



Ministry of JUSTICE

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Mr. John Newman
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Dear Mr Newman,

The appointment of Sir John Chadwick

Thank you for your letters of 9 February 2009 to the Lord Chancellor and Secretary of State for Justice and to the Economic Secretary to the Treasury. I have been asked to reply.

1. The issue you raise is whether it is unlawful for the Government to invite the Rt Hon Sir John Chadwick to advise the Government in relation to aspects of the losses suffered by Equitable Life policyholders. He has been invited to do so following the publication of the Report of the Parliamentary Ombudsman, and to the Government's Response to that Report. Sir John's terms of reference are set out in **Annex A** to the Government's Response to the Report of the Parliamentary Ombudsman's Investigation presented to Parliament by the Chief Secretary to the Treasury in Cm 7538 dated January 2009. Those terms of reference specify the matters on which Sir John will advise. They are annexed to this letter.
2. The terms of reference also set out the assumptions and evidence on which Sir John is invited to act. As the Government's Response makes clear, Sir John's advice is sought in order to assist the Government in establishing a fair *ex gratia* payment scheme for those Equitable Life policyholders who have suffered a disproportionate impact as a result of those cases of maladministration which the Government accepts.
3. It is asserted that the invitation to Sir John would constitute a Ministerial undermining of and failure to uphold the continued independence of the judiciary. It is then asserted that any such undermining or failure would be (a) unlawful under section 3(1) of the Constitutional Reform Act 2005; (b) unlawful because contrary to fundamental

constitutional rights; and (c) irrational and/or in breach of a legitimate expectation because allegedly contrary to the decision by the Lord Chancellor to retain the prohibition on retired judges providing legal advice.

4. The Government's position is that the invitation to Sir John in the particular circumstances in which that invitation has been extended could not and would not be likely to undermine the independence of the judiciary in any way, and is neither irrational nor a breach of any legitimate expectation.
5. The following factual matters are of particular note in considering the context to such issues of independence:
 - Sir John is a retired judge.
 - He is of high reputation and standing, having served as a Lord Justice of Appeal with distinction for a number of years. He is an acknowledged expert in the relation to corporate and commercial matters.
 - His role, as is clear from the terms of reference, is to bring that expertise and experience to bear in an independent, objective and authoritative way.
 - He is not returning to private legal practice.
 - He is not acting in any manner fairly comparable to a lawyer in private practice representing and advising a client. He is not acting as an advocate for any Government position or policy. He is not retained to advise on tactical matters or legal options open to Government to defend a particular position or policy.
 - Rather, his function is a precisely set out and narrowly circumscribed one designed to assist the Government to set up a fair *ex gratia* scheme. That structure has been chosen in order to ensure that his consideration of the issues can be conducted as efficiently and speedily as possible, focussing on the particular, relevant issues.
 - It is emphasised that he has been invited to reach and will reach a considered, independent series of conclusions on the questions raised. He will then make what are in effect non-binding recommendations to the Government on the issues on which his advice has been sought. His function, as set out in the terms of reference, is considerably closer to that of say a person chairing an inquiry – but in a carefully circumscribed process with a particular eye to the need for as speedy a resolution as possible - than that of a retained legal adviser.
 - The terms of reference indicate, consistently with the substance of his function, that he will receive representations from interested parties (if he considers it necessary to do so). I am in a position to confirm that Sir John has indicated that he does indeed intend to afford an opportunity for the provision of such representations.
 - I am also in a position to confirm that his findings will be made public, to the extent consistent with his judgement of the possible impact of his advice on the rights of those involved in the underlying events (a caveat plainly necessary in the circumstances, and many of whom will of course be your members).
6. There have been a number of different views as to whether even a full return to private practice after retirement would have any adverse impact on the independence or appearance of independence of the judiciary.
7. Importantly in the present context, those judges who oppose a return to private practice have drawn a "sharp distinction". The distinction was between "a return to the legal market, where work is done for reward and for a litigant", and "a return to arbitrate, to

mediate, or to give expert evidence in a foreign court as to the law of England and Wales": (see paragraph 13 of the response of the Judges' Council to the proposal by the Lord Chancellor to permit a return to practice by former judges in January 2006). The basis for the distinction was described as follows:

"Although all those tasks [arbitration etc] are routinely carried out by those in private legal practice, the tasks involved all require the exercise of independence, objectivity and authority, these being the hallmarks of a judge. It seems to us that the conduct of those tasks for reward by a former judge is quite different in character from a return to private legal practice."

