



Legislative consultation for changes to remit of Financial Services Ombudsman

JANUARY 2023

Consultation on the draft amendments to the Financial Services Ombudsman (Jersey) Law 2014 and the Exempt Business Order made under it

Summary:

The Government of Jersey is seeking to amend the Financial Services Ombudsman (Jersey) Law 2014 (the “**OFSO Law**”) and the Financial Services Ombudsman (Exempt Business) (Jersey) Order 2014 (the “**Exempt Business Order**”) made under the OFSO Law to inter alia:

- (i) bring into the remit of the Office of Financial Services Ombudsman (**OFSO**) complaints relating to Jersey tax approved employer managed occupational pension schemes
- (ii) bring into the remit of OFSO as respondent those persons who are the employer or trustee or manager of any Jersey tax approved pension scheme whether they are regulated or remunerated for acting in that capacity.
- (iii) introduce into OFSO a UK Pension Ombudsman framework for pension-related complaints with OFSO being able to make directions for an uncapped monetary award to be paid to a complainant’s pension benefits or for the complainant’s pension rights or scheme benefits to be restituted.

This will mean that all Jersey tax approved pension arrangements on the Island will benefit from access to OFSO as a free and independent dispute resolution service and it should enhance the service provided to consumers in relation to their pension arrangements.

It will also help evidence the consumer harms that exist in the domestic unregulated pension market and help determine what regulatory controls need to be introduced as part of a comprehensive framework for pension regulation.

The Government has had the advantage of views from industry representatives, OFSO and the Regulator ahead of the publication of this consultation, which views have informed the drafting of the relevant amending legislation -

- (i) the Draft Financial Services Ombudsman (Amendment)(Jersey) Law 202- (“**Draft Amendments**”).

THIS CONSULTATION NOW SEEKS VIEWS ON THE DRAFT AMENDMENTS.

Date published:

23 January 2023

Closing date:

23 February 2023

Supporting document attached:

- (i) the Draft Financial Services Ombudsman (Amendment)(Jersey) Law 202-

Ways to respond

Charlotte Brambilla

Associate Director, Financial Services | Economy | Office of the Chief Executive

Email: c.brambilla@gov.je

This consultation paper has also been directly provided to:

- Jersey Pensions Association (“**JPA**”)
- Jersey Finance Limited
- The Law Society of Jersey
- Jersey Financial Services Commission (“**Regulator**”)
- Office of the Financial Services Ombudsman (“**OFSO**”)
- Jersey Branch of the Association of Professional Financial Adviser (“**JPF**”)
- Director of Financial Services, States of Guernsey Government

INTRODUCTION

Jersey is recognised as a leading international centre for financial services, offering flexibility in a well-regulated environment, and with a wide body of experienced professionals able to assist.

Unlike in other jurisdictions, such as the UK and Guernsey, pension business is not regulated as a separate category of financial service business. The retail side of pension business is instead regulated in part through other categories of regulated financial service or insurance business which overlap into pensions business. The employer (non-retail) side of pension business is regulated typically by the employee's employment contract, trust law, the Comptroller's tax rules relating to pensions and, in the case of public employees, the statutory framework which applies to the public employee pension schemes ("**Public Sector Employee Pension Schemes**").

In recent years, Government, the Regulator and representatives of the JPA and the local pension industry have been in discussions to introduce a comprehensive framework for pension regulation to the Island, incorporating both the retail and non-retail aspects of it. The Government issued two consultations on the topic in 2018 and 2019.

Following these consultations Government has pledged to introduce, with the assistance of the Regulator, a phased, proportionate approach to the introduction of pension regulation.

The proposed regulation is intended to focus on the specific risks in the Jersey market and seeks to avoid over-burdening providers so that pension provision can remain cost-effective.

Phase 1 of pension regulation was delivered in 2022 and closed a gap which existed in relation to the retail 'sale' type of advice given to consumers about their Jersey pension arrangements or pension products.

The Draft Amendments constitute Phase 2 of Pension Regulation. There will be a further phase of Pension Regulation to follow, which will introduce a comprehensive regulatory framework for all Jersey managed or tax approved pension arrangements.

