RESPONSE TO FOS LEAD CASES ON REDRESS

COMPLAINTS ABOUT THE EQUITABLE LIFE ASSURANCE SOCIETY ("THE SOCIETY")

We refer to your letters of 31 July 2003 in respect of the above cases in which you set out the FOS' present views on redress and invited further representations.

The FOS have already been supplied by the Society with the following specifically in relation to remedies for non-GAR misselling:

1. Joint opinion of Christopher Carr QC and Gabriel Moss QC dated 19 September 2002.

2. Report by B&W Deloitte prepared in September 2002.

In addition the FOS have also been provided with copies of the following:

1. Joint opinion of Nicholas Warren QC and Thomas Lowe dated 10 May 2001 and 12 September 2001 prepared on the instructions of Equitable.

2. Joint opinion of Gabriel Moss QC, David Richards QC, Martin Moore and Barry Isaacs dated 19 September 2001 prepared for the Financial Services Authority.

3. Joint opinion of Ian Glick QC and Richard Snowden dated 19 September 2001 instructed by the Financial Services Authority.

4. Advice and commentary by Clarke Willmott & Clarke.

5. Opinion of Christopher Carr QC in response to commentary of Clarke Willmott & Clarke.

We have addressed below at Section A the Society's response on the legal analysis underlying the approach that FOS propose to adopt in these cases. At Section B we have addressed the actuarial considerations. Section C addresses points specific to the lead cases.

SECTION A: LEGAL ANALYSIS

1. We understand that the FOS propose to adopt the approach to redress as set out in the Opinion of Jonathan Hirst QC dated 10 July 2003. That approach has been summarised as the difference between:

   (a) The value of the investment that the complainant would now have if he had reinvested his surrender proceeds from the Equitable Life into an average with profits fund; and

   (b) The value of the alternative investment the complainant would now have assuming their original investment had been made from the start into the average with profits fund.

2. The Society's legal advisers consider that the Opinion of Mr Hirst is flawed and should not be relied upon by the FOS to assess damages in these cases. Such reliance would not lead to either a "fair" or "reasonable" determination by FOS.

3. We have attached at Tab 1 a copy of a joint Opinion of Christopher Carr QC and Gabriel Moss QC in response to the opinion of Jonathan Hirst QC. They strongly disagree with Mr Hirst's Opinion.

4. Counsel for the Society conclude that Mr Hirst has failed in his analysis to give proper consideration to the application of the principles laid down by the House of Lords in *SAAMCO* and critically the limitations that this case imposes on recoverable loss. The principles laid down in that case apply with equal force to cases of breach of contract, tort and breach of statutory duty. *SAAMCO* requires that attention be paid to the scope of the duty that has been broken and to the extent of the risk of loss which the person subject to the duty undertook.

5. A person liable for negligent misrepresentation should not be responsible for all of the consequences of the transaction entered into in reliance on his statement. In particular he should not be responsible for losses which would have been suffered even if the facts had been in accordance with the representation. The application of *SAAMCO* to the lead cases would preclude recovery for any (assumed) relative under performance by the Society. This is because investors with the Society would still have suffered those losses even if the facts concerning the GAR risk had been as represented. Whilst the *SAAMCO* approach may be subject to exceptions such as fraud the legal policy which underlies the approach to cases of fraud has no application to cases of negligent misrepresentation. Even if *Royscot* was correctly decided, which is not accepted, and requires the full measure of damages for fraud to be applied to a case of negligent misrepresentation, *Smith New Court* confirms that damages are not recoverable for loss resulting from falls in asset values arising after the transaction in question was entered into. Loss associated with the Society's relative under performance is loss of this character and not recoverable either under the principle of *SAAMCO* or if the full measure of damages in fraud were to be applied.

6. Mr Hirst's proposed method of assessing damages is therefore unsustainable as it has the effect of awarding damages for inferior investment performance.

7. Mr Hirst's approach to money market alternatives is similarly flawed. The comparison between the Claimant's actual position and the position he would have been in if he had not entered into the transaction is important in determining whether any loss has been suffered but it does not address the question whether any loss that has been suffered falls within the scope of the breach of duty. Mr Hirst fails to consider this question in the context of money market alternatives.

8. It follows from the above that Mr Hirst is incorrect in compensating for the MVA and policy value cuts. Damages should be limited to the GAR cost.

9. In addition, it would be inappropriate and unfair for the FOS to adopt the opinion of Mr Hirst in determining redress in the lead cases for the following additional reasons:

(a) The opinion is internally inconsistent.