8. As set out above, Sir John's position is *a fortiori*, and not in any sense comparable to return to private practice. His is a single ad hoc invitation to consider discrete and specified issues with a view to producing independent, and public, guidance in the setting up of the *ex gratia* scheme.
9. You focus on paragraph 9.1 of the Guide to Judicial Conduct. Two preliminary points:
 - 9.1. The Guide to Judicial Conduct is just that. It is designed to guide. Its application, particularly in a context such as the present, needs to take fully and properly into account the proper context and particular circumstances in which an issue arises.
 - 9.2. It is not accepted, as appears to be assumed in the Bindmans letter, that it follows that, even if there is non-compliance with the Guide, there would be a failure to uphold the continued independence of the judiciary. In such a situation, the position may be that the Guide is on its face more broadly expressed than is required in order to uphold judicial independence, leaving it open to all concerned to take a sensible, pragmatic view as to whether the particular set of facts required or did not require action to be taken.
10. The Government's position is in any event that there is no breach of paragraph 9.1 in the invitation to Sir John.
 - 10.1. Paragraph 9.1 is to be read with the other provisions of the Guide. They include a recognition (in paragraph 5.1 sub paragraph (11.3)) that there is nothing objectionable in principle in even serving full time judges from serving as members of an "official body ... or advisory body". Whether it is objectionable to do so will depend on the particular facts – service on such bodies must not be "inconsistent with the perceived impartiality or political neutrality."
 - 10.2. Paragraph 9.1 is intended to draw the sort of distinctions identified in the Judges' Council's January 2006 response. It does not seek to identify each and every situation that might fall on one side of the line or the other. Rather, in keeping with its character as part of a Guide, it is intended to be illustrative of where the recommended line is to be drawn.
 - 10.3. The reference to the provision of "legal advice to any person", viewed in that light, is a reference to the sort of legal advice that would be routinely provided by a lawyer in private practice. It stands in distinction to the provision of services as an "independent arbitrator/mediator" in the next sentence.
 - 10.4. The substance of his function needs to be considered. As set out above, it is to exercise an independent judgment and make what are in effect recommendations to the Government on the issues on which his advice is sought. Just such a function would be carried out by an advisory body or by a chairman of an inquiry.

11. For all these reasons, the Government reject the suggestions that the invitation to Sir John is a breach, or his fulfilling his functions would be a breach, of section 3 of the Constitutional Reform Act 2005 or any fundamental constitutional principle.
12. There is no irrationality or breach of legitimate expectation as is asserted in the Bindmans letter. As to that:
 - 12.1. No promise of a kind required to found any legitimate expectation has been made.
 - 12.2. The proposal by the then Lord Chancellor in CP15/06 was "to remove the current prohibition on all holders of salaried judicial office returning to legal practice on ceasing to hold judicial office". It was that proposal that the Lord Chancellor decided not to proceed with following inter alia the report of the Judges' Council Working Group of 30 November 2006. The Lord Chancellor was not focussing on, or seeking to draw or re-draw the precise lines of the kind dealt with the paragraph 9.1 of the Guide to Judicial Conduct.
 - 12.3. Sir John is not proposing to return to private practice and the invitation is not an invitation for him to do so. Accordingly, the invitation is not inconsistent with the decision by the Lord Chancellor not to proceed with the CP15/06 proposal.
13. Finally, you should know that before issuing the invitation to Sir John, the Government considered with care the appropriate expertise that would be needed in order to provide the advice sought. It considered that the issues were pre-eminently suitable for consideration by a retired, senior judge. It did so given (a) the high profile and importance of the issues raised, with the consequent need for public confidence in both the advice to be provided and its independence and (b) the nature of the issues, involving as they do questions of apportionment of responsibility. Having so decided, the Government sought the advice of the Lord Chief Justice on an appropriate appointment. His advice was that Sir John's professional and judicial experience, together with his personal qualities, made him such an appointment.
14. The Government is aware that you have also sent a copy of the letter from Bindmans to the Lord Chief Justice. With that in mind, the Government thought it would be appropriate to consult the Lord Chief Justice before responding. The Lord Chief Justice has now considered that letter, and this Government response, and remains content that there is no difficulty in, or impediment to, Sir John acting in accordance with the invitation extended to him. That is also the position of Sir John himself.

I am sending copies of this letter to the Lord Chief Justice, the Lord Chancellor, the Economic Secretary to the Treasury, the Chairmen of the Public Administration and Justice Select Committees, and Sir John Chadwick.

