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Sir John Chadwick  
The Office of Sir John Chadwick  
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Dear Sir John,

### ***Critique of your Third Interim Report***

#### **Note on Publication**

In view of the events which have transpired since the release of IR3, I feel bound to share my observations immediately with my fellow campaigners at EMAG; nor can I expect them to refrain from publicising such parts as may be relevant to their Parliamentary lobbying. I would however emphasise that EMAG took no part in the formulation of this letter. Accordingly, although I would have preferred to wait upon Sir John's response, on this occasion I must ask that it is treated as an open letter.

#### **Introduction**

I read your third interim report ['IR3'] with a sense of growing disappointment. This was not because of the conclusions it reaches, provisional or otherwise, but because the structure of its arguments is weaker than in the preceding reports and because the logic is arbitrary and disjoint. I have spoken to several colleagues who have studied IR3 for themselves and they had each independently reached the conclusion that the Treasury seems to have had a disproportionate influence on your proposals. Accordingly, I have tried to identify for your consideration the specific grounds for our concerns and these are set out in the remaining sections of this paper. The detailed analyses are preceded by a summary of the main concerns.

If the tone of this letter is negative in that it does not suggest any suitable remedies, that is because the situation we now face has been planned and orchestrated by the Treasury, so that any remedy for that situation must lie in their hands.

## Summary of Concerns

Our primary concern relates to the overall conduct of this EGP project. There are strong and clear indications that the Treasury is exercising a very high degree of control over what was described in the initial Command Paper as your *“independent”* role. I feel accordingly that we have been tricked into cooperating with the project which is constrained to produce a scheme satisfying only the Treasury’s narrow and begrudging concepts of ‘fairness’, and not the appropriate compensation recommended by the Parliamentary Ombudsman.

There are eight more or less distinct areas of concern, each of which is addressed separately in the main body of this letter. These are as follows:

- From the very start of the PO’s investigation, the Treasury had determined to respond to it in an adversarial manner, not in the collegiate manner which was implicit in the creation of her Office. As a result of the Treasury’s *concede nothing* approach, her report has had to give undue space to a selection of failures that can be proved beyond any reasonable doubt. But her broader conclusions, which she has referred to as her *cumulative findings* are of far greater significance and are encapsulated in the title of her Report *“A Decade of Regulatory Failure”*. From the start of your work, the Treasury has mischaracterised her findings as requiring all redress to be based only on the failures she chose to enumerate, while in IR3 you have started to rewrite her overall conclusions without proper cause or authority.
- On the Treasury’s instructions you have examined the significance of the phrase from Penrose *“...the Society was the author of its own misfortunes”* but you have not appreciated that this was a coded comment about the actions of Roy Ranson, the Society’s Appointed Actuary who Penrose could not blame directly. But, European Law and UK statute make the Appointed Actuary part of the system of regulation, and therefore any failings in that role (which were many and serious) are the responsibility of the Secretary of State and the dysfunctional system of oversight which he put in place. They were certainly not the responsibility of the Board of ELAS, and were totally outside both the knowledge and the influence of policyholders in general.
- There is a vacuum in the key area of causation which you have declined to remedy. The PO stated that she was unable to quantify loss as she did not consider that she had the powers to investigate what had happened within the Society itself. Therefore there are no agreed *causes of loss* although this was to have been one of the primary roles of the Tribunal that she called for. In consequence your scheme has no proper foundations and we can argue in circles about ‘who’ and ‘how much’ without ever reaching legitimate and logical conclusions.
- There is a dearth of relevant quantitative information about the year by year build up of premiums, bonuses and policy values for the various classes of policy. You have asked for comments on various proposals which can only

be answered responsibly on the basis of decent statistics, and those statistics have not been made available more than 15 months into your investigation. This is a continuation of the Treasury's long established and disgraceful cover up of the true status of the Society at various crucial points in time. Your study is essentially about the numbers, and to have got so far without disclosure of the basic data represents a serious failure and a dangerous denial of transparency.

