IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Claim No. CO/ /2007

B E T W E E N :

THE QUEEN

(on the application of

(1) ANDREW PARR
(2) DAVID BAKER
(3) ROBIN DUNCAN
(4) JOHN BROOKS)

Claimants

- and -

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Defendant

- and -

THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION

Interested party

CLAIMANTS' STATEMENT OF GROUNDS
FOR JUDICIAL REVIEW AND FACTS RELIED ON

All references are to the permission bundle eg. **[G/159/5.68]** is to paragraph 5.68 at page 159 of tab G.

OVERVIEW

1. The Claimants are members of the Pensions Action Group. They are four of the estimated 125,000 people who have lost part or all of their occupational pensions when their employers' final salary pension schemes wound up with insufficient funds to meet their liabilities.

2. The Claimants challenge two decisions of the Secretary of State for Work and Pensions ("Secretary of State") by which he purportedly reconsidered the First

Recommendation made by the Parliamentary Commissioner for Administration ("Ombudsman") in her report, *Trusting in the Pensions Promise*, HC 984 ("Report") **[G]**. The first decision was announced on 21 March 2007 by the Chancellor of the Exchequer in his Budget speech **[K/11]** and full reasons were given on 28 March 2007 **[K/16-17]** by the Secretary of State himself. A second decision was announced on 18 April 2007 by the Minister for Pensions Reform **[K/18]**.

3. The Ombudsman published her Report on 14 March 2006. She found that between January 1996 and 2004 official publications of the Department for Work and Pensions' ("DWP") wrongly failed to disclose risks inherent in occupational pension schemes, and were positively misleading **[G/159/5.68]** ("**the First Finding**"). The Ombudsman also found that this maladministration was a significant contributory factor in the complainants losing part or all of their expected pension and in them suffering other injustices, such as lost opportunities and distress (the complainants were over 200 individual members of occupational schemes which were wound up but unable to meet their liabilities: the Claimants were four of the complainants and the circumstances two of them, Mr Baker and Mr Duncan, were identified by the Ombudsman as representative of many others who had complained **[G/16-18/[2.18-2.32]**).

4. The Ombudsman made a number of recommendations, including that the Government should, "consider whether it should make arrangements for the restoration of the core pensions and non-core benefits promised" to all those who have lost their expected pension entitlements **[G/181/6.15]** ("**the First Recommendation**"). The Ombudsman used the phrase "core pensions" to refer to "the pension (including that deriving from additional voluntary contributions) that they would have received from their scheme had it not wound up without sufficient funds to meet all of its liabilities" and "non-core benefits" to refer to "'lost' associated benefits – such as life cover, survivor benefits, and ill-health benefits – that have in some cases already been foregone by many of the complainants and in other cases will in future necessarily be foregone" **[G/179/6.6]**.

5. On 15 March 2006 the Government rejected the Ombudsman's findings and recommendations (save for her fifth recommendation which is not material to the present claim) on the basis, inter alia, that the Secretary of State did not accept that the DWP had been guilty of maladministration **[H/3-7]**.

6. Four individuals, including Mr Parr and Mr Duncan, challenged the Secretary of State's decision to reject the Ombudsman's report. On 21 February 2007 Mr Justice Bean gave judgment in the case of *Bradley & Others v SSWP* [2001] EWHC 242 (Admin) **[J293-320]** ('*Bradley*'),

   (a) Mr Justice Bean held that it was unlawful (paragraphs 50-55) and irrational (paragraph 66) for the Government to reject the Ombudsman's First Finding of maladministration; the learned judge quashed the Secretary of State's decision to do so;

   (b) the Secretary of State's rejection of the Ombudsman's First Recommendation was also quashed because it had been premised on the Secretary of State's view that no maladministration had occurred (paragraph 85);

   (c) the Secretary of State was ordered to reconsider the Ombudsman's First Recommendation *"in the light of the Ombudsman's First Finding of maladministration and of this judgment"* (paragraph 85).