The aim of Phase 2 is to improve and standardise the duty of care required of all persons responsible for the management and administration of local consumers' pension arrangements whether those persons are regulated or remunerated. Employer managed occupational pension schemes are presently exempted from the scope of OFSO, Phase 2 will close this gap.

Such schemes typically are managed by employer and employee nominated individuals, who act as lay trustees of the employer's pension scheme. These persons tend not to be regulated and to be 'mere volunteers' without necessarily having had formal pension training or the necessary fiduciary expertise. These schemes were recognised to pose significant risk of consumer harm in our domestic pensions market.

It was also concluded that the Public Sector Employee Pension Schemes, which are managed by unregulated bodies made up mostly of unlicensed individuals who predominantly are not remunerated, should also be within the scope of OFSO as they represent a substantial share of the Island's pension market.

To give adequate protection for the financial harm which can be potentially caused to a person's retirement savings, it was considered appropriate to alter OFSO's framework for pension related

complaints so that they were dealt with in a manner like that of the UK Pension Ombudsman allowing for uncapped compensation and restitutionary awards.

To simplify the complaints process for pension related complaints where there tend to be multiple parties involved, who may be in part responsible for any failings, it was determined to limit the parties' responsible to the employer, scheme manager and, for the Public Sector Employee Pension Schemes, the management body and the statutorily appointed administrator. This again reflects how the UK Pension Ombudsman operates.

To clarify the type of complaint which falls within this new pension ombudsman type of regime, the definition of what is a pension scheme has been narrowed down to Jersey tax approved arrangements only and pension related investment advice has been excluded from the new definition of 'relevant pension activity'. Such advice related complaints are instead to be dealt with as relevant financial service business and subject to the compensation limits which apply to this type of complaint.

By widening OFSO's remit in the manner above-described, Phase 2 will give all consumers of Jersey tax approved pension arrangements access to a simple, free, and independent complaints process and provide them with an enforceable compensatory regime for any failings in the delivery of these arrangements. The details are set out below.

PROPOSALS

It is proposed that the OFSO Law and the Exempt Business Order are amended, by way of an amendment law, to widen OFSO's remit to include complaints relating to all Jersey tax approved occupational pension schemes and to introduce a UK Pension Ombudsman type regime within OFSO. It is further proposed to clarify OFSO's scope as to what should be included in relevant pension business (to be redefined as relevant pension activity) and to provide for a transitional period for complaints to be referred to OFSO in respect of those matters that may fall outside of its remit going forward.

Who would be affected?

The proposals in this Legislative Consultation have the potential to affect:

- (i) All financial service providers (as defined under the OFSO Law) undertaking 'relevant pension activity' as defined under the Draft Amendments.
- (ii) All employers and lay trustees acting in relating to Jersey tax approved pension schemes.
- (iii) Any complainant with a complaint relating to "relevant pension business" as defined under the OFSO Law prior to the redefinition of its scope as relevant pension activity under the Draft Amendments.

