

The DWP triennial review of pensions bodies

Response to call for evidence by

Pensions Ombudsman

and

Pension Protection Fund Ombudsman

8 August 2013

Introduction

1. DWP's call for evidence of 27 June 2013 invites comments on four bodies and their functions, being:
 - the Pensions Regulator;
 - the Pensions Ombudsman;
 - the Pension Protection Fund Ombudsman;
 - the Pensions Advisory Service.
2. This response is for the most part restricted to matters directly related to the Pensions Ombudsman and Pension Protection Fund Ombudsman, with the other two bodies mentioned in the context of their relationship with us. Our experience does not qualify us to comment on wider matters concerning them; for example, the Pensions Regulator's overall effectiveness in carrying out its regulatory function, or the detail of its interface with schemes and employers.
3. Our response does not set out in any detail the background to the office or its current functions, as they will be well known to DWP.

Responses to specific questions

4. The call for evidence invites views on six questions, responded to below.

Q1. Do the functions of each of the Pensions Regulator, the Pensions Ombudsman, the Pension Protection Fund Ombudsman and the Pensions Advisory Service remain necessary?

5. Encouraging adequate financial provision for later years in an aging population is an acknowledged challenge. Automatic enrolment and State pension reform illustrate the Government's view that it is the State's business to encourage provision (and provide an underpinning basic level of benefit). As part of encouraging private sector provision, including and beyond automatic enrolment, it is vital that there are mechanisms in place to support and encourage confidence in private sector pension provision: even more so when confidence and savings levels are low, as at present. Regulation, advice and effective dispute resolution (being the core functions of the four bodies) are essential elements of that support.

Q2. To the extent that the functions are necessary, are there alternative means of delivering them which would be more efficient and effective?

6. The role of the Pensions Ombudsman is to investigate and determine disputes and complaints in relation to the management of any non-State pension scheme or arrangement. That necessarily requires jurisdiction over every employer and every pension scheme. There is no regulatory or voluntary mechanism that could effectively deliver such a broad jurisdiction. A body with a statutory jurisdiction is, in consequence, the only option.
7. The Pension Protection Fund Ombudsman has a more limited jurisdiction - over just two bodies: the Pension Protection Fund and the Financial Assistance Scheme. But since they are both statutory it is to be expected that the dispute resolution body would be similarly constituted. However, see paragraphs 30 to 32 for our observations on the future of the Pensions Protection Fund Ombudsman as a distinct statutory function.
8. See also paragraphs 25 to 29 for discussion of the 2007 proposal for merger with the Financial Ombudsman Service, which did not go ahead for reasons we still consider apply.

Q3. Is continuing NDPB status the most appropriate and cost-effective delivery model?

9. Answering for our two bodies – yes. Both roles require independent quasi-judicial decision making. In neither case would it be appropriate for the service to be delivered by Government. (In the case of the Pensions Ombudsman, all Government Departments are within jurisdiction. But apart from that, the constitutional imperative is to maintain separation between judicial roles and the executive.)
10. The roles also require expertise particular to ombudsmen, not equivalent to the general activity of Government Departments and so not easily found there.
11. The first and second tests for delivery by an NDPB are therefore met for the Pensions Ombudsman and Pension Protection Fund Ombudsman.
12. If anything, the need for independence might suggest the need for greater distance from Government than “tribunal NDPB” status. For example, the more recently established statutory ombudsmen, the Financial Ombudsman Service and the Legal Services Ombudsman, are statutory corporate bodies, whose funding and governance arrangements are entirely separate from their “sponsor” departments. But their funding models are made possible because the businesses they cover cannot operate without regulatory permission. The same is not true of the pensions industry and we do not presently propose that our constitution be changed from NDPB.

Q4. Is there sufficient clarity about the role of each body in relation to the others? Are there gaps or overlaps between their roles which should be addressed?

