

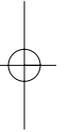
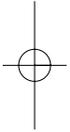
Equitable Life

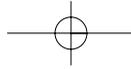
# Notice of Annual General Meeting 2004

## Additional Information

Please Use Your Vote

Centurion  
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PMS 2607  
OTHERS IN JOB:  
  
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# Why You Should Vote AGAINST Resolutions 5(i) and (ii)

## A message from your Board

### Unequivocal legal advice – “no realistic claims against regulators”

Following publication of the report by Lord Penrose, Herbert Smith (one of the country’s major law firms) and leading Counsel were instructed to advise your Board on the merits of possible claims by the Society and policyholders against the various regulators of the Society. Their opinion is published in a letter from Herbert Smith in this booklet, headed ‘Legal Opinion’.

The advice to the Society from our lawyers is that:

### The Society

- “The Society has no realistic claims against the regulators”.

### Policyholders

- Any claim by policyholders “would be complex, lengthy and costly; the result would be uncertain”;

If your Board had been advised that there was a sustainable and cost-effective legal case, we would have pursued it, as we are doing with others. In light of the clear advice of our lawyers, we will not squander members’ money.

**Your Board strongly recommends that you vote AGAINST the resolutions proposed by the pressure group, EMAG.**

### What is EMAG’s proposal?

EMAG wants £2 million of your Society’s money to fund its campaign:

1. To “hire top class professional political, legal, actuarial and financial advisers”.

***On your behalf, we already employ a range of leading professionals across these disciplines, when needed, to advise your Society.***

2. To attempt what EMAG acknowledges would be the “huge task” of pursuing the Government for compensation, in particular through the legal avenues of European Union legislation.

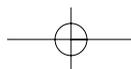
***The unequivocal advice from our lawyers is that any legal action would be limited to one arguable issue and “would be complex, lengthy and costly; the result would be uncertain”.***

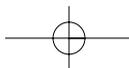
### Why does EMAG want £2 million?

EMAG has suggested that they could spend your money to hire “top class professional, political, legal, actuarial and financial advisers”.

You already pay for the advice that leading professionals give to your Society. To introduce a fresh set of professional advisers would duplicate the costs.

The statement supporting the EMAG resolutions suggests action against the Government in Europe based on the failure of the Government to implement fully the Third Life Directive. Our legal advice states that policyholders may have “a potentially arguable claim” on “one limited issue” in relation to the implementation of the Third Life Directive. If such an action was ever launched in this specific area, it would be hugely complex, there would be uncertainties as to its outcome and it would be lengthy and expensive.





EMAG acknowledges that the Parliamentary Ombudsman (PO) is a viable route to be pursued and that the PO does have the power to recommend compensation. The Society itself is currently urging a reopening of the PO's investigation and your Board believes it is the best hope for compensation. Above all, whether or not any compensation is payable, the Parliamentary Ombudsman could bring independence and finality to the matter. Your Board is advised that £2 million as a fund to pursue Government compensation is wholly unrealistic:

- An action in Europe would cost many times £2 million – the Government would spare no expense in defending any claim;
- If EMAG lost the action, your Society could be held liable for the Government's costs, which could also run into many millions of pounds.
- The Government could bring your Society into the EMAG action for a contribution. In this event, even if EMAG won the action, your Society could then have to pay damages and costs as well as the £2 million proposed by EMAG. In effect, the Society would be suing itself.

Once the £2 million was spent, the action would have to cease or, more likely, EMAG would return to your Society – and your with-profits fund – for more money.

### **How would EMAG's trust fund work?**

The resolution and EMAG's statement leave far too many questions unanswered.

What is the purpose of the trust? – Is it for a legal case or a public relations campaign? Who would actually run the trust on your behalf? To whom would the trust report? How would you know how your money was being spent? What benefits would this resolution bring to members? What do you get for your £2 million?

Members should know that our lawyers advised your Board that to implement the proposed Resolution 5(i), even if passed by members, would be outside the powers of the Society. Before it could be implemented, you would need to approve appropriate Special Resolutions. **These would require at least a 75% majority.**

Based on this advice, your Board could have decided that the Resolutions should not be put to members. However, your Board wants you to have your say on this matter at this Annual General Meeting.

### **What is EMAG?**

Equitable Members' Action Group is a pressure group and does not represent only the interests of current members of Equitable Life – it also represents former members and policyholders. But the costs and risks arising from their proposed resolutions, if passed, will fall entirely on you, the current members – costs you can ill afford to bear.

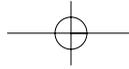
EMAG's constitution explicitly excludes support for litigation against your Society. However, EMAG is currently promoting action groups and lawyers who are proposing to sue your Society. It is your with-profits fund that has to spend money defending such actions.

