

Dear Mr Thornton,

The most valuable structural reform that could be made would be to absorb the Financial Assistance Scheme into the Pensions Protection Fund. I expect you will have heard the reasoning for that from others.

There is also a need for reform of the Pensions Ombudsman mechanism. Your review notes one area where limited Pension Ombudsman powers are "affecting redress for individual complaints". There are other areas. I believe the case for reform has been put to the Regulatory Review via political channels. I repeat it here for convenience:

The Pensions Ombudsman's office conducted a poll of the users of the mechanism and found that there were many more dissatisfied with the Ombudsman's independence than were satisfied. Question 21 asked "*How satisfied were you with the independence and impartiality of the office?*" More than twice as many were dissatisfied or very dissatisfied as were satisfied or very satisfied. This justifies analysis of why those scheme members (and the many others who feel they have cause for complaint but don't think it worth approaching the Ombudsman) perceive the Ombudsman so poorly.

There are two big flaws in the current Ombudsman mechanism. The first concerns cases which in the United States would be termed 'class actions'. Here, some individual must take their case to the Ombudsman although the outcome for him or her will determine the outcome for a class of scheme members. Because of the class, the total money involved is large, much larger than the potential gain for the individual who goes to the Ombudsman. So the Ombudsman knows that if he finds against the trust/employer his decision will very likely be challenged in the High Court (because the cost of that will not be high in terms of the total amounts involved) but that if he finds against the complainant there will not be a High Court challenge (because it would be financially reckless of the complainant to risk the high cost for the relatively small potential gain to him/her as an individual).

There have been a number of important legal questions which the current Ombudsman has addressed in this unbalanced context. Are there any written promises which are enforceable even though they are not written into the trust deeds? Is a change to the trust deeds always acceptable if not explicitly ruled out by the deeds or regulations, even though the change could well be unfair? Should different standards apply to the use of discretions in a non-contributory scheme (where the employer pays all the cost) as opposed to a contributory scheme (where the employee pays part of the predicted cost) or to a pension provided in return for AVC contributions (where the member pays all of the predicted cost)? What should be the impact of the Law Lords decision in the Equitable case on the behaviour of occupational pensions trustees?

The Ombudsman's decisions on these issues have been predominantly against the scheme members' position. Because of the impossibility of challenge, we cannot say whether they were good or bad decisions. The question is whether we want such issues, which affect thousands and set the tone of de-facto trust law, to be decided by the Ombudsman or by judges.

We do know that the Ombudsman was overworked (one determination took four years to produce) and may still be. We do know that this Ombudsman had no experience of pensions law when he took office and will now still be an amateur in comparison with judges experienced in trust law.

Even if one thinks that the problem is solely one of perception there is still cause for concern, and there is a simple reform that would greatly improve the situation. Parliament should give the Pensions Ombudsman the power to require a Court adjudication. He or she should be able to say *"This case raises complex legal issues and their relation to the deeds of this trust is not certain, so a judge should interpret them"*. The trust would bear the cost of getting an answer from a judge. This is not a radical proposal; trusts sometimes choose the route of getting the interpretation they desire validated (or otherwise) by the Courts so as to get more certainty before acting. The proposal is only that the Ombudsman should be able to put them on that course.

The second big flaw in the current mechanism is a lack of separation of responsibilities. A good organisation makes transparent the separation of judgement issues and implementation issues. Thus it is regarded as poor governance if the Chairman and Chief Executive of a company are the same person. In the NHS efforts are made to separate the clinical responsibilities of doctors and NICE from the financial management activities, so that any trade-offs are explicit. We separate the responsibilities of the police and the Crown Prosecution Service. Yet with the Ombudsman we give one person the responsibility for maintaining a good throughput of complaint handling and also give him the responsibility for fairness in deciding which complaints deserve investigation and fairness in the determinations.

It may be that the Ombudsman has great ability in handling his conflicts of interest, and there may be checks within his empire, but that is not the issue. The need is an organisational reform to separate responsibilities in such a way that the trade-offs are understood by scheme members and can be examined to see if they are in the public interest.