



House of Commons
Public Administration Select
Committee

**Justice denied?
Government Response
to the Committee's
Sixth Report of Session
2008–09**

**Third Special Report of Session 2008–
09**

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The Public Administration Select Committee

The Public Administration Select Committee is appointed by the House of Commons to examine the reports of the Parliamentary Commissioner for Administration and the Health Service Commissioner for England, which are laid before this House, and matters in connection therewith, and to consider matters relating to the quality and standards of administration provided by civil service departments, and other matters relating to the civil service.

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The current staff of the Committee are Steven Mark (Clerk), David Slater (Second Clerk), Pauline Ngan (Committee Specialist), Louise Glen (Senior Committee Assistant), Lori Verwaerde (Committee Assistant) and Shane Pathmanathan (Committee Support Assistant)

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Third Special Report

The Public Administration Select Committee reported to the House on *Justice denied? The Government's response to the Ombudsman's report on Equitable Life* in its Sixth Report of Session 2008-09, published 19 March 2009 as HC 219. The Government Response was received on 19 May 2009 and is published below as an appendix to this Report.

Government response

Government response to the Public Administration Select Committee's Sixth Report of Session 2008-08 "Justice denied? The Government's response to the Ombudsman's report on Equitable Life"

In this document, the Government sets out its response to the individual conclusions and recommendations of the Public Administration Select Committee's report on the Government's response to the Parliamentary Ombudsman's report on her investigation into the prudential regulation of Equitable Life.

Implementation of the Government's decision

1. The scheme proposed by the Government is inadequate as a remedy for injustice. Nonetheless, it could help to improve the lot of some of those policyholders who have struggled to make ends meet since the closure of Equitable Life to new business, and on this basis, if the scheme is the best available, we want it to work as well as possible. (Paragraph 9)

The Government notes the Committee's comments about remedy. The Government has been clear about its reasons for not accepting some of the Ombudsman's findings of injustice and her recommendation for a compensation scheme to remedy the injustice she found. At its own discretion, the Government has announced a scheme to provide ex gratia payments to policyholders who have suffered disproportionate impact. The Government welcomes the acknowledgement by the Committee that the Government's scheme could provide help to those hardest hit. The Government agrees that it is important now to ensure that the scheme's design and implementation delivers that help as quickly, efficiently and effectively as possible.

2. Confidence in the scheme will be fatally undermined if the net effect of the limiting factors specified by the Government is either:

- a) to restrict payments to an excessively small number of policyholders,
- b) to make unreasonable demands on policyholders to show that they qualify under the scheme, or
- c) to cap the sums payable at a level that will make little or no real difference to policyholders' lives. (Paragraph 13)

The Government has made no decisions about the scope and scale of payments that will be made under the scheme, or on the specific processes for identifying and delivering payments to policyholders who qualify. These are matters that will be determined taking account of the work that Sir John Chadwick is conducting, and other relevant considerations, including the position of the public finances, but the Committee's views have been noted.

3. It is up to the Government to ensure that its scheme makes a tangible difference as soon as possible to policyholders who have, even by its own reckoning, suffered injustice including financial loss because of failures of the State. This is much more likely to be achieved through a scheme which is simple and clear, and which avoids making demands of policyholders wherever possible. (Paragraph 14)

The Government agrees that the scheme should be as simple and clear as possible. The Government intends to introduce a scheme that can make payments as swiftly and easily as possible, taking account of the practical considerations involved.

4. Our preference would be for the Government to make the scheme simpler by removing the disproportionate impact test altogether. If, however, the Government insists on the test, what matters most is that it should be simple to implement, relying so far as possible only on information held by Equitable Life, and not placing a burden on policyholders or others to provide information. (Paragraph 20)

The Committee itself comments, in paragraph 17 of its report, that "it can see the attraction of targeting payments to those who need them most". The question of disproportionate impact is closely linked to bringing that about. The Government retains an open mind about how disproportionate impact will be determined, in advance of Sir John Chadwick completing the work the Government has asked him to do. In implementing the scheme, the Government will do whatever it can to keep the burden on policyholders to a minimum, consistent with delivering an effective process.