7. The Secretary of State has appealed from Mr Justice Bean's judgment in relation to the First Finding (i.e. from the finding set out at paragraph 6(a) above). The Secretary of State has nonetheless purported to reconsider the Ombudsman's First Recommendation on the basis that he accepts the maladministration found by the Ombudsman. The Secretary of State has stated that such reconsideration is reflected in the announcements made on 21 March 2007, 28 March 2007 and 18 April 2007. On the basis of that purported reconsideration, the Secretary of State has decided to, (a) make certain limited extensions to the Financial Assistance Scheme ("FAS"), which provides

assistance to qualifying individuals who have lost pension entitlements, and (b) establish a "review" to give further consideration to the sources of funding of financial assistance. The Secretary of State was invited to provide full reasons for his decisions. By letter dated 11 April 2007 **[M/1-2]**, solicitors acting on behalf of the DWP confirmed that the full reasons for the decisions were those contained in the statement made by the Secretary of State on 28 March 2007 **[M/3-4]**.

8. In summary, the Claimants contend that the Secretary of State's decisions are flawed and unlawful because,

(a) The purported reconsideration has failed properly to take account of the maladministration found by the Ombudsman and was undertaken on a wrong basis, namely that the maladministration found by the Ombudsman and upheld by Mr Justice Bean related to only a single leaflet –PEC 3— published by he Conservative Government in 1996.

(b) The Secretary of State has entirely failed to address, or provide cogent or any reasons, as to why he had decided not to accept the Ombudsman's First Recommendation.

(c) The Secretary of State has failed to identify what (if any) forms of injustice the Government accepts have been caused by its maladministration and seeks to remedy by the extension of the FAS. It is to be inferred that the Secretary of State has wrongly and irrationally reconsidered the Ombudsman's report on the basis that he does not accept that injustice has been caused by his Department's maladministration.

(d) The continued exclusion of a category of schemes with solvent sponsoring employers from the FAS is arbitrary, irrational and discriminatory.

(e) The Secretary of State has unlawfully reconsidered the Ombudsman's First Recommendation without regard to the fact that many individuals satisfied the Ombudsman that they were victims of the maladministration that she found in that they relied upon the Government information to their detriment. Furthermore, he has fettered his discretion to consider the merits of those individual cases.

THE PARTIES

9. The Claimants were all complainants to the Ombudsman. Mr Baker was one of the four representative complainants considered by the Ombudsman (he was "Mr D" **[G/16-17/2.18-2.25]**) as was Mr Duncan ("Mr B" **G/17-18/2.26-2.32]**). The court is invited to read their witness statements. There is also evidence from Dr Ros Altmann, the advocate for the complainants to the Ombudsman containing important contextual information. It is anticipated that there might be additional Claimants to ensure that the Court has before it information from a representative range of individuals and circumstances. In very brief summary the present Claimants' circumstances are as follows:

(a) Andrew Parr worked at Allied Steel and Wire based at Sheerness in Kent for 20 years before being made redundant in 2002 when the company became insolvent. He was a member of the company's Sheerness occupational pension scheme. In joining the scheme and making other subsequent financial decisions Mr Parr relied on advice disseminated by the Government in its official information and passed on by the company's Staff Consultative Committee (of which he was a member between 1998 and 2002). Mr Parr also undertook a considerable amount of research on the company scheme in 1999, when a merger of the scheme was proposed. On the basis of the information contained in the Government's official guides he was satisfied that the scheme pensions were secure. Especially as the ASW pension scheme was over 100% funded on the official measure with a 104% MFR funding level. In fact, following the company's insolvency in 2002, Mr Parr expects to receive only about 45% of his expected pension of £17,787 per year from age 62

to 65 and £13,863 per year after age 65. Mr Parr reached his scheme retirement age of 62 in September 2006. He has been forced to continue working, at much lower pay, despite the fact that he suffers from a serious cardiac condition. He does not and will not qualify for assistance from the FAS until his 65th birthday and there is no guarantee that payments will be made at that point. Mr Parr suffered a severe cardiac arrest in 2005 campaigning against the Government's rejection of the Ombudsman's Report. He has since collapsed at work.