- As part of the (improper) reworking of the Ombudsman's findings, the Treasury's actuarial advisors, Towers Watson, have sought to analyse what might have happened 'absent maladministration'. The methods they have employed are highly subjective and their approach is naïve and impossible to validate. Moreover, you propose to accord them greater credibility than the PO herself (who also worked closely with actuarial advisors), despite her administrative expertise and detailed familiarity with the issues as they affected the working of the departments in question. If you were to do so, it would debase your whole investigation and raise serious questions of constitutional propriety.
- There has been endless obfuscation and debate as to the proper role of the regulators in relation to the Society's excesses. Even today the Treasury is advancing a defence of '*not our business*'. However, this is completely disproved by the authoritative verdict of the Actuarial Disciplinary Tribunal that dealt with charges arising from the Equitable affair. The Tribunal declared that not only were failures of disclosure on the part of the Appointed Actuary worthy of expulsion, but the same criteria would be applicable to any professional actuary who knew of the failings but did nothing about them. Actuaries in the regulatory system did know what was being concealed and failed to act as required. This has not been taken into account in your deliberations when it should have been.
- From the start, your role was described as independent, and you gave us explicit assurance of even-handedness. It is clear that this is not the case in practice because the Treasury has demanded of you that you give greater weight to their interests and their views than you do to those of any other party. Those of us who have supported your investigation have done so at the cost of great personal effort and substantial diversion of time. We now have strong cause to feel that we have been seriously misled in this regard.
- When you took up this project as a result of the PO's findings and recommendations you inevitably inherited some of the key restrictions on its scope which applied to her investigation. This we can accept, save where to do so would vitiate the whole purpose of the project itself. What we cannot accept is the way in which the Treasury has arrogated to itself the *unilateral right* to overstep those boundaries whenever it may suit them while policyholders are denied the right to go beyond the strict borders that were originally defined. We look to you as a retired judge of great experience to protect us against such injustices. Specific examples are given in the text.

## **Misrepresentations of the PO's Findings and Recommendations**

- 1) **The basis of your remit is the acceptance by the Government of most of the PO's findings of fact and her further broad conclusions regarding the compensation of policyholders. Natural justice for policyholders requires that the integrity of those findings and conclusions be respected, and that those matters which she specifically defined as needing further attention should be properly addressed.**
- 2) **When IR2 was published it seemed that you were observing the first constraint, but that there was no significant progress on the open issues. Indeed I attempted to prepare a submission on the latter but found myself severely impeded by the lack of an agreed statistical base.**
- 3) **However, with the release of IR3 It seems to me that you are trying to reassess the whole of her broad conclusions, but without the situational knowledge or the administrative expertise that the PO brought to her investigations, and which are required to make such judgements. In our view this has seriously undermined the credibility of your arguments and those of your advisors.**
- 4) **In the course of 'rewriting' the PO's fundamental conclusions, you have thought it appropriate to introduce 'evidence' from the Treasury's chosen actuarial advisors, which is doubly inappropriate because:**
  - **no evidence has been adduced that TW have any special expertise in regulation, least of all that they are in any position to overrule the Ombudsman;**
  - **their 'reasons' for deciding that the failures of the Regulators could not have caused loss are entirely speculative and assume that lack of urgency must be endemic in a regulatory system;**
  - **they go over ground which to my certain knowledge has already been covered by the Ombudsman, who found the defences put forward to be without merit;**
  - **they totally fail to comprehend that internal service level agreements may form part of the maladministration in question rather than providing any grounds for excusing it;**

## **The Appointed Actuary was Part of the System of Regulation**

- 5) **There is no mention in IR1, IR2 or IR3 that the Appointed Actuary was part of the statutory system of regulation. The governing Law on this matter derived from the European Life Directive #1 of 5/3/1979 where it is stated in Article 16 that: The supervisory authority of the member state in whose territory the head office of the undertaking is situated must verify the state of solvency of the undertaking with respect to its entire business. The**

**supervisory authorities of the other member states shall provide the former with all the information necessary to enable such verification to be effected.**