Yours sincerely



Vijay Rangarajan

Constitution Director
Ministry of Justice

Annex A

Terms of Reference for the Rt Hon Sir John Chadwick

Sir John Chadwick ("Sir John") is appointed by HM Treasury to advise on matters arising from the Government's response to the Parliamentary Ombudsman's investigation into the prudential regulation of the Equitable Life Assurance Society.

The Government accepts five findings of maladministration in full, four findings in part, and rejects one finding. Within those findings four cases of maladministration resulting in injustice are accepted, as set out at Appendix 1.

In relation to those accepted cases of maladministration resulting in injustice, Sir John will advise HM Treasury on:

- The extent of relative losses suffered by different classes of policyholder in respect of each case of maladministration, taking account of, among other things, wider market conditions during the period under consideration, and comparable insurance products available over the same period;
- The proportion of those losses which it would be appropriate to apportion to the public bodies investigated by the Ombudsman, as opposed to the actions of Equitable Life and other parties;
- The classes of policyholders which have suffered the greatest impact as a result of maladministration; and
- Factors, arising from this work, which the Government might wish to take into account when reaching a final view on determining whether disproportionate impact has been suffered.

Assumptions and evidence

Sir John will:

- 1 Accept as correct and be able to consider all of the Ombudsman's findings of both maladministration and injustice in so far as those findings are accepted by the Government, but disregard findings which are not accepted;
- 2 Accept as definitive the Ombudsman's account of the events at Equitable Life, as set out in the narrative sections of Part 1 of her Report and in Part 3;

- 3 Make such other findings of fact (if any) as he may think necessary in the light of the evidence contained in the publicly available reports produced to date, including the Penrose Report, the Ombudsman's Report and the Government's response to that report;
- 4 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;
- 5 If he deems it necessary, seek written representations as appropriate from interested parties.

Sir John will advise as quickly as he is able, including providing interim updates and conclusions on a continuing basis so that work can progress on the practical issues in parallel without waiting unnecessarily for all his work to be concluded.

Appendix 1: Summary of Government's Response to the Ombudsman's Findings

The Government's response to the Ombudsman's findings is detailed in Chapter 4 of the Government's written response [Cm 7538]. Summarised below are those instances where the Government accepts that maladministration has led to injustice:

Finding 4 (scrutiny of Equitable Life's returns for 1994 – 1996)

The Government accepts two instances of maladministration found by the Ombudsman within this finding that led to injustice to policyholders. These are summarised below.

Changes to retirement ages

The Government accepts that Equitable Life's changes to retirement ages were significant and therefore should have prompted GAD to ask questions of the Society so that the regulator could be satisfied that the changes were justified.

In relation to injustice, it is accepted that the regulator ought to have satisfied itself that the changes to retirement ages were permissible. The Government accepts that Equitable Life might not have been able to justify their changes to

retirement ages and that the regulatory returns might therefore have shown a different picture of the Society's solvency position.

Reserves for guaranteed annuity rates

The Government accepts that there was a requirement for Equitable Life to reserve for its GAR liabilities in circumstances in which the GARs were valuable to policyholders (when the current annuity rate fell below the guaranteed annuity rate). The Government accepts that GAD failed to confirm whether a GAR reserve was established in the 1995 returns.

In relation to injustice, the regulator should have required Equitable Life to establish explicit reserves for its GAR liability in the 1995 and 1996 returns. The Government therefore accepts that Equitable Life's returns would have shown a different picture of the Society's solvency position had no maladministration taken place.

Finding 6 (financial reinsurance)

The Government accepts that the reinsurance Treaty was such as to raise questions which should have been resolved by the regulator before permitting credit to be taken for it in the regulatory returns.

In relation to the injustice resulting from Equitable Life's use of reinsurance, the Government accepts that, because the regulator permitted credit to be taken for the reinsurance treaty, Equitable Life's returns gave a materially misleading picture as to its solvency.

Finding 10 (information provided by the FSA in the post-closure period)

The Government accepts that the statement made in October 2001, namely that Equitable Life remained solvent, but continued to face fundamental uncertainties following the House of Lords' judgment in Hyman, had the potential to mislead policyholders and others reading it. Greater thought should have been given to making it clear that there had been a change in the FSA's understanding of Equitable Life's state of financial health so that policyholders and others could easily understand the difference between its statement that Equitable Life met "regulatory solvency margin requirements" (made in August 2001) and its statement that Equitable Life was "solvent" (made in October 2001). Furthermore, the FSA should have given further thought to its statement that Equitable continued to meet its regulatory solvency requirements.

The Government accepts the finding of injustice, although it believes that the number of policyholders who could show reasonable reliance solely on statements made by the FSA is likely to be relatively few, if any.