13. Our only observation concerns the boundary between the Pensions Ombudsman and the Pensions Advisory Service, an aspect of which we consider should be reviewed. (We comment separately in paragraphs 30 to 32 on the potential for merging the Pensions Ombudsman and the Pension protection Fund Ombudsman.)
14. Ever since the Pensions Ombudsman opened for business in 1992, complainants have been expected to use the services of the Pensions Advisory Service before making a formal complaint to the ombudsman. Both offices are funded on the basis that this will happen.
15. Many embryonic complaints can be dealt with by explanation or mediation. That is supported by the Pensions Advisory Service's statistics. Their 2012/13 annual review recorded that they received 4,474 complaints of which 1,966 required investigation¹.
16. The original rationale for using the Pensions Advisory Service as the filter was no doubt that its predecessor, a charity, was performing a complaints advisory role before the Pensions Ombudsman was established, using volunteer advisers from the pensions industry. A pool of experienced, free, advisers was understandably not overlooked when the new structure was put in place. (There was also an analogy with the relationship between what were then the Industrial Tribunals and ACAS – the original recommendation having been for a Pensions *Tribunal*.)
17. The legal mechanism is that the Pensions Ombudsman has discretion whether to investigate and determine any complaint. One principle for that discretion (not to be regarded as a fetter) is that it will not be exercised unless the Pensions Advisory Service has been consulted.
18. If any cost benefit analysis of the present arrangement was carried out in the early 1990s it is lost in the past and would be largely irrelevant now. There is good reason to review the arrangement to ensure that our discretion is being exercised on supportable grounds. Those grounds would be that it:
 - efficiently achieves the purpose of preventing unnecessary complaints and resolving necessary complaints early;
 - adds value for complainants and respondents to justify the extra step, measured in both time and cost;
 - gives good value for money to the payers of the pension scheme levy.
19. Although the existing arrangement *may* be the right one for today, our present concern is that it has not been recently reviewed and:

¹ In the same year the Pensions Ombudsman accepted 1,074 complaints for investigation of which most would have been through the Pensions Advisory Service. So on a highly superficial analysis their intervention was effective in about half of the cases they investigated.

- the role of the Pensions Ombudsman has changed significantly from that originally imagined (away from formal, tribunal-like processes, towards modern, proportionate dispute resolution – which can and does include mediation²);
- no other ombudsman service operating in the private sector has an equivalent filter (so our standard of accessibility is inconsistent with others);
- discretion is being exercised without an up to date justification.

Q5. Is there sufficient clarity about the roles of these bodies in relation to other regulatory, advisory or dispute resolution bodies?

20. There is an overlap between the jurisdictions of the Pensions Ombudsman and the Financial Ombudsman Service in relation to the administration of personal pension schemes. Administering a personal pension scheme is a “regulated activity” by regulations under the Financial Services and Markets Act 2000. It therefore falls into the Financial Ombudsman Service’s jurisdiction. It falls into the Pensions Ombudsman’s by dint of the primary legislation.
21. The overlap also existed under the self-regulatory regime before the Financial Services and Markets Act 2000 and the creation of the Financial Ombudsman Service. It has been managed through memoranda of understanding with successive ombudsmen and would present no significant operational difficulties, were it not for the signposting issue described next.
22. Rules, made by what is now the Financial Conduct Authority, require firms carrying out a regulated activity to direct consumers to the Financial Ombudsman Service. In the case of personal pension administration complaints that is inconsistent with the memorandum of understanding. Attempts to have the rules changed have not borne fruit. There are two workarounds in place:
 - some pension providers include the required signposting, but then add that it is likely that the Financial Ombudsman Service will pass the complaint to the Pensions Advisory Service and us, and include contact information for us;
 - the Financial Ombudsman Service field the complaints that reach them through incorrect signposting and forward them to the Pensions Advisory Service (in the first instance).
23. Self-evidently neither is satisfactory. In particular, the second workaround results in extra delay for the complainant (and the potential irritation of an already unhappy consumer) – and causes some difficulty in ensuring the necessary consents since there is no effective gateway for the passing of information without them.

² Mediation is likely to be an even more important tool when automatic enrolment brings more complaints involving small employers not used to dealing with an ombudsman and consumers with expectations of a swift resolution of relatively straightforward complaints (see paragraph 45).

24. Also, there is a recognised but unresolved gap in jurisdiction in that neither body can deal with a complaint about advice given to an employee in relation to an occupational pension scheme. Such complaints would be most appropriately handled by the Financial Ombudsman Service (for consistency with advice about *personal* pension schemes, which is within their jurisdiction) but there are no presently regulated activities concerning occupational schemes.