- 6) In the UK it was decided that the primary responsibility for such ‘verification’ should rest with an actuary appointed at each undertaking to be responsible for returns required under the Insurance Company Acts. This ‘Appointed Actuary’ (AA) therefore became accountable to the Secretary of State for this ‘verification’ and all related tasks under the Life Directives. Thus the Minister was inescapably responsible for the adequacy of his work.<sup>1</sup> Accordingly, unlike many continental systems, UK insurance regulation depended on the diligence, integrity, and competence of an official not in public service.**
- 7) The heavy responsibilities attaching to the role of Appointed Actuary under European Law were made very clear both by the Regulators and by the Actuarial Profession. It is therefore all the more surprising that Roy Ranson was allowed to hold that role and the role of Chief Executive for a period of seven years.**
- 8) It follows therefore that any inadequacies in the work of the AA which put the solvency calculations in question are defects in regulation and are not failures of the Society unless it can be shown that other senior officers were fully aware of those inadequacies. In fact we have written evidence from the GAD files to the effect that Ranson had a dictatorial style of management and was the only point of contact between them and the Society.**
- 9) The significance of this is that when Lord Penrose said “...the Society was largely the author of its own misfortunes” he was observing the prohibition on imputing individual blame and it is quite obvious that he intended to convey that “Roy Ranson, the Appointed Actuary and Chief Executive was the author of those misfortunes”. Hence, unless proved otherwise, Mr Ranson’s errors are billable to the Secretary of State responsible for Regulation at the times in question.**
- 10) The Treasury is fully aware of these constitutional responsibilities for enforcing a proper system of regulation but is consistently silent as to their implications. But this does provide the Treasury with ample motivation for obstructing the identification of the causes of loss at Equitable Life, because it is almost certain that those causes ultimately lie at the door of the Secretary of State.**

## **The Causation Vacuum**

- 11) As I have pointed out previously, the PO has explicitly acknowledged that, although she found irrefutable evidence of serious maladministration on the**

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<sup>1</sup> The detailed historical implementation of these arrangements is described in part 2 of the PO’s Report: “The Regulatory Regime”. However it does not discuss the significance of the wording of the EU Directives. [See [http://www.ombudsman.org.uk/pdfs/equitable\\_life\\_2\\_regulatory\\_regime.pdf](http://www.ombudsman.org.uk/pdfs/equitable_life_2_regulatory_regime.pdf) ]

part of the public bodies, she was unable to quantify the losses arising because she considered that her Office was not equipped with powers to carry out the necessary investigations of Equitable Life in order to determine the primary causes. Accordingly she proposed that an Independent Tribunal be entrusted with this task and, by implication, that it be given the necessary powers.

- 12) However, when the Treasury assigned you the role of designing an EGP scheme it was silent on the issue of special powers and made no reference to the lack of any firmly established primary causes for the losses incurred by policyholders. You have pursued your remit in the spirit of the Treasury's implied approach by seeking to infer levels of loss without acknowledging the primary causes, and even more importantly to deduce the share of responsibility of the Public Bodies without knowing how those losses came about.
- 13) Specifically, when I suggested that you should acknowledge that the primary cause of losses was the Society's determination to award excessive bonuses and thereby to operate with inadequate assets (in loose industry terms 'with no estate'), you declined to do so, or to adopt any alternative causation.
- 14) I note that in its correspondence with you of Jan 11<sup>th</sup> the Treasury actually concedes obliquely this point on causation at 36:-
  - a) "It was Equitable's decision to have a policy of full distribution and not maintain an estate ..... if the management of Equitable made improvident or unwise decisions which led to loss ...."
- 15) You may well respond by pointing out that the PO was equally ignorant (in formal terms) of the causes of loss, despite having a detailed knowledge of Penrose and being extremely well informed of the nature of different losses, and therefore that her estimations of the consequences of maladministration must have been largely third-hand. This is of course correct, but the implications cut both ways:
  - [In favour of the Regulators] When the primary causes are examined it might be that, despite Maladministration, the Public Bodies were not strongly implicated with the process or processes which caused the majority of policyholders to lose a very substantial part of the value of their investment.
  - [In favour of the policyholders] It may also prove to be the case, indeed it is much more likely, given what they knew about Equitable's lack of an estate, that the Public Bodies should have recognised that the Society was behaving in such a way as to favour early joiners to the very substantial and improper detriment of later generations, and that they should have deployed their extensive powers of intervention to mitigate those subsequent losses.
- 16) Your progress reports do not contain any proper analysis of the potential for such mitigation of loss by the Society 'absent maladministration' and under

proper guidance from its Regulators. Had the regulators acted as soon as they were aware of inherent contradictions in WPWM (early 1989), then nearly all of the subsequent losses could have been mitigated. The careers of a large part of the Society's management would surely have been curtailed in consequence.