5. It is acutely disappointing that the personal circumstances of policyholders are not taken into account in any part of the Government's response, for example, their age, their health, or the number of years since the relevant events. Nowhere in the response does the Government take account of the need for simplicity in the design or operation of any scheme. This marks a basic failure to understand the problem which the Government's scheme is designed to address. (Paragraph 21)

The Government acknowledged in its response document concerns about the length of time policyholders have had to wait for resolution of this case, including the fact that many have retired. But it was not the purpose of the response document to discuss details or analyse issues which are for the design of the payments scheme. Issues surrounding the personal circumstances of policyholders will be considered in the light of the advice received from Sir John Chadwick. Neither the Ombudsman nor the Government currently has the precise information needed to establish the extent of

relative losses experienced by different policyholder groups. The Government believes the approach it is adopting represents the most efficient way of establishing the facts and opening the way to a scheme that can pay out as swiftly as possible.

6. Those policyholders who have died, or will have died before a scheme is implemented, clearly cannot benefit personally from the payment scheme. But many will have surviving partners, who will have suffered worry and a diminished standard of living alongside them. It would be deeply unfair, and add to their justified outrage, if they were denied the opportunity to benefit. (Paragraph 22)

The Government recognises the importance of the issue of the estates of deceased policyholders, and will take it into account, along with Sir John Chadwick's advice, when deciding on the terms of the payment scheme.

7. A successful judicial review could result in a better process, but one with a worse outcome for policyholders. (Paragraph 24)

It would not be appropriate for the Government to speculate on the outcome of a judicial review of its response, or the nature of any impact that might ensue. The Government believes the process it adopted in determining its response was entirely fair and proper.

The Government's approach to this case

8. Given the difficulties faced by Members and the public in obtaining timely copies of the Government's written response, the Chief Secretary should have been more explicit in her statement to the House about those findings made by the Ombudsman which the Government was rejecting or substantially qualifying. (Paragraph 29)

Many of the Ombudsman's findings are technically complex and to have addressed them in detail in the statement would have lengthened it considerably. The Government believes the right balance was struck in communicating the terms of the Government's response on the floor of the House and presenting the technical detail where it would be most accessible, in the response document. The Government understands members of the public's interest in these matters and will continue to make relevant documents available on the Treasury website, including a copy of this response.

9. In its response to the Ombudsman's report, the Government has taken a highly selective and partial approach to its representation of our views. It has not addressed our conclusions or analysed our arguments, but simply taken our words out of context to support arguments of its own in a way that gives an inaccurate impression of our views. (Paragraph 33)

As a general observation, the Government would note that its response addressed the Ombudsman's report and was not, and was not presented as, a response to the

Committee's report and its conclusions and arguments. The Committee refers in its report to two examples (paragraphs 31 and 32). The first of these is in paragraph 5.16 of the Government's response, where the Committee's statement that few people dispute that the former management of Equitable Life were primarily to blame was quoted. The Government's intention was to demonstrate the wide acceptance of this view, not to imply that the Committee accepted this as a reason for rejecting compensation. The Government made clear in paragraph 5.16 that the Committee supported the Ombudsman's recommendation. The Government's reference in paragraph 5.18 to the Committee's observation that "the decision to compensate must not...be the equivalent of signing a blank cheque on taxpayers' behalf" was similarly used in the context of setting out a general principle. No links were made to the Government's own belief, set out in paragraph 5.20, that there would be serious repercussions were the taxpayer to provide a remedy for all losses whenever financial institutions fail and maladministration is found, nor was it implied that the Committee necessarily supported that belief or the Government's position as a whole.

10. The Ombudsman is not a judge, but a parliamentary investigator. The Government is not legally obliged to respect her findings as it would have to respect a judgement of the courts. It must, however, have compelling reasons for disagreeing with her. (Paragraph 35)

The Government agrees with this conclusion. As the Government has made clear on several occasions, where it did so, it did not depart lightly from the Ombudsman's findings and considers that its response observed the test of cogency at all times.