Q6. Are there any other issues or evidence the review team should take into account?

Potential for merger – Financial Ombudsman Service

25. In 2007 an independent review of the pensions institutions³ concluded that the Pensions Ombudsman should be merged with the Financial Ombudsman Service. However, after a considerable amount of work by the two ombudsman’s offices, DWP and the Financial Services Authority, including public consultation, it was decided that the merger should not go ahead.
26. The main reasons were related to the significant differences in powers. In particular:
- the Financial Ombudsman Service’s decisions are binding on the respondent firm only if the consumer accepts the decision: the Pensions Ombudsman’s decisions are final and binding on both complainant and respondent whether or not they accept it;
 - there is a limit on awards of the Financial Ombudsman service (then £100,000, now £150,000): there is no limit on Pensions Ombudsman awards (and even if desirable, imposing one would be difficult in view of the nature of directions in defined benefit schemes particularly);
 - the Financial Ombudsman Service’s decision are made on a “fair and reasonable” basis, not necessarily the same as the law: the Pensions Ombudsman is effectively confined to the same outcomes as the law in almost all cases;
 - the Financial Ombudsman Service’s decisions are susceptible to judicial review only; the Pensions Ombudsman’s decisions are subject to appeal on a point of law.
27. Since the decision not to merge the two bodies, nothing of significance has changed to suggest that the obstacles then present can now be overcome. If anything the similarity of activity is likely to lessen as employers’ fulfilment of automatic enrolment requirements will tend to be a growing proportion of our work – with no comparable activity presently within Financial Ombudsman Service’s jurisdiction.

³ Paul Thornton: A Review of Pensions Institutions- An independent report to the Department for Work and Pensions, June 2007.

Potential for merger – the Pensions Regulator

28. For completeness we note that separation of regulation and dispute resolution is widely regarded as necessary and appropriate in most areas in which both exist. (See, for example, the separation of the Financial Ombudsman Scheme from the Financial Conduct Authority and its predecessor the Financial Services Authority, or the Legal Services Ombudsman and the Legal Services Board (and self-regulatory bodies)).
29. It should also be noted that the Thornton review recognised that the two bodies should stay separate.

Potential for merger – Pensions Ombudsman and Pension Protection Fund Ombudsman

30. The posts of Pensions Ombudsman and Pension Protection Fund Ombudsman (and deputy in each case) have always been respectively held by the same people. The Pension Protection Fund Ombudsman uses the staff and resources of the Pensions Ombudsman. In effect the two bodies are run as one.
31. The 2010 Cabinet Office Review of Public Bodies recommended that the two offices be merged – and there can be no doubt that doing so would be a logical step. It is not, however, likely that there will be significant financial savings from a simple merger without more, since operationally the present arrangements are a merger in all but name. One potential inconvenience of maintaining present arrangements is that if the workload of the Pension Protection Fund Ombudsman were to become a more significant proportion of the total, proper governance would require separate accounting, audit and reporting. That is not likely as things presently stand, however.
32. Benefits *could* result from a merger if the opportunity is taken to review the legislation of both bodies and to simplify and harmonise jurisdiction and process where possible. That requires some work, for which resource has not yet become available.

Efficiency

33. One of three “key issues” in relation to the Pensions Ombudsman, rightly noted in the Thornton Review, was the:

“...small scale of PO resources – capacity for greater flexibility over the use and direction of resource would undoubtedly help to improve workflow and productivity.”
34. That issue remains. We have noted in successive annual reports that we deliberately keep “back office” functions at a low level, buying in support where needed. But by definition a small organisation cannot benefit from economies available to much larger ones.
35. However, over the six years since the review we have significantly improved our effectiveness (notably by reducing case throughput times and backlogs⁴) without significant increase in unit costs in real terms.

⁴ For example, at the beginning of 2007/8 there were 512 cases in the office over a year old (441 after adjustment for anomalies) out of 982 in total, whereas at the end of 2012/13 there were 67 over a year old out of 777 in total.