(b) David Baker was born in November 1943 and has worked for his current employer, an electrical instrument and fibre optics company, since 1961. He joined the company's pension scheme at the earliest opportunity as he wanted to be responsible and protect his future. After the Maxwell scandal, and as he moved closer to retirement age, he read the official guides which reassured him about the security of his pension. He took an active interest in his pension and he made a number of requests for pension forecasts. The company was sold in 2000 and the new owners decided to wind up the pension scheme, which they were lawfully entitled to do. Mr Baker has been told that he can expect to receive very little from the pension scheme, but because the scheme is still in the process of being wound up he has not been given a precise figure. His employer company remains trading. Although Mr Baker had planned to retire early he has continued to work because he cannot afford to retire. Because the sponsoring employer is solvent, Mr Baker does not qualify for assistance from the FAS. Moreover, the scheme does not apparently meet the conditions set out by the Minister for Pensions Reform on 18 April 2007 for a solvent scheme to qualify for the extended FAS in future. Mr Baker will not therefore receive any financial assistance from the DWP even if the Government's proposed extension to the FAS is made.

(c) Robin Duncan worked for BUSM for 36 years. He was a union shop steward and convenor who actively promoted the company pension scheme to other members, believing it to be safe and secure. Although

scheme materials encouraged this belief, he formed it on the basis of DWP and OPRA materials which he not only read and relied upon personally, but disseminated to others. He made approximately £25,000 of additional voluntary contributions over the years. He has been told that, thanks to the BUSM insolvency, he is likely to see about 10% of his pension at best. He sold his house and moved North because of the financial crisis his wife and himself found themselves in. Until very recently, when he was advised by his doctor to cease working on grounds of stress, he worked a night shift driving a 500 mile nightly run for the Royal Mail for a minimum of 49 hours each week. Mr Duncan qualifies for FAS payments now that he has reached 65 but has yet to receive anything.

(d) John Brooks is aged 67. He saved for his retirement in his company pension scheme for 38 years. He was not highly paid, earning around £14,000 a year when the company, Earlys of Whitney, made redundancies in 2002. At that point he was 62 and could have retired under the scheme early and begun drawing his pension. Having believed the assurances in the DWP's leaflets, that his pension was safe (which were conveyed to him in his capacity as chair of the staff committee by the scheme's trustees) he instead accepted an offer of continued, alternative employment to help the company in its time of difficulty. It then became insolvent and, as he was not a pensioner member of the scheme at the time, his position in the priority order was far lower. Following the closure of Earlys, Mr Brooks began working in bookmakers' so as to avoid having to claim benefit. In July 2005 he was told he had leukaemia. In June 2006 he started a course of chemotherapy and was so affected that he had to cut back to three days a week and then two days a week working. He has now had to stop work. To date he has received no money whatsoever from his company scheme and none from the FAS.

10. The DWP, or its predecessor the Department of Social Security ("DSS"), for which the Secretary of State is responsible, has at all material times had

responsibility within Government for occupational pensions policy as well as for the framework of law and regulation relating to occupational pensions. The Secretary of State responded on behalf of the Government to the Ombudsman's report and, as mentioned above, the announcements of 21 March 2007, 28 March 2007 and 18 April 2007 are said to reflect the Secretary of State's reconsideration of the Ombudsman's report following the decision of Mr Justice Bean in *Bradley*.

11. Both the parties agree that the Ombudsman is an interested party to these proceedings. She has been sent the pre action correspondence.

THE POWERS OF THE OMBUDSMAN

12. The Ombudsman's function is to investigate administrative action taken on behalf of the Crown. Section 5 of the Parliamentary Commissioner Act 1967 **[C]** ("PCA") sets out the matters that are subject to investigation by the Ombudsman, as follows:

> "**5 Matters subject to investigation**
> (1) Subject to the provisions of this section, the Commissioner may investigate any action taken by or on behalf of a government department or other authority to which this Act applies, being action taken in the exercise of administrative functions of that department or authority, in any case where—
>
> (a) a written complaint is duly made to a member of the House of Commons by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action so taken; and
>
> (b) the complaint is referred to the Commissioner, with the consent of the person who made it, by a member of that House with a request to conduct an investigation thereon. …"

13. Section 7 of the PCA sets out the way in which the Ombudsman must conduct her investigation, as follows:

> "**7 Procedure in respect of investigations**
> (1) Where the Commissioner proposes to conduct an investigation pursuant to a complaint under [section 5(1) of] this Act, he shall afford to the principal officer of the department or authority concerned, and to any person who is alleged in the complaint to have taken or authorised the

action complained of, an opportunity to comment on any allegations contained in the complaint.
(2) Every [investigation under this Act] shall be conducted in private, but except as aforesaid the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case; and without prejudice to the generality of the foregoing provision the Commissioner may obtain information from such persons and in such manner, and make such inquiries, as he thinks fit, and may determine whether any person may be represented, by counsel or solicitor or otherwise, in the investigation."