### **Conclusion**

Your Board strongly recommends you reject EMAG's resolutions. The proposal from EMAG flies in the face of top class legal advice. Its purpose is unclear and wasteful. It is against your best interests.

**Please vote AGAINST.**





# Legal Opinion

The Directors  
The Equitable Life Assurance Society  
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14 April 2004

Dear Sirs,

### Possible Claims by the Society and Policyholders against Regulators

Following publication of the Report of the Equitable Life Inquiry by Lord Penrose on 8th March 2004 ("the Report"), you have instructed us to advise the Society on the merits of possible claims by the Society and policyholders against the various regulators of the Society.

The failings of the regulators are set out in detail in the Report, and summarised at Chapter 19, paragraph 240 (pages 726-727).

We have consulted Leading and Junior Counsel on the various issues which arise. The views expressed below represent their and our collective firm opinions.

We have considered potential claims against:-

- (a) the prudential regulators under the Insurance Companies Act 1982 ("the ICA 1982"), being the Secretary of State for Trade and Industry acting through the Department of Trade and Industry, up to 5th January 1998, and thereafter HM Treasury, the relevant functions of which were contracted out to the Financial Services Authority ("the FSA");
- (b) the conduct of business regulators under the Financial Services Act 1986 ("the FSA 1986"), being the Personal Investment Authority, the relevant functions of which were contracted out to the FSA.

We have identified the following potential claims which the Society or its policyholders might conceivably have against the regulators:-

- (1) Claims in respect of the breach of enforceable private rights arising under the First, Second and Third Life Directives (79/267/EEC, 90/619/EEC and 92/96/EEC), to which the ICA 1982 (as amended from time to time) is intended to give effect.
- (2) Claims for breach of statutory duty under the ICA 1982 or the FSA 1986.
- (3) Claims in common law negligence – for breach of a duty of care owed by the regulators to the Society or its policyholders.
- (4) Claims for misfeasance in public office – i.e. that the regulators exercised their powers unlawfully, specifically intending to injure the Society or its policyholders, or with reckless indifference to the possibility of such injury.
- (5) Claims for breach of human rights.
- (6) Claims for contribution under the Civil Liability (Contribution) Act 1978.

### Potential Claims by the Society

#### Claims against the prudential regulator

##### (1) *Breach of the Directives*

We do not consider that the Directives give rise to any enforceable rights on the part of the Society in respect of the shortcomings identified in the Report. As such there is no prospect of the Society succeeding in such a claim.

##### (2) *Breach of statutory duty under the ICA 1982*

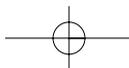
We do not consider that the Society has any claim for breach of statutory duty, since (i) it cannot be said that the regulator failed to consider whether to exercise its powers of intervention under the ICA 1982 or that no rational prudential regulator could have acted in the way in which it did; and (ii) the ICA 1982 does not confer private law remedies on the Society.

 **Herbert Smith in association with Gleiss Lutz and Stibbe**

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**Stibbe** Amsterdam Brussels London New York  
\*associated firm





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(3) *Common law negligence*

We do not consider that the Society has a claim in common law negligence, since (i) there is nothing in the Report to indicate that anything which the prudential regulators did, or forbore from doing, fell outside the ambit of their powers; and (ii) the regulators had no duty to hold the Society harmless from any loss which it might have suffered as a result of the shortcomings in prudential regulation identified in the Report.

(4) *Misfeasance in public office*

There is nothing in the Report to suggest that any one or more of the individuals employed by the prudential regulators exercised power unlawfully, specifically intending to injure the Society, or with reckless indifference to the possibility of such injury. There does not appear to be any realistic prospect of such evidence emerging.

(5) *Breach of human rights*

The Society's lack of remedy in respect of any failings of the prudential regulators is the result of the substantive provisions of European law and English domestic law, and not the result of some procedural obstacle. As such there is no basis for a claim for breach of human rights.

(6) *Contribution*

Even if the policyholders had claims against the prudential regulators, the Society has not compensated policyholders in respect of the same damage, and accordingly would not have a claim under the Civil Liability (Contribution) Act 1978.

Claims against the conduct of business regulator

In the absence of bad faith such claims are precluded by section 187 of the FSA 1986. That does not amount to a breach of human rights. We do not consider there to be anything in the Report to support a claim of bad faith; nor that there is any realistic prospect of such evidence emerging.

**Potential claims by policyholders**

Claims against the prudential regulator

(1) *Breach of the Directives*

We consider that there is a potentially arguable claim on the part of policyholders for breach of the Third Life Directive, in respect of one limited issue, namely the arguably excessive value ascribed to the reinsurance treaty in the Society's technical provisions. Quite apart from uncertainty regarding the merits of a novel claim of this sort, there are further difficulties in that (i) it may well involve a reference to the European Court of Justice; (ii) there are likely to be numerous complex causation and loss issues; and (iii) such litigation would be lengthy and costly. Further, it is unclear as to what extent the Society might ever benefit financially from such a claim, and we consider separately below whether the Society may or ought to fund such a claim.