- 17) The point that I am making here is that we are all obliged to accept the Ombudsman's findings about the Maladministration that she investigated, but there remains the strong possibility that there was Maladministration in connection with matters that she could not investigate. A "fair" EGP system should resolve the full contribution of the Public Bodies to the losses in question and not leave an artificially defined residue as an unresolved sore to rankle on for another term of years before being finally resolved by the European Courts. We understood that this was the implication of your "Flexible Approach", but that no longer seems to be the case.
- 18) Thus, it is conceivable that the proper degree of compensation might prove, as the Treasury claims, to be vastly smaller than the actual degree of loss. But if true this needs to be established positively on a basis of hard facts, not because the full details of the regulators' guilt have been successfully buried for a decade or more.

## **The Fear of Numbers**

- 19) I refer unapologetically to a 'fear of numbers' which seems to characterise both the Treasury's long term stance and the way in which your remit has been tackled. This is all the more to be deprecated because the issues which have to be addressed are inherently quantitative. That is to say they are not about absolute rights and wrongs (for the most part), they are about how much or what percentage each policyholder should have received on the premiums that he or she invested, as well as why did so many receive so much less than 100% of what they paid in.
- 20) In early January, I urged that you should insist on the provision of simple statistics of the Society's business going back to 1980 at the very least, but it is now mid March and all that is available in IR3 is partial and incomplete data going back to 1992 which greatly hampers the calculation of gains and losses, and increases the likelihood of serious unfairness in framing the EGP Scheme. It is clearly causing you considerable difficulties in that you are unable to take account of possible overbonusing prior to 1990 (IR3 7.8)
- 21) An unfortunate consequence of 'fear of numbers' is to assign exalted status to the views of quantitative analysts such as accountants and actuaries. In the course of the Equitable drama the former have been of questionable use while the effects of the latter on truth and transparency have been deplorable. It is now clear that Towers Watson have no intention of departing from this unfortunate precedent. Nevertheless, and for reasons that are most unclear, you express your intention of placing great reliance

upon their opinions, extending to a wide range of matters where their expertise appears to be close to non-existent.

22) The following problems derive from this anti-quantitative approach as exemplified by the current situation:

- There has been delay and reluctance in providing Action Groups with an agreed basis of statistics going back over the relevant period. What has been provided so far in IR3 itself is manifestly inadequate and falls far short of the modest requests that I made at the beginning of January. The only ‘benefit’ of this economy of effort is that Action Groups waste time arguing amongst themselves, which can only suit those with a “divide and rule” mentality.
- The unfortunate consequence is that the advice you receive from us is unnecessarily conflicting and confusing. This situation is not new, because the Treasury has chosen not to respond to requests for fuller and more reliable information for most of the last decade. The PO encountered similar difficulties and specifically recommended a Tribunal which could command access to the necessary data.
- The separate concepts of individual policyholder losses and the amounts that may rank for compensation have become confused and blurred together. “Losses” should be defined on a simple objective basis that everyone can understand and relate to, and which should allow for gains on earlier premiums. This provides a stable foundation for whatever scheme may follow, but it does ensure that those who have made no (significant) loss can be eliminated from further consideration. The simplest and most robust basis for calculating the ‘Basic Losses’ is to use the earned rates of return on the Equitable WP Fund year by year, corrected for operational costs.
- At the second stage, everyone is agreed that some sort of comparator should be applied, but there are strong disagreements as to the nature of the comparators and their actual composition. In IR3 it is proposed that different comparators be employed according to the extent to which different cohorts and classes would have been able to mitigate their losses ‘absent maladministration’. This is a misuse of the comparator concept because its primary merit and justification is to demonstrate what returns were available in the real market over various timescales.
- What is being proposed is much closer to claiming that the Public Bodies were only responsible for  $x\%$  of the real losses of some or all classes, and therefore only that  $x\%$  of loss should be eligible for compensation. The great merit of this explicit approach is that if the percentage ‘x’ is changed after discussion and debate then it is a trivial and transparent matter to adjust the calculations, whereas changing a comparator mix seems more like witchcraft than a rational response.

- While I certainly cannot claim that there is only one correct way to calculate individual losses and determine a fair basis of compensation for those who qualify, there are good, robust, and objective approaches and there are other approaches which are poor, arbitrary, subjective and volatile in their outcomes. . As I have said in earlier correspondence transparency in such schemes is a vital public good, to which you should be giving priority at every stage of development.