14. Section 10 of the PCA establishes the process by which the Ombudsman must report, as follows:

"**10 Reports by Commissioner**
(1) In any case where the Commissioner conducts an investigation under this Act or decides not to conduct such an investigation, he shall send to the member of the House of Commons by whom the request for investigation was made (or if he is no longer a member of that House, to such member of that House as the Commissioner thinks appropriate) a report of the results of the investigation or, as the case may be, a statement of his reasons for not conducting an investigation.
(2) In any case where the Commissioner conducts an investigation under [section 5(1) of] this Act, he shall also send a report of the results of the investigation to the principal officer of the department or authority concerned and to any other person who is alleged in the relevant complaint to have taken or authorised the action complained of. …"

15. If, after conducting an investigation and having concluded that injustice has been caused by maladministration, the Ombudsman nonetheless considers that the injustice has not been or will not be remedied, section 10(3) of the PCA, confers a power on the Ombudsman to lay the report before Parliament:

"(3) If, after conducting an investigation under [section 5(1) of] this Act, it appears to the Commissioner that injustice has been caused to the person aggrieved in consequence of maladministration and that the injustice has not been, or will not be, remedied, he may, if he thinks fit, lay before each House of Parliament a special report upon the case."

ACTION IN RESPONSE TO AN OMBUDSMAN INVESTIGATION

16. The Cabinet Office, the Treasury and the Defendant have issued consistent guidance on the action that should be taken in response to an Ombudsman investigation and recommendations for redress in particular.

17. The Cabinet Office publication, 'Handling Parliamentary Ombudsman cases' **[D/1-13]** states materially:

> "52. Where mistakes have been made, the priority of the organisation should be to avoid a "blame culture" (where staff feel threatened by complaints and defensive about receiving them). Guidance should instead encourage the ready admission of mistakes, the provision of swift and effective redress and steps to ensure that a similar failure does not recur. Any attempts to conceal maladministration or its direct consequences will be considered a disciplinary offence. This is set out in paragraph 6 of the guidance note produced in July 1996 by the Cabinet Office (OPS) Citizen's Charter Unit, entitled "*Redress under the Citizen's Charter: Guidance for Departments and Agencies*".
>
> 53. "*Redress under the Citizen's Charter*" (paragraph *15)* also states that in cases of maladministration, the body concerned should seek to identify, wherever reasonably practicable, all those affected and offer appropriate redress…
>
> **PAYMENT OF COMPENSATION**
>
> 61. Guidance on compensation payments by departments, agencies and NDPBs in cases where maladministration has occurred is set out in detail in Chapter 36 of *Government Accounting,* issued on 28 March 1996 under DAO(GEN) 7/96 "*Financial Redress - Maladministration and Charter Standards*". The main points in relation to Parliamentary Ombudsman cases are as follows:
>
> - If it is concluded that financial redress is appropriate, an amount should be identified which is fair and reasonable, but no more, in the light of all the facts and circumstances of the case.
>
> - "Reasonable" is likely to mean restoring the complainant's financial position to what it would have been if the maladministration or failure had not occurred.

18. The Treasury Manual, 'Government Accounting' **[D/14-26]**, is issued to guide departments on the circumstances in which expenditure from public funds can and should be authorised, including the making of payments to redress maladministration. The current version states materially:

> 18.7.4 The question of whether financial redress should be paid may arise:

a. as a result of a recommendation by the Parliamentary Ombudsman[6] following investigation of a complaint referred by a Member of Parliament;…

18.7.5 If the department concerned accepts that maladministration has occurred and that financial redress is appropriate, the general principle should be to provide redress which is fair and reasonable in the light of all the facts and circumstances of the case. Where the complainant has suffered actual financial loss as a result of the maladministration, or faced costs which would otherwise not have been incurred (and which are reasonable in the circumstances), the general approach should be to restore the complainant to the position he or she would have enjoyed had the maladministration not occurred….