(b) The formula proposed by Mr Hirst has the effect of penalising the Society twice in respect of the same loss.

(c) The opinion errs in equating the departure of a policyholder from the Society with mitigation.

(d) The result of the opinion is to suggest that the Society would have to pay greater compensation that if it had been guilty of fraud.

We comment further in respect of the above points below:

10. **The Glick Cap**

10.1 Mr Hirst's opinion is based on measuring damages by reference to a hypothetical "opportunity" cost i.e. the result the policyholder might in fact have achieved (assuming the reinvestment of his Equitable proceeds in an "averagely performing" fund) compared with the result he might have achieved by placing the same funds into an allegedly comparable product with a hypothetical average provider.

10.2 In their Opinion dated 20 September 2001 on behalf of the FSA, Ian Glick QC and Richard Snowden point out that the opportunity cost is only the "first step" in identifying recoverable loss. At paragraph 216 of that Opinion they point out that the claimant may recover less. We would refer the FOS to paragraph 248 of the Glick/Snowden Opinion in which they conclude that the Society:

> "Should only be liable to the extent to which the losses of a policyholder are attributable to features of the non-GAR policy, which should have been disclosed, but were not disclosed, namely the GAR risk. We believe that the courts would probably not hold the Society liable for all the consequences of non-GAR policyholder having bought the policy. We recognise, however, that the contrary view is arguable".

This has been referred to colloquially as the "Glick cap".

10.3 The Carr/Moss Opinion dated 19 September 2002 considered the Glick cap at paragraphs 35 and following and concluded that damages in such cases should be limited to the Glick cap.

10.4 In its correspondence with the Society in December 2001 requiring the Society to establish a process for addressing misselling claims of former non-GAR policyholders who believed they were missold, the FSA confirmed its view that the Society should only compensate policyholders for the loss they might have suffered which flowed from the cost of meeting the GAR options. Thus the compensation paid to any policyholder should be limited to the lesser of:

(a) The amount he would have received if he had bought an equivalent policy with another insurer less what he actually received; and

(b) The GAR costs attributable to that policyholder's fund.

10.5 As you are aware the Glick cap was also applied in calculating the uplifts to be given to non-GAR policyholders under the Scheme of Arrangement under s425 of the Companies Act in return for which policyholders' rights to sue for GAR misselling were compromised. The basis on which the uplifts were calculated was specifically approved by Mr Justice Lloyd who sanctioned the Scheme of Arrangement in February 2002.

10.6 Whilst it is open to Mr Hirst to either agree with the views of the FSA and Society's Counsel or to set out a reasoned disagreement with them, the Society's fundamental concern with his Opinion being used as the basis for FOS determinations is that his opinion does not address the Glick cap. We do not believe it is properly open to FOS to rely on an opinion which fails to deal expressly with what is probably the most important point in these cases.

10.7 In the event that FOS were to revert to Mr Hirst and he were to disagree with both the Glick/Snowden and the Carr/Moss Opinions we do not consider that the FOS could safely rely on Mr Hirst's opinion to ignore the Glick cap. The situation in this case is perhaps exceptional. Detailed consideration has been given over a considerable period of time by two independent sets of leading counsel advising independent parties and they have come up with similar limitations on the recoverability of damages on the basis of a House of Lords decision. The fact that Mr Hirst disagrees with this view would not in our view be a safe basis for FOS to ignore the views of Glick/Snowden and Carr/Moss. It would not give rise to a "fair" or "reasonable" determination.

10.8 We are aware that the FSA have written in January 2002 in similar terms to other providers requiring them to assess whether they have a GAR problem and to provide compensation where appropriate calculated on the basis of the Glick cap. Those letters were expressed to contain guidance to firms as to the steps they should be taking to identify and address possible problems arising from the sale of GAR policies. That guidance expressly referred to the Opinion of Ian Glick QC. Those letters state "The FSA considers that the principle for assessing the amount of a policyholder's reasonable loss as set out in the Opinion of Ian Glick QC and Richard Snowden are likely to be applicable

in other similar cases and so does not at this stage think it necessary to give detailed guidance on the steps which a firm should undertake to assess its potential liabilities to policyholders." So far as we are aware the FSA are still requiring firms to comply with that guidance.