23) I believe that something along the following lines is needed, where we start with the situation as perceived by policyholders and progress to a fair but realistic outcome:(all results are time corrected to a common date, say 1.1.2011)

- a) Calculate basic losses by comparison with ELAS earned returns (net of costs); eliminate anyone with net gains or with losses less than say 10%.
- b) Repeat calculations using realistic market rates of return; eliminate anyone with realistic gains or with losses less than 5%. [Uses general comparator]
- c) Apply agreed proportionate liability factors ( $X^1\%$ ,  $X^2\%$ ...) to relevant classes of policyholder, where and if it has been agreed that the regulators were only partially responsible for loss. This stage gives the “Qualifying Loss”.  $X^n=100\%$  signifies that the Public Bodies are fully responsible for the losses in question, while  $X^n=60\%$  signifies that they were only deemed 60% responsible.
- d) Rank for disproportionate impact based on a combination of age now and Basic Loss/Total Premiums, the “Basic Loss Percentage”. The rationale is that hardship is very much a function of age combined with the overall degree of loss, because older people have less time to rearrange their finances, but this only matters if the losses are particularly large in percentage terms. [We might take the minimal criteria to be age at least 70 and basic loss at least 30%]
- e) Apply an uplift to the Qualifying Loss according to the degree of disproportionate impact, so that the hardest hit are treated a little more generously. This avoids the problem that you have already encountered, which is that disproportionate impact does not align neatly with any particular class of policies but is spread over almost the whole range of policy types.
- f) Lastly, apply any caps or minimum payment rules together with any progressive reductions in the percentage of loss refunded. [I sketched out a possible approach with an individual cap on total compensation and a progressive reduction in percentage compensation as the amount of losses increased in my letter of 12 October headed “Calculation of Individual Losses”.]

- 24) The great advantage of this approach is that it does not pre-judge who qualifies or does not qualify until the actual calculations are done, while allowing perhaps 50% of policyholders to be filtered out in the initial stages. The calculations are data intensive, not computation intensive and a single PC should be able to process 1.5 million cases (say 400 million individual records) in a few hours. A sample set of 15,000 cases would be enough to check out the rules and the total amounts of compensation deriving from those rules, so as to avoid any last minute embarrassments.
- 25) It is most inadvisable to finalise the compensation rules before running the data on the computer, because the total of losses may be much larger than the net gain/loss of any particular class or cohort. But, by now you should at least have run computations of basic loss and disclosed the overall scale of the possible impact (probably huge) and the proportion of policyholders likely to be completely excluded as having suffered no significant loss. This would concentrate everyone's attention very nicely, even the politicians.

### **Misuse of 'Fictionalisation'**

- 26) Substantial parts of IR3 are based on 'fictionalisation', the imaginative reconstruction of what might have happened 'absent maladministration'. This is an approach required of you by the Treasury, to which you have assented. This is also known as scenario painting, role playing, counterfactual thinking or creative writing. As a systems professional and management consultant I have often used such techniques and am familiar with their benefits and drawbacks.
- 27) Towers Watson have used this approach in attempt to 'prove' that the GAD would have reacted ineffectually even if they had not been in breach of duty. That is a totally inappropriate use of the methodology: in general it only discloses what is possible, and in narrow situations it can indicate what is more or less likely, but it offers no means of proof sufficient to deny victims their proper redress for maladministration.
- 28) In the case in hand, we need merely note that the determining factor is not some theoretical timetable but whether the management culture (which is at the heart of any sustained maladministration) requires a priority response to potentially serious situations. There is absolutely no doubt that the regulatory issues that were raised by the matters that GAD chose to ignore were extremely serious (see separate section on the *Applicable Professional Standards*), but GAD's responses were leisurely, superficial and designed to prevent any alarm from being raised with the responsible Ministers. TW have chosen to endorse such incompetence by claiming that it was, in effect, unavoidable. It was nothing of the sort. What was needed was the regulatory equivalent of a Chief Petty Officer to prioritise and drive action on a day to day basis.

- 29) There is no indication in what they have submitted for you (or more properly for their clients, the Treasury) that TW are aware of the duties of the regulatory college which encompassed the Appointed Actuary and the GAD, or of the high standards which the Profession demands of its members in that connection.
- 30) One consequence of TW's very obvious partisanship is that their credibility has been seriously damaged in relation to the exercise as a whole. Surely it is improbable that any aware policyholder or taxpayer will accept their warranties or assurances about any calculations or formulae.