18.7.6 Where, following a complaint or the discovery of a case, departments conclude that other individuals or bodies may have suffered in the same way, they should seek to identify (wherever reasonably practicable) all those affected and consider whether, in the interests of equity, they should offer redress…."

adding materially:

Departmental procedures

18.7.10 Departments should put in place suitable guidance on the handling of compensation cases, designed to achieve consistency in handling the same type of case throughout the organisation. Departments should ensure that defective systems or procedures are corrected where a complaint (or Parliamentary Ombudsman investigation) has shown systemic faults.

19. A useful, but non-exhaustive checklist of relevant factors is also provided:

ANNEX 18.2 Maladministration checklist

This list sets out some of the questions which should be asked when handling financial redress cases. It is not exhaustive nor a substitute for reading 18.7.

Does the department accept that maladministration has occurred?
Is financial redress appropriate?
What are the grounds for the financial redress?

Loss or deferment of entitlement

Was maladministration the sole cause or were there other contributory factors?
Should compensation for delay be considered?

Additional expenses/fruitless expenditure

Did this arise as a result of the maladministration?
What is reasonable expenditure in the circumstances?

Delay in payment

Was the delay abnormal or excessive?
Are there any other contributory factors?
What is the appropriate interest rate?

Inconvenience, distress, etc.

Is this exceptional?
Is this the direct result of maladministration?
What is the nature of the department's fault?
What has been the effect?
Is there corroborative evidence of this?

Hardship

What is the degree of hardship?
Are the complainant's financial circumstances a relevant consideration?

Loss of opportunity to make a gain

Is the claimed gain realistic?

Is the proposed payment justified and reasonable on the facts of the case? (Payment for non-financial loss should only be made in exceptional circumstances.)

Should other departments be consulted?

Is Treasury approval required?..."

19. The DWP publishes a Guide to Redress for Maladministration **[D/27-57]** (presumably intended to give effect to paragraph 18.7.10 of Government Accounting) sets out a series of "key principles" the purpose of which is explained at paragraph 4:

> "as the Department aims to provide similar remedies for similar injustices, the principles must be applied to every case. "

20. Paragraph 15 states:

"15 Where maladministration has occurred, seven basic principles should be followed when considering redress. These are that

- all mistakes are admitted and put right
- a sincere and meaningful apology is offered
- redress is fair and reasonable
- as far as possible, redress restores the customer—or in very exceptional circumstances a third party—to the position that he or she would have been in but for the official error
- due account is taken both of the need to provide a suitable remedy for the customer and the need to protect the public purse
- arrangements for considering redress are made public
- where it is possible to remedy an error by statutory means that option must be used rather than resorting to an extra-statutory or ex gratia payment."

21. The remainder of the Guide discusses (in considerable detail) how redress for various financial and non-financial losses should be calculated.

THE OMBUDSMAN'S REPORT

22. The Report dealt with members of final salary occupational pension schemes which were wound up between 6 April 1997 and 31 March 2005 without sufficient funds to give their members the benefits which they had been previously promised. Although the schemes were private, the DWP prescribed the legal framework within which they operated, and issued information about them, and made a series of decisions during the course of their operation about the level of funding that should be in place to fulfil the underlying aims of the Defendant's pensions policy.

23. Following the Maxwell scandal in the early 1990s a new pensions regime had been established under the Pensions Act 1995 ("the 1995 Act"). A central component of this new regime was the Minimum Funding Requirement ("the MFR"). This set the minimum level to which schemes had to be funded and trustees could not force employers to make contributions above this level. Indeed, the relevant provisions permitted employers to fund below this minimum level by allowing them to bring their scheme up to 100% MFR funding only over many years. The level was set by the Defendant in regulations made from time to time under section 56 of the 1995 Act.

24. Another central component of the new regime was the establishment of a "priority order" for the distribution of scheme funds when schemes wound up. The priority order was established by regulations made under section 75 of the 1995 Act. The effect of the priority order was to remove the discretion formerly afforded to pension scheme trustees to decide on the prioritisation of the distribution of assets to scheme members on the wind-up of a scheme, for example by means of a Deed of variation. Under the new regime, it was compulsory for pensions in payment to be paid in full before assets were allocated to non-pensioner members.

