

Review of Pensions Institutions Pensions Ombudsman's response to Consultation Paper

Introduction

1. This paper is in response to Paul Thornton's Consultation Document issued in March 2007 and focuses on the question posed on page 10 of the Paper: "Is there a good case for bringing the PO and the FOS closer together?" I observe that it is difficult to see how such a question emerges from the published terms of reference of the Review.
2. The Paper acknowledges that there is "no evidence to suggest that the current arrangements for distribution of functions between the various institutions in the pension's landscape are not fit for purpose". The question then is whether there are ways in which they could be made more efficient and effective.
3. The arguments presented in the Paper for possibly bringing the organisations closer together are:
 - The separation may be historical, and is less valid as FOS has broadened its jurisdiction beyond FSA regulated activity.
 - FOS operates efficiently with low unit costs and effective case throughput.
 - Some redirection of cases is required under present arrangements.
 - There are potential cost savings.
4. The arguments presented for no change are:
 - So long as the Pensions Regulator and the FSA are separate, a separation should similarly be maintained at ombudsman level.
 - The PO and FOS work well together in effective management of the current responsibilities.
 - The FSA has voiced concern that FOS should not take on additional responsibilities unless there is clear benefit to its existing stakeholders.
 - The complexity of PO casework is not something FOS could readily accommodate.
 - There are markedly different procedures involved in the respective processes.

- Revised governance arrangements would be required given that the Treasury is responsible for FSA/FOS activity whereas DWP has responsibility for the Pensions Regulator/PO.
- There would be implications for The Pensions Advisory Service (TPAS), as undertaking work on the FOS model would involve FOS subsuming the role which TPAS play in relation to complaints about occupational pension schemes.
- Separate consideration would be required of the role of the Pension Protection Fund Ombudsman, a post currently combined with that of PO.

Consideration of Arguments presented for change

Historical perspective

5. It is true that there is perhaps now a less clear distinction between occupational and personal pensions than there was historically. DWP's own thinking seems to create a distinction between workplace and non-workplace pensions, recognising that the former can encompass both occupational and personal pensions. Combined with a current trend for employers to move away from final salary, defined benefit, pension arrangements, to defined contribution schemes, within which the risk is effectively borne by the employee, the current split of responsibility between the Pensions Ombudsman and FOS might be seen as less necessary.
6. But the same argument would apply to maintaining a separate Regulator for workplace as opposed to other pension products. The Paper suggests however that the status quo should remain so far as Regulators are concerned.
7. There is a similar distinction (which again is not proposed to be changed) in the arrangements dealing with failed schemes. Workplace pensions look to the Pension Protection Fund (and also the Financial Assistance Scheme) while the Financial Services Compensation Scheme helps those who would lose money where a regulated provider of a financial product has ceased to exist.
8. There is a symmetry to the present arrangements where TPR, PPF and PO, match FSA, FSCS and FOS.
9. The current Deregulatory Review is focusing on ways to arrest the trend from DB to DC schemes. It may not be helpful to that aim to take steps which imply that workplace pensions have less importance in DWP's thinking.

FOS processes

10. FOS no doubt operates efficiently, but comparisons of unit costs and output times are only valid if comparing like for like. Such measures are helpful in monitoring an organisation's own ongoing efficiency (assuming that external factors remain broadly stable), but they are not helpful in comparing disparate bodies. In fact, low unit costs and fast throughput times in a complaint handling environment can be more a reflection of the bodies *about* which complaints are being handled than of the bodies receiving and investigating the complaints.
11. FOS considers its current pensions work some of its most difficult, and it is accepted that many of FOS's current cases across its several jurisdictions are very straightforward. TPAS sees the work of the PO as involving cases which are more complex than the pensions work undertaken by FOS. There is no basis for suggesting that, with like resource, FOS would deal with those PO cases quicker or more cheaply than can the PO, which is on target to be dealing with 95% of its cases within a year.

Customer confusion

12. The Consultation Paper states that some redirection of cases between the PO and FOS is currently required, suggesting some consumer confusion. It is true that a small number of cases do have to be redirected (although it is accepted that FOS and the PO have effective arrangements in place for managing such redirection). The numbers are exceptionally small – a few tens of cases per annum, and could readily be addressed with some more effective signposting.
13. The particular proposal is an example of a solution looking for a problem

Cost savings

14. There is scope for making cost savings in the PO sharing resources and infrastructure. I am certainly not averse to considering what scope there is for this (be it with FOS or some other body), however it is doubtful that the proposals as presented by FOS are confined to such economies. Rather, they seem to be based on making an entirely new FOS pensions jurisdiction, and are likely to involve additional and wasted costs.