Summary of Draft Amendments

OFSO Law Changes

<p>Article 1 -new definition of "pension scheme"</p>	<p>A new definition of pension scheme has been added to ensure that this term is limited only to an arrangement which is held out or is a Jersey tax approved pension scheme for the purposes of Part 19 of the Income Tax (Jersey) Law 1961 ("Income Tax Law").</p> <p>The previous definition in Schedule 3 was wider. It extended to UK and other recognised foreign equivalent tax approved pension schemes, and other</p>
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	<p>employee benefit arrangements whether tax approved. Such complaints will in future need to be brought to the appropriate UK or overseas ombudsman or to a court.</p>
<p>Article 1 – new definition of a "public service pension scheme"</p>	<p>A new definition of public service pension scheme has been added to distinguish between the different statutory types of Public Sector Employee Pension Schemes which exist in Jersey, and which provide for different management bodies and different administration.</p>
<p>Article 1 and Article 9 – new definition of "relevant pension activity" and deletion of Schedule 3</p>	<p>A new definition of relevant pension activity has been added to replace the previous definition of 'relevant pension business' as set out in Schedule 3 of OFSO Law (deleted).</p> <p>This new definition is distinguished from being a sub-category of relevant financial services business in the amended OFSO Law and instead operates as an entirely separate category of complaint with different OFSO compensation powers. This type of complaint does not need to be undertaken by way of business by the relevant provider.</p> <p>The new definition is limited to activity which comprises the establishment or operation of a pension scheme. This has removed from its scope, the business giving advice about the 'choice' of a pension scheme to consumers which was previously included in the definition of 'relevant pension business'. It has been removed as the activity or business of giving advice about the choice of pension scheme is already captured as a sub-category of relevant financial service business, investment business (Article 9(1)(a)).</p> <p>Such a complaint is a mis selling type of complaint. This mirrors the distinction drawn between complaints that fall under the UK Financial Ombudsman's jurisdiction and those that fall into the UK Pension Ombudsman jurisdiction.</p>
<p>Article 1 – new definition of "scheme manager"</p>	<p>A new definition of scheme manager has been added to capture those persons responsible for the overall management of a pension scheme and is defined by reference to the Income Tax Law.</p>
<p>Article 8(1) and Article 8(8)(b)– new definition of "relevant activity"</p>	<p>A new definition of relevant activity has been added which is defined as the relevant pension activity in the course of which the relevant act occurred.</p> <p>This mimics the existing definition in Article 8(1) of "relevant business" applicable only to relevant financial service business.</p> <p>The term, 'relevant business' and the new term, 'relevant activity' are used in the amended OFSO Law when OFSO is exercising its powers under Article 8(6)(c) in determining a relationship which is "sufficiently close to give appropriate standing for the services of OFSO to be available to the complainant" as set out in the guidelines to be issued by OFSO under the sub paragraphs of Article 8(8).</p> <p>Article 8(8)(b) are the guidelines to be made by OFSO in respect of a relationship between the complainant and the relevant provider where the</p>

	complainant is a person to or in respect of whom benefits are to be provided under a pension scheme. This provision has accordingly been amended to replace its reference to relevant business to relevant activity.
Article 8 (1) – new definition of “relevant provider”	<p>The definition of relevant provider determines who the complainant is complaining about.</p> <p>The existing definition has been replaced with a new definition which splits the term relevant provider into two categories of person: (i) where the relevant act complained of relates to relevant financial service business; and (ii) where the relevant act complained of relates to relevant pension activity.</p> <p>Where the complaint relates to relevant pension activity, this new definition limits the person responsible for the relevant act to be the scheme manager, employer of the pension scheme, and for the Public Employee Sector Pension Schemes: (i) the management body appointed under the law and (ii) for the public service pension schemes (i.e., not the Teachers Superannuation Fund), the administrator appointed under the law.</p> <p>The new definition provides that these persons who undertake relevant pension activity are responsible for any failings in the scheme, whether they have delegated their responsibilities to third parties and the third party is responsible for the relevant act complained about. This is to simplify and allow for a more efficient complaints process for pension-related complaints.</p>
Article 9(2) – relevant ancillary business	The definition of relevant ancillary business has been expanded to capture business ancillary to relevant pension activity.
Consequential changes to Article 10 - Respondents	This provision has been amended to ensure that persons who undertake relevant pension activity will be made respondents to OFSO complaints in the same manner as persons who undertake relevant financial service business.
Article 12(3)(d)(i) – jurisdiction of OFSO to deal with employment matters	<p>Article 12(3)(d)(i) previously excluded a complaint as ‘inappropriate’ for OFSO to determine a complaint about an employment matter, where the complainant is an employee or former employee of an employer. This has been amended to allow for such a complaint if it relates to the employee’s pension arrangement.</p> <p>This ensures that where an employer has made certain pension related promises to its employees (whether by way of contract or not), OFSO has jurisdiction to deal with these complaints and has power to award compensation to the relevant employee or require the performance of these promises.</p>
Consequential changes to Article 16 (awards and directions)	New provisions have been added to Article 16 to provide OFSO with power to (i) make a direction for payment of money or money’s worth into a complainant’s pension scheme (new Article 16(5A)); (ii) to provide that a direction for payment into a complainant’s pension scheme can bear interest and be recoverable by the complainant as a debt due from the respondent (new Article 19(9A)); and (iii) allow OFSO to assist the complainant in recovery