10.9 We understand that in addressing these complaints the FOS must have regard to statute and case law. In addition the Ombudsman must have regard to the criteria that would have applied to the determination of the complaint by the former Ombudsman under the former scheme. Paragraph 5.1(c) of the PIA Ombudsman's Terms of Reference states that the Ombudsman shall have regard to any relevant standards of redress as issued by PIA or by any other SRO as may be relevant to the firm in question. We consider that the FOS must, therefore, have regard to the position taken by the FSA in this matter.

11. Internal inconsistency

11.1 At paragraph 42 of his Opinion, Mr Hirst states:

> "Here I consider that, in common sense terms it cannot be said that the market loss which the claimant would have suffered anyway was caused by the misrepresentation or by the transaction entered into as a result of misrepresentation".

11.2 At paragraph 45 it states:

> "I conclude that if FOS is satisfied that the Claimant would have invested in an alternative but similar "with profits" investment, FOS should have regard to the market loss that the Claimant would have sustained anyway".

11.3 These views are put forward to encourage FOS not to over compensate by putting the Claimant in a better position than he would have been in but for the alleged misrepresentation (see paragraph 44). However, this approach is quite inconsistent with subsequent paragraphs of the Opinion where Mr Hirst considers that Equitable is liable to compensate in respect of both the MVA and, in the case of policyholders leaving after the 16 July 2001, the policy value cut (see paragraphs 67 to 71).

11.4 The awarding of the MVA and the July 2001 policy value reduction has a critical effect on quantum. A policyholder who left on 17 July 2001 would, according to Mr Hirst, receive compensation reflecting "market loss which the Claimant would have suffered anyway". This would create a huge financial burden on the remaining policyholders of Equitable. The significance of this inconsistency in the treatment of market losses cannot therefore be overstated.

11.5 Another significant inconsistency lies in the approach to the date of assessment of damages, starting at paragraph 48.

11.6 At paragraph 50 Mr Hirst states quite correctly:

> "What a Claimant cannot do once he knows of the misrepresentation is to wait and see how the market moves before he decides to transfer".

11.7 Unfortunately this point is not followed through possibly because Mr Hirst was not supplied with all the facts that he would have needed. For example he observes at footnote 31 that he did not have the information which he would have needed to form a view as to the date when the Claimants knew that a misrepresentation had been made. We would observe that this is a critical omission in trying to make any judgment about the behaviour of Claimants and the knock on effect as to the date of assessment of damages. We cannot see how FOS can come to a sensible view about this without this date being established. For the reasons stated in the enclosed opinion at paragraphs 124-132 the date of commencement is irrelevant if the Glick cap applies. If, however, the date of assessment is to be taken into account then there are a number of difficulties arising out of what is proposed as addressed in the opinion. It is also probable that many policyholders who left long after the House of Lords decision but before the Compromise Scheme, had stayed on for a considerable period in the expectation that they would receive demutualisation windfalls. If that is generally correct in relation to Claimants then it is plain to us that the Claimant was not entitled to wait and see whether that came about any more than he was entitled to wait and see how the market moves. We address this issue in more detail below with regard to "mitigation" in the individual lead cases.

11.8 At paragraph 56 Mr Hirst highlights (rightly) the danger of a Claimant being over compensated and sets out excellent reasons why FOS should take full account of such concerns. Mr Hirst's solution at paragraph 57 appears to be to assess compensation as at the date of the award. This suggestion is plainly made with a view to avoiding over compensation and protecting the Society, but unfortunately, the way in which it is applied in subsequent paragraphs can actually lead to the opposite result (see paragraph 142 of Carr/Moss at tab 1). That consequence follows from the application of the opportunity cost approach to damages without the application of the Glick cap, together with the award against Equitable of the MVA and the July 2001 policy value cut. If a policyholder suffered a policy value cut whilst a member of the Society and subsequently surrendered his policy and suffered the MVA, assuming he then invested the proceeds with another provider he may then have suffered another bonus and policy value reduction with the other provider. The second reduction will tend to give him a worse outcome than the average and hence increase his damages under Mr Hirst's methodology.

11.9 The point is that the July 2001 policy value cut and the MVA reflected, amongst other things, market risk that the Claimant had agreed to take independently of the alleged misrepresentation and would have taken with the Society or some other provider in any event. To compensate him for a market fall and other market risks unrelated to the GAR

issue is to compensate him for something for which the Society is not liable. It is also plain that comparable providers have (usually later) imposed similar policy cuts and MVAs. At the end of the day the critical point is that over compensation should have been prevented by the application of the Glick cap.