Apart from that potential claim, we do not consider that the Directives give rise to any enforceable rights on the part of policyholders in respect of the shortcomings identified in the Report.

(2) *Breach of statutory duty under the ICA 1982*

We do not consider that policyholders have claims for breach of statutory duty under the ICA 1982, for similar reasons to those set out above in relation to the Society.

(3) *Common law negligence*

We do not consider that policyholders have a claim in common law negligence, for similar reasons to those set out above in relation to the Society.

(4) *Misfeasance in public office*

We do not consider that policyholders have any such claims, for similar reasons to those set out above in relation to the Society.

(5) *Breach of human rights*

We do not consider that policyholders have any such claims, for similar reasons to those set out above in relation to the Society.

(6) *Contribution*

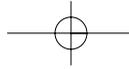
There is no basis for such claims on the part of policyholders.

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#### Claims against the conduct of business regulator

We do not consider that policyholders have any such claims, for similar reasons to those set out above in relation to the Society.

#### **Funding policyholders' claims**

In our view funding claims by policyholders (and possibly also former policyholders) against regulators does not fall within the objects clause of the Society's Memorandum of Association. As such, we consider that the directors would only be permitted to pursue such a course with the authority of special resolutions passed by the Society's members.

Further, we believe that in deciding whether or not to pursue such a course for the benefit of the Society, the directors should have in mind in particular the following:-

- (1) Although the Society would not be a party to such litigation, by funding the policyholders' claims there is a very real risk that the Society would be made liable to meet the regulators' legal costs under section 51 of the Supreme Court Act 1981, in the event that the policyholders lost.
- (2) There is also a real risk that the regulators would seek to bring a contribution claim against the Society under the Civil Liability (Contribution) Act 1978. Effectively, the Society would end up funding claims against itself.
- (3) It is not clear how it is proposed that the fruits of any such litigation be divided up, or whether the Society is to receive any financial benefit from funding the litigation.

#### **Conclusion**

We and Counsel have concluded that:-

- (1) The Society has no realistic claims against the regulators.
- (2) Apart from a potentially arguable claim for breach of the Third Life Directive in relation to one limited issue, the policyholders have no arguable claims against the regulators. The potentially arguable claim, if brought, would be complex, lengthy and costly; the result would be uncertain and it is unclear whether it would be of financial benefit to the Society.
- (3) It would require special resolutions authorised by the members of the Society to permit the Society to advance funds to policyholders for the purpose of pursuing claims against the regulators.
- (4) In considering whether or not to advance such funds, the directors should in particular bear in mind the potential financial consequences to the Society of being made liable for costs in the event that the policyholders lose, or having to make a contribution in the event that the policyholders win.

On the basis of the above conclusions we do not consider that legal action by the Society against the regulators would be cost-effective and we therefore advise the Society not to proceed with such an action. As to the funding by the Society of claims by policyholders, we have identified above the difficulties of bringing such claims and our concerns as to whether the Society can or ought to fund such claims. Ultimately it is for the directors to decide, in the light of those difficulties and concerns, whether to adopt such a course. However, as matters stand it is difficult to see how such a course could be justified.

The findings in the Report provide grounds for encouraging the Parliamentary Ombudsman to carry out a further investigation, by extending the period covered by her investigation, and including the Government Actuary's Department within the scope of her investigation. It is our view that such a further investigation should be the preferred course for the Society to adopt in its attempts to obtain redress for its policyholders.

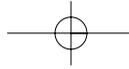
Finally, although we appreciate that the Society may wish to communicate this advice to policyholders, we should make it clear that we and Counsel are advising the Society, not policyholders, and neither we nor Counsel accept any responsibility towards policyholders in relation to this advice.

Yours faithfully,

 **Herbert Smith in association with Gleiss Lutz and Stibbe**

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## Resolutions 5(i) and (ii)

**The resolutions under Resolution 5 have been requisitioned as Members' Resolutions under Regulations 11A and 11B of the Society's Articles of Association. The resolutions have been drafted by the Equitable Members' Action Group (EMAG) and the statement below (which the Society is required to circulate) has been supplied by EMAG. The Board does not support these resolutions nor the statement and cannot accept responsibility for their content or for any consequences arising.**

### Members' Statement

Over 1,000 members of the Equitable Life Assurance Society ('ELAS' or the Society) have supported the resolution tabled by Equitable Members' Action Group ('EMAG') for the AGM on 19th May. It calls for ELAS to contribute £2,000,000 to a trust established by EMAG to campaign for compensation for regulatory failure by the Government. Please consider this and join with those thousand policyholders in voting FOR this action.

