

**MEMORANDUM BY THE PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN
TO THE PUBLIC ADMINISTRATION SELECT COMMITTEE**

**THE GOVERNMENT'S RESPONSE TO *EQUITABLE LIFE: A DECADE OF REGULATORY FAILURE*
INITIAL OBSERVATIONS**

Introduction

1. This Memorandum sets out my initial observations on the Government's response to my July 2008 report, *Equitable Life: a decade of regulatory failure* (HC 815).
2. The Memorandum is not intended to be a detailed critique of, or comprehensive response to, the Government's document *The Prudential Regulation of the Equitable Life Assurance Society: the Government's response to the Report of the Parliamentary Ombudsman's Investigation* (Cm 7538). It focuses instead on the main high-level issues prompted by the Government's response and my initial reaction to those issues.
3. The Memorandum is submitted in advance of my appearance before the Committee on 29 January 2009. At that evidence session, or perhaps subsequently, I would be happy to assist the Committee by providing a more detailed reaction to the content of the Government's response to my report if that would be helpful.

Background - the Government's response

4. As the Committee knows, the Government provided its response to my report by way of an oral statement to both Houses of Parliament on 15 January 2009. Later that day, the Treasury published the above Command Paper which contained the detailed response of the Government to my report.
5. Ministers told the House that the Government accepted some, but not all, of my findings and apologised to the policyholders of The Equitable Life Assurance Society for the maladministration which the Government accepted had occurred.
6. In the 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.
7. The Government set out what they described as an '*alternative proposal*'. This alternative 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*'.
8. The Command Paper explained that 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 be made. The Government then set out its decision to ask Sir John Chadwick, a former judge of the Court of Appeal of England and Wales, to advise the Government on four issues.

9. Those issues were:

- first, the extent of relative losses suffered by Equitable Life policyholders;
- secondly, 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;
- thirdly, which classes of policyholder have suffered the greatest impact; and
- finally:
... what factors arising from this work the Government might wish to take into account when reaching a final view on determining whether disproportionate impact has been suffered. The Government will consider Sir John’s advice on the relevant factors before setting the criteria for the payment scheme.

10. The Command Paper 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 sections of Part 1 of my report and as set out in the detailed chronology of events in Part 3;
- to 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, my report and the Government’s response;
- 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, but only ‘*if he deems it necessary*’.

11. The Command Paper contains no timetable for the completion of this work, although it is said that Sir John will 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.

My initial observations on the Government's response

12. It is disappointing that the Government has decided not to accept all my findings and has rejected my central recommendation that it should establish and fund an independent compensation scheme. However, there are certain things about the Government's response that should be welcomed.
13. First, I welcome the fact that, for the first time, the Government has 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.
14. I also welcome the fact that the Government has accepted that at least some people have been adversely affected by such regulatory failure and that action on the part of Government to seek a fair remedy, including financial redress, is warranted. Those are positive developments, if not a fully satisfactory response to my report.
15. It is also a positive development that the response of the Government to my report was not provided immediately and that my findings and recommendations appear to have been given careful consideration, which has not always been the case on previous occasions in recent history. I welcome the measured and respectful tone in which the Government's response to my report was provided to the House.
16. However, the Government's published response raises a number of issues, many of them fundamental, which are of concern to me - and which I believe should also concern the Committee and Parliament more generally. Those issues relate to:
 - the rejection of findings of maladministration and injustice;
 - the basis on which those rejections were made; and
 - the alternative approach taken by the Government to the questions of remedy and redress.

Rejection of findings

17. Once again, the Government has thought fit to reject findings made by the Ombudsman after a lengthy, detailed, complex, and rigorous investigation. This scenario was one considered by the Committee in its report *Justice delayed: The Ombudsman's report on Equitable Life*, published in December 2008:

We urge the Government to act without further delay and to accept the Ombudsman's findings of maladministration. She is Parliament's Ombudsman and it is imperative that the Government respects her conclusions. There are valid arguments to be had about the scale of compensation and the way that such cases should be handled in the future, but we would be deeply concerned if the Government chose to act as judge on its own behalf by refusing to accept that maladministration took place. This would undermine the ability to learn lessons from the Equitable Life affair.