12. **Leavers and Mitigation**

12.1 It seems to us that Mr Hirst applies "mitigation" arguments to justify awarding recovery of the MVA. The Society's case is that the issue of mitigation is irrelevant. The issue for determination is whether the MVA was a loss which was caused by the breach. That is a matter of causation. Notwithstanding this, we comment as follows:

12.2 In paragraph 71 of his Opinion Mr Hirst describes the transfer out of the leavers as "reasonable mitigation". This appears to be on the basis of the following passage at paragraph 67(c):

> "The result "to put it kindly" was a complete mess directly related to the failure to have proper reserves for the GAR liabilities. The Claimants were surely entitled to say, as many do, that they had lost all faith in the Society and also to decide to obtain certainty by crystallising the position and stem any further loss".

12.3 It is a well established legal principle that a Claimant may not increase the losses that he claims by his own unnecessary acts subsequent to the tort: (see *Admiralty Commissioners v SS Amerika*).

12.4 In the present cases it was not "necessary" for the leavers to leave, even if it might have been reasonable for them to do so. A hypothetical reasonable person might have stayed and received the benefit of the Section 425 compromise or might have decided to make a new investment elsewhere. It was accordingly not necessary for them to suffer the MVA and it is plain that they cannot recover it since it was self induced loss, however reasonably it might have been incurred.

12.5 Another related concept is that where a tort has been committed and an act is reasonably done with a view to minimising possible future damage, as long as that act is not a mere voluntary act breaking the sequence of cause and effect then expenses incurred in doing that act may be recoverable as damages.

12.6 In the present case the tort related to the existence of a liability which was provided for by means of a solution involving about 5%, for example, of the value of the policies of the Claimants. It seems to us that a decision taken, often considerably later, but often where the Claimant has expected a demutualisation and been disappointed in that expectation to suffer an MVA of at least 1½ and sometimes even three times the size of the cost of the GAR problem constitutes a new and indeed voluntary act which cannot be regarded

as a direct consequence of the original alleged misrepresentation. However reasonable we may assume that such a decision was, it cannot in any event be characterised as "mitigation" in relation to the original alleged wrong. It is in reality a new investment decision in which the Claimant calculates that in the long term his monies will perform better with a rival provider.

12.7 A further point arises as a consequence of applying a formula that involves comparing industry comparators which is that Equitable may end up paying for the perversity of those other offices' position. Assuming a policy was taken out in 1999 and surrendered in late 2001. The first issue is the lack of available data for the industry's two year surrender values. Aside from that difficulty, we assume that the Society's payment is worse than the industry's the reason being that Equitable cut policy values earlier than its competitors. If the policyholder had not surrendered but had kept the policy it may be that there would be no comparator loss now having regard to the falls in average surrender values over the last year. Is it reasonable that the formula proposed should have the effect of causing a large loss when it was the policyholder who exercised the surrender option and did so at the worst time and when much of the loss is only because other companies were slow to act?

13. **End position worse than it would be if a fraudulent representation had been made**

13.1 We must emphasise of course that FOS has made no finding of fraud. However, it may be a significant test of the credibility of Mr Hirst's views that one finds that he suggested that the Society is under a greater liability for alleged misrepresentation than it would be for fraudulent misrepresentation. Jonathan Hirst's opinion does in fact lead to the extraordinary position that Equitable would be in a worse position, if his opinion were correct, than if the alleged misrepresentation had been made fraudulently.

13.2 As examined in detail in the opinion at tab 1, to the extent that Mr Hirst suggests that Complainants should be compensated for subsequent events such as market losses (ie the MVA and July 2001 policy value cuts) he is suggesting that the Society's liability should be greater than the liability would be in the case of fraudulent misrepresentation where applying *Smith New Court* and *Royscot* would limit such losses.

SECTION B ACTUARIAL ANALYSIS

1. Assuming that Mr Hirst's methodology is correct (which is not accepted), no consideration appears to have been given by FOS to the very real difficulties of applying what is proposed in practice. We attach at tab 2 a report prepared by B&W Deloitte on the information that would be necessary to implement exactly Mr Hirst's opinion, how much of this is realistically available and what alternative approaches and/or approximations might be made in place of information which is not likely to be available. Their conclusion is broadly that having regard to the lack of data there would be significant difficulties in

applying Mr Hirst's formula in order for a fair and reasonable comparison to be made (even if the number of comparator companies were significantly reduced).