### **Applicable Professional Standards**

- 31) Much of the argument in this affair turns on the issue of what professional standards were applicable to the Public Bodies, particularly to GAD and other actuarial functions that were involved in the Maladministration now accepted by the Government.
- 32) The Treasury have argued that the personnel in question were essentially box-tickers, despite their professional qualifications as Life Actuaries, and that they could be immobilised at any time by pronouncing the magic phrase "*commercial decision of the directors*". We cannot deny that the GAD *behaved* in this way for reasons that have never been disclosed, but their actual duties under the law and under the derived professional standards were altogether different. Moreover, it is very clear that GAD in conjunction with the DTI were required to examine commercial decisions, in direct contrast to the Treasury submission to you (CD Daykin "The developing role of the Government Actuary's Department in the supervision of insurance" *Journal of the Institute of Actuaries* 119, II, 1992. Page 339. 16.4)
- 33) The wording of the three EU Life Directives and the wording of the derived UK statutes were applicable to the prudential regulation of insurance over the period in question. Each of those directives required the Secretary of State to ensure that solvency calculations and the assumptions underlying them were verified with a comprehensive and detailed scrutiny. Under the UK system the task of 'verification' was shared between the Appointed Actuary and the GAD/DTI, with the former taking the initiative by 'carrying out an investigation' and preparing the prescribed Insurance Returns.
- 34) As I point out in a separate section, the Appointed Actuary was a statutory part of the Regulatory system under the formal control of the Secretary of State. Certainly the other officers of the Society were not allowed to interfere with or challenge his work or his advice.
- 35) It is a matter of record that the Society was being run with a very small margin of solvency compared to other large or medium sized life companies.

Because of this Ranson as AA should have been extremely meticulous in carrying out his work and the GAD should have been on alert and ready to respond rapidly to any signs of financial distress or imprudent behaviour.

36) We are fortunate in having an unquestionably authoritative assessment of the professional standards that should have been applied at the times in question, as well as a (partial) list of the matters of concern at Equitable Life, in the form of the full findings and verdict of the Actuarial Disciplinary Tribunal which ruled on charges levelled at Roy Ranson, Chris Headdon and Alan Nash arising out of this affair.<sup>2</sup> Those findings, which were reached under a requirement of proof “to criminal standards”, make clear that:

- a) The level of the Society’s realistic commitments as well as its guaranteed commitments were the proper concern of the regulators
- b) That failure to discriminate between classes of policy carrying substantially different guarantees was potentially serious misconduct
- c) That the concealment of any significant financial or prudential information from the Directors of the Society was potentially serious misconduct.

37) Those same findings also make clear that any actuary who became aware of such potential misconduct had a professional duty (and in the case of GAD a regulatory duty) to follow up the matter in a timely and diligent fashion.

38) The document itself is 140 pages long and provides many specific examples, of which I proffer just one:

*“133. Particular 5(d) of Charge 2 : You (Ranson) misled policyholders as to the Society’s financial position in that the fund values quoted to them were higher than was warranted by the level of the Society’s assets;*

This issue has partly been addressed earlier in the Panel’s findings in respect of Charge 1. Aggregate potential vesting values (fund values) exceeded asset values in almost every year from 1989 to 1996 inclusive (even allowing for the asset undervaluation alleged by the respondents). The information given of total policy values without explanation created a misleading impression and was contrary to the reasonable expectation of policyholders.”

39) On 14/11/1990, Ranson approached officials at the GAD with information about the Society’s realistic position<sup>3</sup> (the matter covered by this finding) and a half year later<sup>4</sup> provided fuller documentation and asked them to keep it tightly restricted. Those officials were under a regulatory and professional duty to pursue the causes and implications of this situation with urgency and vigour. They did not do so and allowed the matter to lie on file without appropriate action. This exemplifies the PO’s later conclusion that there was a “*Decade of Regulatory Failure*” on the part of the Public Bodies in regard to Equitable Life.

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<sup>2</sup> See [http://www.actuaries.org.uk/data/assets/pdf\\_file/0005/27788/tribunal\\_rep\\_elas.pdf](http://www.actuaries.org.uk/data/assets/pdf_file/0005/27788/tribunal_rep_elas.pdf)

<sup>3</sup> PO Report Part III “Chronology”

<sup>4</sup> “Chronology “: 11/6/1991

## **Ambivalence and “Even-Handedness”**

40) Sir John, in my original letter<sup>6</sup>, I raised a number of issues of concern to myself and fellow activists. We found it difficult to understand your precise role and whether it encompassed both advisory and arbitral responsibilities. In your reply you refuted some of the possibilities that I had suggested, but refrained from any more explicit exposition. You did however say:

*“My task is to provide independent advice on the matters set out in my Terms of Reference..... I understand it to be an overriding requirement of my Terms of Reference that the advice which I am asked to give should be even handed: both as between different classes of policyholder and between the policyholders and the Government.”*

41) These were powerful assurances and they undoubtedly persuaded many on the policyholder side to participate in your work. However, on the basis of actual experience it appears that there are two aspects to your role and that these aspects are less than compatible:

- a) Your role as advisor to the Treasury under which your dominant concerns are to come up with proposals which satisfy the criteria which they advance from time to time – a normal consultant-client relationship.
- b) Your role as independent and even-handed assessor of the PO’s findings and designer of a fair and appropriate payment scheme pursuant to those findings.

42) Clearly the possibility of pursuing both roles in tandem depends entirely on the willingness of the Treasury to give up a substantial degree of control over the outcome of the whole exercise. Whatever your original expectations it is manifest that they are not so willing. The evidence for this conclusion is exemplified both by the surprising changes in direction between IR2 and IR3, as well as the remarkably assertive correspondence between the Treasury and yourself, which appears to have driven much of IR3. The whole matter is so obvious and so personally sensitive that I do not here tabulate the many examples which are available in the published text.

43) Our concerns were amplified by this extract from an article in FT Advisor of 11 March 2010:

*In the Third Interim Report, Sir John sets out the issues very even-handedly. Coursing through the body of the report is the blood of Gavin Palmer of Towers Perrin, actuaries. Sir John is in effect saying: "this is what Gavin Palmer is telling me and I'm minded to accept it. Is that okay?"*

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<sup>6</sup> 16<sup>th</sup> September 2009

**44) In other words, Mr Palmer is perceived by an independent source to be a joint author with yourself of IR3, which in the context of the actual text may well be the case.**

**45) Several questions arise:**

- a) If Mr Palmer is so important why has his role not previously been disclosed?**
- b) What exactly are his experience and qualifications which enable him to opine on these matters?**
- c) Has he been given any share of the authorship of IR3 or subsequent reports?**
- d) To whom does he report, to yourself or to the Treasury?**
- e) Who precisely was responsible for setting up the interview with the FT Advisor and on whose instructions?**

**46) There is a related matter which has caused us repeated concern: rather than submit its arguments via its own advocates (of whom there are reputedly many) and allow you to assess them fairly, the Treasury has required you to investigate various matters on its behalf, notably the Society's share of the blame and apportionment to third parties. Now we see the same distortions being applied to the work of TW who were clearly asked to minimise the consequences of Maladministration. Neither arrangement is capable of providing the even-handed approach which you promised us in October. Would it not be better to withdraw your assurances now so that public and Parliament can know how matters really stand?**

### **Unjust Constraints on Scope**

**47) The Treasury has persisted in a mindset where it sees the Public Bodies as if they were the targets of criminal charges, and so it regards any means of defence or minimisation as appropriate. This manifests repeatedly in the inclusion of matters which lay outside the scope of the PO's Report, but on a strictly unilateral basis.**

**48) For example after trawling Penrose for evidence of recklessness on the part of policyholders the Treasury introduced the "everyone was aware" argument deployed in IR1. It is quite obvious that this relates to conduct of business rather than prudential failings, a topic that policyholders are not allowed to introduce, just as the PO was not allowed to investigate it. In IR3 the Treasury introduces an argument that overbonusing in the mid-80s was a matter of strictly commercial discretion for the Society and not subject to regulatory oversight. Apart from the fact that this is plain wrong, it also raises issues of what happened prior to the time boundaries that you are expected to observe, but this freedom to overstep limits is seen as applying only to the Treasury and not to policyholders.**

**49) One of the tests of even-handedness and indeed of general judicial practice is how such disparities are handled, especially when they are dressed up as elements of your terms of reference by very clever lawyers. We call on you to make it clear that 'fair' means fair, and that you will not be led astray by such disparities in the scope afforded to the various parties..**

**50) To sum up, the implications of the Treasury's intransigence are serious. It has clearly provoked EMAG, the largest policyholder action group, to break off its participation in your work. It will inevitably detract from your eventual proposals in the Final Report, and make them much more politically contentious. Already there is talk of further judicial reviews, such is the perceived unfairness of the latest proposals. This cannot be in anyone's interest.**

**Yours sincerely**

**Michael Josephs**