36. But keeping our support costs as low as possible may hold us back from activities that would, in the longer term, offer greater efficiency and benefit our stakeholders. A ready example is in the area of communications and access, including use of modern media, where the lack of internal resource is limiting. (We have been able to rely on DWP expertise in some other areas, notably IT procurement.)
37. Previous discussions with other bodies about resource sharing have produced little of benefit. The reason is doubtless that they are bound up in their own priorities and are themselves trying to limit overheads. However, we and the Pensions Advisory Service are in the same building, are of similar size, and have similar business needs. We already sometimes combine our efforts in one area – training. We propose to reopen discussions with them about potential for sharing other services (and they are amenable to such discussions).

Governance

38. The office holders of both Pensions Ombudsman and Pension Protection Fund Ombudsman are statutory commissioners. There is no board and consequently no provision for non-executive involvement in corporate decision making (though there is a small audit committee with unpaid non-executive members). That is a comparatively unusual model now, reflecting practice at the time the office was established.
39. In the past we have informally considered the option of an extra-statutory advisory non-executive board and rejected it as not necessary, given the size of the office. However, we expect to keep the possibility under review as the impact of automatic enrolment on our business (and hence our size) becomes clearer over time.
40. We think, though, that an advisory board is likely to remain as good an option as a statutory one, particularly as it could be achieved more easily and with greater flexibility.

Legislation - jurisdiction and procedure

41. As noted in paragraph 32, there would be benefits from a review of the legislation relating to the two offices. In particular, the Pensions Ombudsman operates under procedure rules that have been in place since 2006. They do not reflect modern practice in the proportionate and early resolution of complaints and disputes. They also set out unnecessary procedural detail, which seeks to match (but in particular cases oversteps) the demands of natural justice.
42. The Pension Protection Fund Ombudsman's jurisdiction is unusual in at least one respect, being the power to deal with appeals brought by schemes about the Pension Protection Fund levy. That does not fit altogether comfortably with the general view of what an ombudsman does (essentially, adjudicating on administrative and other matters where there is an imbalance of power between individuals and other bodies).

43. However, we agree that there should be a body to whom such appeals can be made – and we accept that the Pension Protection Fund Ombudsman may be the best of a very limited number of options. Whilst we do not argue that we should lose the jurisdiction, experience suggests that it is more constrained than applicants might expect. It is, on the face of the legislation, limited to considering whether the Pension Protection Fund has applied its own determination of how the levy should be calculated, whereas Schemes often expect us to go into the fairness of the levy in the particular case - in a more "ombudsman-like" way. The review team may wish to consider whether our statutory function provides quite the appeal process that the levy raising process needs.

Future Developments

44. There are three future developments that the review team may want to bear in mind.
45. First is the Pensions Ombudsman's jurisdiction in relation to automatic enrolment. Over time that will bring into jurisdiction large numbers of employees not previously included in pension schemes at all. Their age and other demographics will not match those of those who presently complain to us. They will have different expectations as to process, which will need to be more closely aligned to their experience of pension scheme membership (quick, web based access, for example). It will also bring in more and smaller employers, less used to dealing with pension scheme matters.
46. Second is the continuing decline in membership of defined benefit schemes, which will bring with it a reduction in the more complex complaints concerning funding, discretionary benefits, scheme mergers and so on.
47. Third, the EU Directive on Alternative Dispute Resolution⁵ is to be implemented by 2015. It requires alternative dispute resolution "entities" to be available for consumer goods and services. It has no direct consequences for the Pensions Ombudsman (in that we comply with the requirements of the directive in relation to those matters with which we deal and that fall within its scope). But consideration should be given to whether there are matters within its scope not dealt with elsewhere, for which we would be the suitable "entity".

Conclusions

48. We consider that the functions of the four bodies under review are necessary and that the delivery of their functions by NDPBs is appropriate.
49. As far as the Pensions Ombudsman and Pension Protection Fund Ombudsman are concerned, we agree that they should be merged, but that doing so will only be of value with consideration of simplified and more consistent jurisdiction and processes where possible. In particular the Pensions Ombudsman's procedure rules should be brought up to date.

⁵ Directive 2013/11/EU, 21 May 2013

50. The combined office should otherwise be unchanged, but:

- there should be a review of the effectiveness of the present arrangement that the Pensions Ombudsman does not generally deal with a complaint until it has been to the Pensions Advisory Service;
- clearer signposting of complaints about personal pension administration is needed;
- opportunities for shared services with the Pensions Advisory Service should be considered.

51. We look forward to further discussions with the review team in due course.