EMAG is well established with a legally drafted constitution, an elected committee of past and present policyholders and membership by subscription. It has championed the cause of policyholders for over 3 years. For the past 2 years EMAG's central objective has been to pursue the Government for compensation for all policyholders. Without EMAG the door to the Parliamentary Ombudsman – which is the recommended route of Equitable's board – would now be very firmly shut.

EMAG is independent of any commercial organisation and under its constitution cannot support litigation against the Society. EMAG's committee give their services FREE, aided by the paid for work of our General Secretary. EMAG, on modest member subscriptions, has achieved much, for example:

- obtaining over 19,000 signatures in support of its successful campaign to modernise the Society's Articles,
- keeping the scandal in the public eye whilst Lord Penrose prepared his report,
- lobbying countless MPs and writing six times to ALL of them in the last year.
- Paul Braithwaite, our General Secretary has presented our case robustly in the media and to Parliament,
- maintained an informative, up-to-date and authoritative website at: "www.emag.org.uk"
- commissioned ground-breaking reports, for example, from Professor David Blake, which first used the term 'Ponzi' for the modus operandi of ELAS – a judgement, which Lord Penrose implicitly supports.

Then, a year ago, from Burgess Hodgson, Chartered Accountants, the report, which first disclosed that throughout the 1990s the old board repeatedly declared bonuses FAR in excess of assets. By forensic accounting they found a black hole of £1.3bn in 1990, a figure now confirmed by Lord Penrose. The cost of their report (£9,400) compared to Lord Penrose (£2,500,000) demonstrates EMAG's skill at maximising its cost effectiveness.

Lord Penrose blames the downfall of ELAS on the old directors. However he also says that their practices could not have been sustained if there had been a proper regulatory regime in force. He repeatedly criticises all the regulators and finds that the Department of Trade & Industry was 'ill-equipped' and the Government Actuaries Department was 'complacent'. Now the Treasury denies us compensation on the grounds that the debacle was the fault of the previous Conservative Government. Incredibly, the Treasury's line is that policyholders should, effectively, sue themselves. This is clearly nonsense, but who is best placed to fight it?



On 21st January 2004, before the Penrose report came out, Charles Thomson ELAS Chief Executive told the media: 'the legal hurdles that the society would have to clear to go after the government were high'. We agree: one of the reasons for this is that ELAS (in the form of its past directors) was the wrongdoer, so it does not have "clean hands". From the same press conference, the Daily Telegraph reported Mr Thomson said:

'the hurdles for an individual or a group of Equitable's policyholders pursuing the Government "are less high" and would stand a greater chance of success'.

Again we agree. However, on being asked if ELAS would fund such a venture, Mr Thomson said: "it would be extremely hard to justify to existing policyholders". EMAG is the only credible focus for that huge task and we are offering, given your vote of support, to take up that baton.

EMAG would NOT favour suing the Government for 'misfeasance'. As ELAS's chairman Vanni Treves said in the Evening Standard on 22 March, 'the costs would be enormous and it would take years to come to trial'.

But there are other routes open to a determined, motivated and appropriately funded group of policyholders with "clean hands". In addition to the Parliamentary Ombudsman, who unlike Lord Penrose, does have power to recommend compensation (which happened over the Barlow Clowes affair), EMAG is considering legal avenues to the EU, with a Frankovich action and a petition to the European Commission. Both would be based upon the failure of the UK Government to implement the "Third Life / Non-Life" Directives of 1992 on insurance business supervision. Lord Penrose report and Ruth Kelly's speeches contain numerous indications of this failure.

The proposed £2m contribution from ELAS would be placed in a trust fund formed by EMAG for this purpose. This sizeable sum should be viewed in the context of the estimated £50m total legal fees over three years spent by ELAS in fighting policyholders' claims and reaching settlements with selected groups.

Millions have been spent seeking £3.2bn from 15 former directors. Coincidentally, this is the sum that Burgess Hodgson estimated as the policyholders' loss attributable to regulatory failure. The difference is that the government DOES have the wherewithal to pay.

Even without costly misfeasance litigation, and with EMAG's proven cost effectiveness, campaigning is expensive. It costs more than £150,000 just to write to 450,000 ELAS policyholders. With the contribution envisaged, we will be able to hire top class professional political, legal, actuarial and financial advisers. EMAG's loyal supporters have borne the costs to date but would appreciate the Society's support to see it through.

On March 23rd (the time of writing) there are again press stories that Equitable's board does not think there are grounds to pursue Government compensation. Having studied Penrose's report, EMAG cannot agree. Only EMAG has demonstrated unequivocally a determination to hold the Government to account. We will do our very best to obtain redress for the £3.2billion lost by policyholders. We have the will and the "clean hands" to take this forward to the EU – with YOUR backing.

PLEASE EXERCISE YOUR RIGHT TO VOTE ON THIS IMPORTANT ISSUE