	<p>of the award as an award for a payment made under a direction – consequential changes to Article 16(10).</p> <p>These changes are to ensure complainants with pension related complaints can be properly restituted without triggering any adverse tax consequences and that a direction for a money award can benefit from the same enforcement rights and penalty rights as an ordinary money award.</p> <p>The financial cap on money awards under Article 16(7) has also been removed for pension related complaints so that OFSO’s regime can mirror that of UK Pensions Ombudsman and ensure that full restitution of a complainant’s pension benefits can be given where there has been any failing in the establishment or operation of their pension scheme.</p>
<p>Article 25A and Schedule 5 and Transitional Provisions – new transitional provisions</p>	<p>There is inserted a new Schedule 5 into the OFSO Law which contains transitional provisions – Schedule (5) paragraphs 1, 2 and 3.</p> <p>These provisions give complainants with complaints about relevant pension business (as previously defined in Schedule 3 of the OFSO Law) the right:</p> <ul style="list-style-type: none"> (i) If the complaint has already been referred to OFSO before the law was changed to have their complaint determined by OFSO as if the law had not been amended; or (ii) If the complaint has not been referred to OFSO before the law was changed but the act complained of occurred before the law change, a period of 12 months to refer it to OFSO and then for it to be determined by OFSO as if the law had not been amended. <p>This ensures persons with valid complaints concerning relevant pension business under the current law, who would otherwise be affected by its replacement with the narrower definition of relevant pension activity, will have their rights protected and will be given a reasonable period of time to bring their complaints and will give them the right to have their complaint determined in the same way as before the law changed.</p>
<p>Other Consequential amendments</p>	<p>The other changes made to the OFSO Law are to ensure that where the term ‘business’ is used there is inserted the term ‘or activity’ and where relevant financial service business is used there is inserted the term ‘or relevant pension activity’ –</p> <p>See Articles –</p> <ul style="list-style-type: none"> 1 – definition of financial service provider 7(b) 8(6)(a)(i) and 8(16) 9- heading and 9(3)(c) and (d), 9(4) and 9(5)(b) 10(2)(b)(ii) and 10(3)(c) 11(7)(a) 16(2)(b)(ii)

Exempt Business Order Changes:

Consequential changes to Article 2(2)(j) - relevant pension activity	The term 'relevant pension business' previously used in this provision has been replaced with the new definition of 'relevant pension activity'. The reference to Article 3 of the Order (deleted – see below) has been removed.
Deletion of Article 3	Article 3 previously excluded employer managed occupational pension schemes from the definition of relevant pension business and the remit of OFSO. These are now to be included as part of OFSO's remit.
Consequential changes	The other changes made to the Exempt Business Order are to ensure that where the term 'business' is used there is inserted the term 'or activity' – See Articles – 1 - definition of main business 6(2) and 6(3)

Impact on pension market providers

OFSA already had within its remit complaints relating to retail pension services provided to consumers in the local market.

The Draft Amendments will alter who is a respondent to a pension-related complaint and against whom a complaint can be made.

Pension providers who offer trustee or scheme manager services to Jersey tax approved pension schemes will be affected in the following manner:

- (i) Their liability for any failing in the scheme operations will no longer be capped by OFSO's money award compensation cap; and
- (ii) They will be directly responsible for the acts of their authorised delegates.

Businesses, which offer only administrative or other pension related services, such as actuarial, tax advisory or investment management services, will not be a respondent to a OFSO pension-related complaint if they are not also the trustee or scheme manager of the relevant Jersey tax approved pension scheme.

Businesses, which offer pension related advisory services will have complaints about their services now dealt with by OFSO as a subcategory of relevant financial service business, with OFSO's powers of compensation being limited to this category of business.

OFSO will still have power under Article 8 of OFSO Law to bring a relevant provider offering services to a pension scheme within the scope of a complaint, as a relevant financial service business, where there is a sufficiently close relationship and OFSO deems it appropriate to issue new guidelines.