Wider issues

15. A move to merge the PO into FOS is likely to send out a message that pension provision does not differ in kind from other savings and investments, but is instead just one of many financial based products around facing prospective investors. That is not a measure which is likely to encourage citizens to make provision specifically for their retirement as is understood to be the policy of the Government.
16. The current PO arrangements have been designed to ensure that the PO can resolve disputes in a way which enables the Government to meet its obligation under Article 6 of the European Convention on Human Rights. As presently constituted, FOS does not have such a role and it is difficult to see how it could, given its governance arrangements and its procedures.
17. The PO and FOS operate within quite distinct regimes, designed for different purposes, and careful thought must be given both to why the regimes were so designed, and what the consequences of change would be, before the differences were simply swept away.
18. For example, the PO's determinations are binding on all parties subject to a successful appeal on a point of law. FOS decisions, in contrast, are not binding on the complainant and can be challenged by the respondent only by seeking the discretionary remedy of judicial review, with FOS generally mounting a vigorous defence against such an action. The PO can bring therefore greater finality, and recent European case law has indicated that the existence of judicial review is not itself sufficient safeguard to comply with Article 6, if the body taking the original decision is not itself sufficiently independent and impartial.
19. The PO publishes its determinations in full. Not only is this a requirement under Article 6 of the ECHR but it enables practitioners (including TPAS) to take account of such decisions when advising clients.
20. Aspects of the PO's work currently lie with the overview of the Council on Tribunals which has no jurisdiction over FOS. There are political overtones to taking decisions which reduce the oversight of the Council on Tribunals.
21. FOS currently has a ceiling on the compensation it can award and makes clear in its submission that it would be controversial should that ceiling not apply across its entire jurisdiction. The PO (and the Courts) has no such constraints in terms of redress which can be provided.
22. The position of the PPFO warrants particular attention. The PPFO's functions are, in part, explicitly appellate, it deals with appeals against decisions of the FAS and the PPF. Whilst with appropriate statutory changes FOS clearly could take on these functions, that would take it into different territory than its

usual model. The Parliamentary Ombudsman explicitly refused to take on an appellate role in relation to FAS because it compromised the nature of her function. The PPFO could also be decoupled from the PO, but that would be tantamount on the face of it at least to adding another body, dealing currently with a low volume of work, to the landscape.

23. There may be scope for retaining the defining characteristics of the PO, whilst within an umbrella which also included FOS, and those responsible for its governance would need to reach a view on the extent to which it would be prepared to accommodate marked differences between its existing and a new pensions jurisdiction. The existing business model of FOS is not presently compatible with the current legal framework (of both primary and secondary legislation) which governs the PO.

Summary

24. In summary therefore, I do not accept that a case has been made out for the wholesale merger of the PO into FOS, or indeed for an interim transfer with a view to later making such a merger.
 - There is little evidence of customer confusion around the current arrangements, and PO and FOS work well on a day to day basis in ensuring that any cases which are misdirected are quickly redirected.
 - Retention of a separate PO sits well with parallel arrangements for Regulation and provision of Compensation.
 - Merger of the PO into FOS, albeit within a new pensions jurisdiction, would send out quite inappropriate messages at a time when the importance of pension provision, as opposed to other forms of saving or investment, is high on the Political agenda.
 - Significant primary and secondary legislative change would be required to align the PO's functions with those of FOS, and the legal and judicial implications require careful consideration. There are significant advantages to a regime in which decisions are binding on all, are published and in which there are no constraints on available redress.
 - There would be adverse implications for the effective advisory service offered by TPAS.
 - The FSA has voiced concern about any expansion of FOS' jurisdiction.

- To the extent that change may be suggested in order to save costs, account should be taken of the sums recently spent on the accommodation and IT of the PO.
25. I am, however, receptive to proposals to explore some degree of closer working. This could embrace both a review of current resources and infrastructure to identify scope for synergy, and also extend to current boundaries of responsibility to produce yet greater clarity and minimise any confusing overlap or gaps between jurisdictions.

An alternative way forward

26. Given what is said above about the significance of promoting pension provision, there is a case for the PO to take on responsibility for *all* pension complaints and disputes. That is not my preferred option: my preferred position arises from the philosophy that, “if it ain’t broke, don’t fix it”. But if there is a desire to make a recommendation to reduce the number of players in the pension’s landscape in accordance with the Hampton principles, then that could best be done by removing FOS.
27. That would result in a single PO dealing with all pension related complaints and disputes, thus overcoming such problem as has been noted to exist in consumers finding their way to the right office.
28. The PO already deals with some complaints of mis-selling (of AVCs), the type of complaint currently dealt with by FOS. Thus the expertise to deal with such complaints already exists and would not need to be newly acquired. Very little would be required by way of statutory change. Whereas FOS’ jurisdiction does not extend to occupational pensions, the PO already has a statutory jurisdiction covering both occupational and personal pensions.
29. The role of TPAS would be largely unaffected and might indeed be expanded to encompass a greater involvement in complaints about personal pensions.

I look forward to having further opportunity to contribute as the Review progresses.

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26 March 2007