2. It is particularly difficult to obtain reliable comparator data in respect of short term policies (which include the test cases and the vast majority of other complaints being handled by FOS). The relative unreliability and incompleteness of comparator data for short term policies is relevant to both limbs of Mr Hirst's formula. It is, however, exacerbated particularly in relation to the second part of the first limb where one is trying to identify comparative performance over an even shorter period of time ie from surrender (ie sometime after July 2000 but before February 2002) to date. The likely inaccuracy in both limbs increases the risk and size of potential inaccuracy in the difference between the two figures which forms the basis of Mr Hirst's approach to compensation.

3. This highlights the difficulties of the approach proposed by FOS compared to the certainty of the Glick cap. We do not consider it appropriate or reasonable for FOS to adopt a formula for compensation which cannot in fact be calculated with any degree of reliability and precision.

SECTION C : CASE SPECIFIC

Without prejudice to the Society's case that the correct approach to redress in these cases is to apply the Glick cap, we have set out below our comments on the lead cases with reference to the documents headed "Summary of the Ombudsman's views on redress at 31 July 2003."

1. **MR** A

1.1 Although the adjudicator found the Society liable we note that the Ombudsman has yet to determine liability in this case.

1.2 The Society agrees with the Ombudsman's view that the complainant has lost the right to rescind.

1.3 The Society agrees with the Ombudsman's analysis that Mr A would have invested in an alternative equity based investment.

1.4 As highlighted above and in the B&W Deloitte report at tab 2 there are numerous difficulties for what is proposed at paragraph 9 of the summary view having regard to the data required and the extent to which it would be available in order for such a comparison to be made.

1.5 We confirm that losses on unit linked investments are not related to the GAR but performance related only (paragraph 10 of the summary note).

1.6 The approach proposed at paragraph 13 is not entirely clear particularly as regards the treatment of withdrawals. In this respect we would refer you to Appendix 1 to the B&W

Deloitte report and the specific difficulties that arise in taking such withdrawals into account under the formula proposed by the FOS. It is also unclear whether and to what extent the proposed approach should give credit for what Mr A has actually received on the reinvestment of the proceeds.

1.7 As regards whether Mr A should have left the Society earlier we do not see how the absence of any widely held view that the only reasonable course of action was for with profits or other policyholders to leave Equitable Life immediately is relevant. Without prejudice to the comments made above at paragraph 12 regarding mitigation generally the test (if applicable at all) is whether having discovered the misrepresentation Mr A should have taken steps to mitigate his loss by transferring out. The consequences of the House of Lords ruling were widely publicised in August 2000. It might be expected that having discovered the alleged misrepresentation at that stage Mr A s should have acted sooner. We note Mr A first complained to the Society in January 2001 after the Society closed to new business yet did not surrender until December 2001. Had he transferred in January 2001 he would have suffered the same level of MVA as was imposed in December 2001 but would have avoided the policy value cuts in July 2001. By way of illustration, the surrender value as at 15 January 2001 would have been £224,279.96 as opposed to the actual surrender value paid of £189,594.14 in December 2001. We consider that if mitigation is relevant at all, Mr A ought reasonably to have surrendered much earlier and in any event no later than January 2001.

2. Ms E

2.1 We note that the Ombudsman has yet to determine liability in this case.

2.2 We agree that had Ms E not invested with Equitable she would have invested in a personal pension plan with another provider.

2.3 We would refer the FOS to B&W Deloitte's comments on the availability of the data in order to carry out the comparison envisaged at paragraph 5. It is unclear how, if at all, credit should be given for the actual growth of her investment with Norwich Union.

2.4 We repeat the general comment made above under Mr A s complaint as regards mitigation. As regards whether Ms E should have transferred out sooner we would make the following observations. In February 2001 Miss Head provided an authorisation to ZZ Financial Trustees Limited to release information about her pension policy. It was not until 12 March 2001 that ZZ wrote to the Society requesting details of transfer values and applicable charges. At the same time ZZ wrote enclosing a completed APP2 form notifying the Society that Ms E wished to stop contracting through the Society. On 16 March 2001 the Society wrote to ZZ notifying them of the transfer values and that in non contractual situations the value was not guaranteed and that there was currently a financial adjustment of 15% applied. Ms E did not

complete the transfer out form to Norwich Union until 25 July 2001. On 27 July 2001 Ms E wrote to the Society setting out the grounds of her complaint. It is clear from the above that Ms E had sought independent advice about transferring out as early as February 2001 yet she did not transfer until after the July 2001 policy value cuts. It is perhaps significant that she only complained to the Society after the policy value cuts were imposed in July 2001. By way of illustration, had Ms E transferred in March 2001 the value would have been £1,994.54 as opposed to £1,753.56 in August 2001. We consider that if mitigation is relevant at all, Ms E ought reasonably to have surrendered much earlier and in any event no later than March 2001 on the above basis.