Any business that remains unsure as to the effect on its status, should seek advice.

Impact on employers (and their self-appointed scheme trustees board or trustee company)

Employers who operate Jersey tax approved pension schemes for their employees will now be within the scope of OFSO for pension-related complaints as a respondent, regardless of whether they are a regulated provider or not.

Such employers and or their nominated trustee board or self-administered trustee company will be directly responsible for any failing in the establishment or operation of the employer's pension schemes as appropriate. The liability will be uncapped and directly enforceable against them or enforceable through the pension scheme as a sum to be paid in.

Any business or individual who remains unsure as to the effect on their position, should seek advice.

We are keen to hear from the representatives of any employer or any lay trustee of an employer's trustee board or trustee company to understand the concerns they may have about this change to their liability and their new responsibility as a respondent in OFSO's statutory framework.

Impact on lay trustees

Lay trustees who act as trustee of any pension scheme will now be within the scope of OFSO and will be directly liable for any complaint relating to the negligent or wrongful acts of their delegates in the management and administration of the pension scheme. This will be regardless as to whether they are remunerated or not for acting in this capacity.

They will also now be a respondent to any pension-related complaint concerning the pension scheme and obliged to comply with the obligations which exist for respondents under the OFSO Law. This includes, inter alia, providing information to OFSO in relation to the matters complained about and complying with any direction or money award made by OFSO.

Impact on potential complainants

Individuals previously entitled to bring a complaint about a relevant provider to OFSO in respect of their foreign tax approved pension scheme or their employee benefit arrangements will no longer be able to do so after the Draft Amendments are made, and the Transitional Period is over.

If the matter complained about is an act which took place before the law is changed, they have 12 months to refer the complaint to OFSO if it has not already been referred and they will be entitled to the same remedies as existed before the law changed. Any existing complaints already referred will be dealt with as they were before the law was changed.

Members or beneficiaries of Jersey tax approved occupational pension schemes of any type and by whosoever managed will now be able to bring a complaint to OFSO and benefit from OFSO's ability to award them full restitutionary compensation, either to their pension rights or scheme benefits or to them directly.

Impact on Public Sector Employee Pension Schemes

The States Employment Board as an employer and the management boards of these statutory schemes will now be within OFSO's remit. They will be liable in the same way any other scheme manager of a Jersey tax approved pension scheme is liable for any failing in the establishment or operation of a Jersey tax approved scheme. The only difference will exist where the failing complained

about is that of the administrator appointed to undertake certain responsibilities under the relevant statutory framework.

This applies to the statutory schemes made by regulations under the Public Employees (Retirement) (Jersey) Law 1967 or the Public Employee (Pension)(Jersey) Law 2014. The Treasury, as the Administrator, can be a potential respondent of an OFSO pension-related complaint and liable as such. The same rule does not apply to the Teachers Superannuation Scheme.

OSFO Levy

OSFO is a self-funded body which is independent from Government and the Minister. It has power to determine the levy to be paid by industry participants who use its services each year and any changes that need to be made to the levy scheme it operates.

With the extension of its remit to the Public Sector Employee Pension Schemes and non-regulated persons, who are private employers or lay trustees of Jersey tax approved occupational pension schemes, it is anticipated OSFO will wish to alter its levy scheme for when the Draft Amendments come into effect and extend it immediately or in due course to these new participants to cover its additional operational costs.

Date proposals effective

It is intended that these changes shall have immediate effect 7 days after registration of their approval by the Privy Council. OSFO has been engaged with Government in the process and has confirmed the changes can have immediate effect but that it may wish to introduce further guidance and will look to issue a consultation on changes to the levy prior to the changes taking effect.

Responding to the Consultation

The Government invites comments in writing from interested parties on the proposals and the Draft Amendments included in this consultation. Where comments are made by an industry body or association, Government requests that body or association provides a summary detailing the type of individuals or businesses it represents who have expressed a view on the proposals.

All responses must be provided before the closing date, set out above to c.brambilla@gov.je.