11. The fact that the Ombudsman feels that she has been misunderstood and misrepresented is an indictment of the quality of the Government's arguments as presented to the public. (Paragraph 40)

The Government does not accept this assertion. As acknowledged in the Committee's report, at paragraph 41, the Government has provided the Committee with a further memorandum addressing the examples of misunderstanding and/or misrepresentation felt by the Ombudsman to have occurred, and given to the Committee by the Ombudsman in her memorandum and in oral evidence.

12. In attempting to produce a response that was readable and accessible, the Government also produced one that prevented a proper analysis of the validity of its reasons for rejecting and qualifying the Ombudsman's findings. We do not think it was the right decision to sacrifice intelligibility for accessibility. Where the Government departs from the Ombudsman's findings, it has a duty to explain why it is doing so in enough detail to enable a proper examination of its reasoning. (Paragraph 42)

No decision was taken to sacrifice intelligibility for accessibility. The Government does not consider that the two concepts are mutually exclusive. With respect to the level of

detail, the response rightly focused on each of the Ombudsman's specific findings and recommendations, setting out the Government's response to each of those findings and recommendations in clear terms, and with an appropriate level of technical detail taking into account the purpose of the document. Given the scale and technical complexity of the Ombudsman's report, which was the product of four years work, it would not have been practical to seek to address every issue discussed in it.

13. We concluded in December 2008 that “we would be deeply concerned if the Government chose to act as judge on its own behalf”; yet this is precisely what it has done. (Paragraph 44)

In responding, the Government studied the Ombudsman's report with the greatest of care and sought to ensure that its actions are founded in full appreciation of the circumstances of the case. That includes thorough appraisal of the findings set out in the Ombudsman's report. The Government does not depart lightly from the Ombudsman's findings, and has done so in this case only where it believes it has a cogent justification for doing so. The constitutional balance reached by the legislation on the one hand permits the Ombudsman wide powers of determination, as well as the ability to make far-reaching recommendations, but on the other it does permit the Government to reject findings in certain circumstances. The Government would rightly have been open to criticism if it had accepted findings where it considered there were cogent reasons for departing from them.

14. The injustice the Ombudsman found, and that part of it which the Government has accepted, were caused by the maladministration of public bodies, not by the former management of Equitable Life. Both we and EMAG have suggested that the fact that regulators were not primarily responsible for policyholders' losses warrants, as recognition of that fact, a discount on the amount of compensation payable. But this does not alter the fact that public bodies were responsible for injustice, and should not allow them to escape liability for that injustice altogether. (Paragraph 49)

The Government has explained that it does not consider that it is generally appropriate for the taxpayer to fund compensation, even where there is regulatory failure. In recognition of the impact on some policyholders of this particular case, however, the Government believes that it is right to set up an ex gratia payment scheme to help. The Government agrees with the principle that any payments should recognise that responsibility for the losses suffered by policyholders does not fall wholly on the regulators. That is why Sir John Chadwick's terms of reference include consideration of the proportion of 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.

15. The Government uses its general responsibility to taxpayers as an argument for not establishing a compensation scheme. If this argument were carried to its logical conclusion, compensation would never be payable – even in part – where public

bodies had been responsible for injustice resulting in substantial financial loss, but only where any financial loss was modest. Such a position would be patently absurd and unfair. (Paragraph 51)

The Government does not accept the Committee's logic. The Government has given several reasons for its decision not to accept the Ombudsman's recommendation for a compensation scheme. With regard to the impact on taxpayers, as recognised explicitly by the Ombudsman herself, the potential impact on the public purse is an appropriate consideration.

16. We struggle to understand the logic behind the Government's decision to make payments to policyholders on an ex gratia basis rather than as compensation. It gives three reasons for this decision:

- a) **first, the primary responsibility of the former management of Equitable Life for policyholders' losses,**
- b) **second, the Government's responsibility to taxpayers generally to balance the competing demands on the public purse, and**
- c) **third, that "Parliament has accepted that it is not generally appropriate to pay compensation even where there is regulatory failure". (Paragraph 58)**

These reasons were set out in the Government's response document to explain why it was not accepting the Ombudsman's central recommendation for a compensation scheme. The Government has explained that it does not consider that it is generally appropriate for the taxpayer to fund compensation, even where there is regulatory failure. The Government's decision, at its own discretion, to establish an ex gratia payments scheme in recognition of the disproportionate impact that may have been suffered by some policyholders is an entirely separate issue.