18. The Government has only accepted four instances of injustice resulting from maladministration from the ten findings of maladministration and five findings of injustice that were set out in my report. Even those acceptances have been qualified by commentary within the published response, which appears to limit the basis on which I made the relevant findings.
19. That the Government has, through its response, again sought '*to act as judge on its own behalf*' raises questions about whether it is prepared to accept independent judgments about the actions of Government bodies. It also raises questions about whether citizens can rely on the implementation of independent adjudications of their complaints.
20. Those are serious questions which go to the heart of the effectiveness of the Ombudsman system and the ability of Parliament to hold the Executive to account using the work that we produce.
21. As the Committee itself has said, in another but similar context, the system '*will only work if the Parliamentary Ombudsman, the Government and Parliament share a broad common understanding of what maladministration might be and who should properly identify it*'. The Government's response indicates that they do not share such a common understanding.
22. It is a matter of general consensus that Government (with the consent of Parliament) must retain the power to decide what should be done to put matters right, including by way of the provision of remedies, when maladministration leads to injustice.
23. However, it does not seem to me consistent with the intention of Parliament when it established my Office that Government bodies should, before such questions of remedy arise, reject my judgments on maladministration and injustice on the grounds merely that they disagree with those judgments or simply have a different view.
24. Indeed, as the Committee knows, the proper approach to be taken to responses to my reports became the subject of legal proceedings in relation to my report into the role of Government bodies in the security of final salary occupational pension schemes.
25. The Court of Appeal held - with Sir John giving the leading judgment - that, in the words of paragraph 51 of the judgment:

The Secretary of State, acting rationally, is entitled to reject a finding of maladministration and prefer his own view. But... it is not enough that the Secretary of State has reached his own view on rational grounds: it is necessary that his decision to reject the Ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies the 1967 Act. To put the point another way, it is not enough for a Minister who decides to reject the Ombudsman's finding of maladministration simply to assert that he had a choice: he must have a

reason for rejecting the finding which the Ombudsman has made after an investigation under the powers conferred by the Act.

26. The judgment then set out, in paragraph 72, the Court's agreement with the proposition that '*the question is not whether the [Government body itself] considers that there was maladministration, but whether in the circumstances the rejection of the Ombudsman's finding to this effect was based on cogent reasons*'.
27. The Committee will doubtless wish to explore not only what the Government's response means in constitutional terms for the Ombudsman system, but also whether that response - and the rejection of my findings in particular - was founded on cogent reasons.

The basis for the rejection of findings

28. This brings me to the basis on which the Government has rejected many of my findings.
29. I have not set out in this Memorandum detailed analysis of each of the responses provided by the Government to each finding of maladministration or to each finding of injustice resulting from maladministration. I would, however, be happy to explore this with the Committee or to provide further written evidence which provides such analysis.
30. However, put as briefly as possible, I would make the following three initial observations about the basis on which the Government has rejected those of my findings it has not accepted:
 - **First, the Government's response provides insufficient support for the rejection of those findings.**

For example, the response includes only a very brief statement setting out the Government's view on the regulatory regime which applied at the time relevant to my report.

The standard applied in my report was grounded in a detailed analysis of the historical development of the applicable regime and of the law as it stood at the relevant time (see Chapter 5 of Part 1 and the whole of Part 2). I addressed more limited assertions about the nature of the regulatory regime in Chapter 9 of Part 1 of my report.

The principal basis for the Government's view seems to be such an assertion - that the regime was '*reactive and unintrusive*'. Many of the subsequent rejections of my findings appear to be based on this inadequate view as to what the duties and powers of the prudential regulators at the time were.

The Government's response is partial - making, for example, no mention of the EC Directives in which that regime was grounded - and is not evidenced - failing to provide any support for the Government's limited view.

- **Secondly, the Government's response also fails to address the basis on which I came to several of my findings when rejecting those findings.**

On a number of occasions, my findings of maladministration were predicated on failures by the prudential regulators and those acting on their behalf to consider the use of their powers or to take appropriate action.

In rejecting findings of maladministration which are founded on those failures, the Government sets out now - with the benefit of hindsight - its analysis of why certain courses of action would not have been appropriate or were, in its view, not available to the prudential regulators within the limited view of the relevant regime that the Government now asserts.

But that analysis was not done at the time. The Government's approach thus fails to address the basis on which I came to those findings. That the Government is able now to set out its view regarding the courses of action or the use of powers that I found should have been considered in the 1990s is irrelevant: this does not adequately explain why those courses of action or the use of those powers were *not considered at the time*. The maladministration I found has therefore not been properly addressed.

Equally, on occasion my findings were that injustice in the form of lost opportunities had occurred.

In rejecting findings of injustice in the form of those lost opportunities, the Government merely states that it is not convinced by what it says are my assessments of what might have happened had maladministration not occurred - pointing to other possible outcomes. That is an insufficient basis on which to reject findings of injustice in the form in which I made them.