3. **MR** D

3.1 We note that the Ombudsman has yet to determine liability in this case.

3.2 We agree that Mr D has no right to rescind.

3.3 We agree with the view that had Mr D not taken the Equitable Managed Pension he would have taken a similar product elsewhere.

3.4 As to paragraph 8 please see B&W Deloitte's comments on the availability of the data.

3.5 See further comments below at 4.6 regarding the approach to calculation of loss in this case.

3.6 We repeat the comments made above under Mr A s complaint regarding mitigation generally. As regards whether Mr D could have transferred sooner we note that Mr D first complained to the Society in December 2000 but did not leave the Society until October 2001 long after the policy value cuts. No MVA was applied because he took an annuity with another provider. When Mr D registered his complaint with the PIA Ombudsman in July 2001 he stated that the day he first realised the advice or service he received was unsatisfactory was "late 2000".

3.7 In his letter to the FOS explaining why in late 2001 he had decided to take an enhanced annuity he said this was because

(a) It seemed desirable to distance himself from Equitable's situation;

(b) This means he avoided an encashment penalty; and

(c) The prospects for with profits policies generally appeared to be abysmal.

3.8 We consider that if mitigation is relevant at all, he ought reasonably to have transferred much earlier and in any event no later than December 2000. Had he transferred in December 2000 he would have avoided the July 2001 policy value cuts. By way of illustration had he transferred in order to take benefits with another provider in December

2000 the value would have been £99,601.69 as opposed to £91,040.35 in November 2001.

4. MR B

4.1 We note that the Ombudsman has yet to make any determination on liability in this case.

4.2 We agree with the Ombudsman's view that it is not open to Mr B to rescind.

4.3 We agree that had Mr B not taken out the income drawdown product with Equitable he would have taken out a similar product elsewhere.

4.4 As to paragraph 8 please see B&W Deloitte's comments regarding the availability of data.

4.5 We repeat the comments made above in respect of Mr A 's complaint on mitigation generally. As regards whether Mr B could have transferred sooner we would make the following observations. Mr B wrote to the Society on 7 August 2000 stopping the income drawdown payments from his plan and complaining that he had been misled. The Society responded to Mr B on 22 August 2000 denying his complaint. It was not however until 9 December 2000 that Mr B wrote to the Society again complaining and asking for a transfer value and the alternative options open to him. Mr B did not ultimately decide on the open market option value until 11 January 2001. Mr B did not suffer an MVA because he took benefits with another provider. He also avoided the policy value cuts in July 2001. To the extent that it may be relevant to the FOS's proposed approach (see 4.6 below) had he not taken benefits with another provider he would have suffered an MVA of 20% of final bonus in August 2000 as opposed to an MVA of 10% in December 2000. We consider that if mitigation is relevant at all, he ought reasonably to have transferred much earlier and in any event no later than August 2000.

4.6 We understand that what is proposed in this and Mr D 's case is a comparison of Equitable's product assuming reinvestment of the proceeds in an average managed pension (rather than the purchase of an annuity) compared to the amount the complainant would have received had he invested from the start in a managed pension elsewhere. There are a number of additional difficulties with this analysis in order to allow for the incidence and amount of income/annuity payments in the comparator figures (see B&W Deloitte's report at tab 2). No MVA was applied when Mr B took out his annuity. If we are to assume that for the purpose of this calculation that there was reinvestment of the proceeds in a managed pension elsewhere does the MVA that would have applied at the time then have to be deducted? Also, how, if at all, is credit to be given for payments received under the annuity?

CONCLUSION

In summary, the Society's response is that the legal basis upon which the FOS are proposing to act is incorrect. Even if the approach proposed was correct there are overwhelming difficulties in obtaining the necessary data to ensure that any award of compensation would be fair and reasonable such that former policyholders are not overcompensated at the very significant expense of remaining policyholders. We maintain that the correct approach to the provision of redress in these cases is that set out in the opinions of Messrs Glick/Snowden and Carr/Moss.

30 September 2003