice in toto in respect of failure to reserve for capital gains tax, arbitrary changes to assumed retirement ages and failure to reserve for guaranteed annuity rates.

- Heavy qualifications of the findings of maladministration and injustice in respect of the reassurance treaty in 1999.
- Subsequent to 1999 the Parliamentary Ombudsman found it unnecessary to make further findings of injustice in view of her findings that no-one would have paid into or continued with Equitable after May 1999. Notwithstanding this, the Government said that they would reject any such finding of injustice after 1999 except in respect of misinformation provided by them in the post-closure period.
- Having rejected so many findings retrying those remaining to see what effect they would have had contrary to the policy of the Parliamentary Ombudsman to treat the findings cumulatively.
- The requirement to inquire what proportion of losses should be attributed to the actions of Equitable and other parties such as the accountants and auditors.
- The requirement to inquire whether disproportionate impact has been suffered.

The Treasury

The Treasury's tactics no doubt reflect its desire to minimise the cost of payouts. But in EMAG's view it is also to do with the culpability of those in the Treasury who connived at what has been proven to be a fraudulent reassurance treaty in 1999, and subsequent cover-ups. The Treasury has long obstructed and delayed justice for the victims of the Equitable Life including:

- allowing the High Court to be deceived over the 2001 compromise;
- tearing up complaints made to the Office of Fair Trading in 2001;
- influencing the Financial Ombudsman Service in 2004 to refuse to investigate any complaints based on facts revealed by Lord Penrose;
- preventing genuine representatives of policyholders being appointed to the board of Equitable Life;
- persuading the PIA to do nothing about Equitable Life mis-selling;
- resisting the PO study and then heaping spurious arguments during Maxwellisation in April 2007 to ensure a further one year delay

No wonder policyholders have NIL confidence in the Treasury

Ministers need to understand that to base any compensation upon advice from Sir John Chadwick is completely unacceptable. The Coalition Government should be seen to fulfil its promise – to implement the Parliamentary Ombudsman's, not Sir John's, recommendations. It should be for the independent Commission to establish comparative losses before finalising a quantum for fair distribution.

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