It is a matter of common ground that what the end result would have been, absent maladministration, is necessarily a matter of some speculation and would be made on the balance of probabilities. In rejecting such findings of injustice, the Government seeks to suggest that its view of what might have happened is preferable to the findings set out in my report. That appears to be a return to an argument that it is permissible for those investigated merely to prefer their own view over an independent judgment of their actions.

Whatever the case may be as to that, the Government's response has provided no basis that reasonably could question the undeniable fact that maladministration led to the *loss of opportunities* that are set out in some detail in Chapter 12 of Part 1 of my report, instead addressing findings - that injustice is predicated only on a particular outcome transpiring - that I have not made. Injustice in the form of the lost opportunities has thus not properly been addressed.

- **Thirdly, the Government's response begs the question as to what the purpose of regulation was supposed to be.**

In particular, when considering findings of injustice resulting from maladministration, the Government appears to suggest that, whatever the regulators had done, it would have made no or little difference to events.

If it were truly the case that the relevant regulators, acting without maladministration and operating the regulatory system as Parliament intended it should be operated, could have made no difference to the events covered in my report, then that would be astonishing.

Indeed, without further support for these assertions and in the absence of consideration of the European dimension to regulation, the basis on which the Government have responded to my findings raises more questions about the responsibilities of regulators than it addresses.

The Government's alternative approach

31. This brings me to the Government's alternative approach, outlined at the beginning of this Memorandum. I understand that a debate in Westminster Hall will be held on the Government's response. Others have called for a full debate on the floor of the House. It is of course Parliament's role and not mine to consider the nature of the proposals for action put forward by the Government in its response and to scrutinise those proposals. However, the Committee might find the following five observations about those proposals helpful.
32. First, I am concerned that no detailed timetable has been set for the work to be done by Sir John Chadwick. Both my report and the Committee's report highlighted the fact that the resolution of the complaints made about the regulation of the Society has been a protracted process, a process vitiated by the failure of Government to establish a comprehensive and fit-for-purpose inquiry at the outset. The Government's response has not addressed this. I recognise that the relevant issues are complex, but it seems to me unfortunate that it has not been felt possible to set any form of timetable for the completion of Sir John's work, let alone for the establishment and operation of any resultant scheme.
33. This brings me to my second point. It is clear that Sir John will act only in an advisory capacity and that final decisions will be taken by Ministers. It also appears that Sir John will only solicit evidence from those directly affected and from other interested parties if he considers that necessary to fulfil his remit. This raises issues of both public confidence in the process and the degree of Parliamentary or other external scrutiny which will take place. These issues should be resolved.
34. Thirdly, even in relation to findings which have been accepted by the Government it is not clear on what basis Sir John will be able to take those into account. Will he act on the findings accepted by the Government as those findings were set out in my

report? Or is he only to take those findings into account as they have been re-interpreted or limited by the Government in the commentary provided within its published response? The answer to those questions is likely to have a profound impact on the outcome of his work and on the scope of any compensation to be provided - and should thus be clarified.

35. Fourthly, no definition has been provided of the concept of '*disproportionate impact*' which has been introduced by the Government in its response to my report. Given the centrality of it to the work now to be done, I am surprised that no attempt has been made to give a clearer picture to those affected as to the basis on which Sir John will undertake his work. That should be remedied.
36. Finally, I should comment on the requirement imposed on Sir John that he must assess what proportion of losses could be attributed to the actions of the Society and of other parties. This fails to recognise that I have found *injustice* resulting from *maladministration on the part of the prudential regulators*. There is no basis for suggesting that any such injustice was caused by the actions of anyone other than those regulators and those acting on their behalf. There is thus no basis on which to assign blame for maladministration on the part of a public body to anyone else; a remedy for injustice resulting from maladministration should be forthcoming from those alone who acted with that maladministration.

Next steps

37. As indicated above, I am happy to provide further evidence and assistance to the Committee on these matters if that would be helpful. We will continue to do what we can to assist those of the Society's current and former policyholders who complained to us, although we now have a limited role and may not be able to help them further. If Sir John would find it helpful, we will also provide what assistance we can to him.
38. As the Committee knows, section 10(3) of the Parliamentary Commissioner Act 1967 provides that if, after conducting an investigation, it appears to me that injustice has been caused in consequence of maladministration and that this injustice has not been, or will not be, remedied, I may, if I think fit, lay before each House of Parliament a special report upon the case.
39. It is clear to me that the nature of the Government's response to my report means that the injustice I have found resulted from maladministration will not in every case be remedied - nor in any case will it be remedied fully.
40. That being so, I am giving consideration as to whether it would be appropriate for me to lay a further report before both Houses of Parliament. I will keep the Committee informed as to my thinking on that.

Ann Abraham
Parliamentary and Health Service Ombudsman
26 January 2009