17. The first of these two reasons had already been taken into account by others, including ourselves, and are in any case grounds for limiting compensation, not for denying it altogether. The third reason might have some validity if made at the outset of the Ombudsman's investigation: this the Government had every opportunity to do. It was, however, shabby, constitutionally dubious and procedurally improper to introduce it as an argument at such a late stage in her work. In doing so, the Government undermined the purpose of the Ombudsman's investigation and the reasonable expectations of policyholders. (Paragraph 59)

The Government rejects the assertions made by the Committee about the manner in which it engaged with and responded to the Ombudsman's investigation. To have stated in absolute terms at the outset reasons of policy as to why financial redress to remedy maladministration would be inappropriate would have been to close the Government's mind to the possibility of circumstances in which compensation would be appropriate. The principle advanced by the Government that it is not generally appropriate to pay compensation for regulatory failure does not constitute, of itself, an absolute bar to

compensation in all circumstances. The Government made representations during the course of the investigation in 2007 which included discussion of the liabilities of regulators. Submissions specifically on redress were made when the Government was invited to do so in 2008.

18. There is also a broader point of principle here. The Government has accepted that public bodies were responsible for maladministration which caused injustice to people. It is arguing at the same time that it is under no duty to put right these wrongs, even in part. This may be a legally valid position, but we think that most people would consider it to be a morally unacceptable one. (Paragraph 60)

In its response, the Government has set out a position that is fair, just and reasonable to policyholders and taxpayers alike.

19. Given that the Lord Chief Justice has in effect approved Sir John Chadwick's appointment and has considered and rejected the concerns subsequently raised by Equitable Members' Action Group, it seems almost inconceivable that there could be any legal or procedural irregularity with the appointment. (Paragraph 65)

The Government concurs that there was no legal or procedural irregularity in the appointment of Sir John Chadwick.

20. The Government has designed Sir John Chadwick's remit to be of limited scope. When his work is complete, the Government, not Sir John, will decide who receives payments and on what scale. It is of constitutional importance that a government should not use the reputation of the judiciary to make a process appear more independent or more far-reaching than in fact it is. The Government should take care not to give the impression that the independence that Sir John brings to his remit extends more widely to those parts of the process which remain in the hands of Ministers. (Paragraph 70)

Prior to 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. The remit given to Sir John Chadwick reflects the need to determine information on the precise extent of relative losses experienced by different policyholder groups, and on the extent to which losses were linked to maladministration that the Government accepts occurred, required before the Government can implement the ex gratia payments scheme it has announced. The Government has set out clearly the basis on which he has been asked to conduct

this work, and the footing on which the Government will then proceed to implement the scheme.

21. The Government needs to understand that uncertainty about the design of the scheme and the timescale for making payments is unsettling to say the least for those who do not know if or to what extent they will benefit from those payments. We are disappointed that the Government has not made it a priority to establish a simple process for determining payments that can then be implemented swiftly. While it has asked Sir John Chadwick to advise it as quickly as he is able, the nature of the task he has been given seems likely to mean that payments will be made more slowly – possibly much more slowly – than policyholders have a right to expect. We urge Sir John to establish and make public as soon as possible an estimated date for his final report, and to take explicitly into account in the advice he gives the Government the speed and ease with which different possible scheme criteria could be implemented. We urge the Government to provide an indicative timetable for making payments under the scheme as soon as Sir John’s interim findings allow. (Paragraph 73)

The Government recognises the legitimate concerns of policyholders that the scheme be finalised and introduced as quickly as possible. The Government has asked Sir John to complete his work as quickly as he is able. The Government will provide information on timescales as soon as it is in a position to do so. So far as is possible without Sir John’s advice, work is also going on in parallel on the practical issues of setting up a scheme.

22. The Government’s failure to set a timescale for payments, together with its indication that a scheme may not be completed for considerably longer than two and a half years, make it in our view all the more important that it finds a way of making interim payments considerably sooner than this to those who need them most. (Paragraph 74)

The Government will consider all options for getting payments to those who need them as quickly as possible, but reiterates its view that it is important to avoid any risk of delaying implementation of the main scheme. The Government has not sought to suggest that its scheme may not be completed for “considerably longer than two and a half years”. The comments made by the Chief Secretary to the Treasury in the House on 15 January on the Ombudsman’s suggestion of a two and a half year timescale, which appear to inform this assertion (paragraph 72 and footnote 62 of the Committee’s report) were not indicative of a timescale for the Government’s ex gratia payments scheme, rather they were an observation on the need to avoid the kinds of overruns and timescales experienced by other schemes in the past.

23. The Government is not obliged to follow Sir John Chadwick’s advice. The benefit of transparency would be to show to what extent it had done so, as well as the extent to which Sir John’s advice had been influenced by the representations he had received. We recommend that Sir John’s interim reports, and any representations he receives, should therefore be published expeditiously. (Paragraph 75)

The Government will report to the House on progress made at regular intervals, and will make Sir John Chadwick's advice 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.

24. We encourage Sir John Chadwick to invite and to receive representations in person from a range of those who have suffered loss through their involvement in Equitable Life, as well as from other relevant parties. It is important that he should not be kept at a remove from the human dimension of what has happened. (Paragraph 76)

These are matters for Sir John Chadwick. He has indicated that he will be inviting representations.

25. The Government's response has provoked a strongly negative reaction from the Ombudsman, from Equitable Life, from policyholders, and now from us. This should give the Government pause for thought. There are two sets of lessons to be learned: not only from the serious failings of the prudential regulators of Equitable Life, but also from the Government's approach to the Ombudsman's findings and to providing a remedy for those who have suffered injustice. (Paragraph 80)

The Government's response sets out new help for policyholders that we believe is fair both to them and to taxpayers. It is important now to focus on taking forward the work needed to deliver the payments scheme.

Wider lessons

26. So long as there is no better alternative for dealing with grievances of this kind, the Ombudsman should continue to consider investigating cases such as this, irrespective of the likelihood of a remedy being provided. (Paragraph 85)

The Government notes the Committee's conclusion. The Government values the Ombudsman's role and independence, and takes the work of her office very seriously. As the Committee notes, the decision on whether or not to investigate cases must be a matter for the Ombudsman of the day to decide on.

27. It is vital to ensure that lessons from crises such as Equitable Life and the recent near-collapse of the banking system are not forgotten as soon as the good times return. Prudential regulation needs to be implemented consistently in the interests of the taxpayer and customers of financial institutions, not just in the short-term interests of those institutions. (Paragraph 88)

The Government fully recognises the importance of working to ensure that prudential regulation remains effective in the face of changing market conditions, and is implemented consistently.

28. Despite the years that have passed since the closure of Equitable Life to new business, and despite the numerous opportunities to learn lessons, the system of prudential regulation has once again failed the taxpayer and the customers of financial institutions. What is needed is effective regulation. We are concerned that without an honest and full appraisal of what went wrong, both in the regulation of Equitable Life and more recently of the banking system, there will be failures again in the future – failures which could otherwise have been avoided. (Paragraph 91)

There have been several independent investigations into the events surrounding Equitable Life. Those events took place under a system of regulation that has since been replaced. The lessons of what happened at Equitable Life have already informed substantial regulatory reform, as well as wider reviews of corporate governance. The events surrounding regulation of the banking system present different issues but the Government recognises the need to strengthen financial markets for the future, and welcomes the recommendations put forward in the Turner Review of Financial Regulation, published on 18 March 2009. The Government will publish a document on the future of financial markets before summer 2009.

29. Effective accountability needs to be an important part of effective regulation. The way that industry regulators are held to account currently is inconsistent and piecemeal. We called in December for reflection upon whether more could be done in Government, Parliament, and the National Audit Office to maintain an overview of regulators as a way of mitigating the risk of serious regulatory failure in the future. Our view now is that the question is no longer whether, but how. (Paragraph 92)

The Government agrees that proper accountability is integral to effective regulation. The Government notes the Committee's comments. Regulators operate within defined frameworks, there are robust complaints procedures in place for them, and they are accountable to Parliament through the normal channels.