25. Although the new pensions regime established a compensation scheme that applied only to pension funds wound up due to fraud, there was no equivalent provision for schemes that wound up without sufficient assets to meet all of their liabilities where this was not attributable to fraud. Pension schemes could wind up where sponsoring companies became insolvent or where a solvent company simply decided to wind the scheme up because it did not wish to continue to fund it (as was the case with Mr Baker's scheme). A solvent company could lawfully wind up a scheme, provided that it had paid in an amount sufficient to fund the scheme up to the MFR, or reached a compromise with the trustees for payment of a lower amount.

26. Between 1996 and April 2004 a series of public statements were made by the Government, particularly the DSS and the DWP, and the Occupational Pensions Regulatory Authority ("OPRA"), including statements in Parliament, press releases, and statements in official guides provided to the public, which were intended to explain the new pensions regime. There were two common, linked themes. First, the Government sought to encourage people to join their employers' pension schemes. Secondly, it sought to offer reassurance about the safety of money saved in this way on the basis of the changes made by the 1995 Act. The Ombudsman's investigation specifically commented adversely on two series of official Government guides published by the DSS/DWP, called PM and PEC (examples at [F]), but the Ombudsman also refers to other sources of official information in Chapter 4 of her Report which she refers back to in her conclusions. Of particular relevance (but not to the exclusion of the other information) are the following official guides,

PEC 3, "The 1995 Pensions Act" (January 1996) **[F/1-13]**

PM 1, "Don't Leave Your Pension to Chance" (1998) **[F/30-31]**

PM 3, "You and Occupational Pensions" (1998) **[F/32-41]**

PM 3, "Occupational pensions Your Guide" (May 2002) **[F/14-29]**

PM 7, "Understanding contracted-out pensions" (1998) **[F/42/49]**

27. The Ombudsman also considered booklets published by OPRA, which were published for the benefit of scheme trustees, and also guides published by the Financial Services Authority ("FSA"). The Ombudsman made no findings in relation to the FSA publications because they fell outside her jurisdiction **[G/11/1.50]**. Both OPRA and FSA guides had a smaller circulation than the DSS/DWP guides and were based on information provided by the Government.

The Ombudsman's Key Conclusions

28. The Ombudsman drew six key conclusions from the evidence which have not been challenged by the Defendant ("the Key Conclusions"), as follows:

    (a) DWP was responsible for the "legal framework" governing occupational pension provision **[G/152/5.5-6]**.

    (b) The DWP saw itself as acting – and told the public that it was doing so – in partnership with others both to promote the benefit of membership of occupational pension schemes and to remind individuals that, where they could, they had an obligation to save for their retirement **[G/152/5.7]**.

    (c) The DWP recognised throughout the relevant period that pensions were complex and often not a topic that was generally understood and that, consequently, there was a need for greater financial education, for improved awareness of pensions and for clearer information about the various savings options **[G/152/5.10]**. An example of the DWP's position is a statement by the Defendant in July 1997: "people need to have confidence in pensions and be sure that their pensions are secure…" and there was need to "raise awareness of pensions and improve the level of financial education…" **[G/ 65/4.90-91]**.

(d) The DWP saw itself as having a key role in promoting such better education, awareness and information about pensions and saving for retirement, and told others that it would do so **[G/152-153/5.12]**.

(e) The DWP said at the relevant time that the guides and other relevant official publications issued by public bodies were an integral component of the promotion of the benefits of saving for retirement and aimed to assist people to make informed choices about various pensions options **[G/153/5.14]**. For instance, in its Green Paper on 15 December 1998, the Government referred to the PM leaflet series, stating,

> "We published a new series of DSS pension leaflets in June 1998 which help to meet the need. The leaflets are concise and accessible and relate information directly to decisions individuals need to take at various life stages. The leaflets meet the Plain English Crystal Mark standard and have been awarded the Money Management Council Quality Mark for providing clear and unbiased information on money matters. We are running a nationwide marketing campaign to promote the leaflets." **[4.150]** (emphasis added)**.**

(f) The Government accepted at the relevant time that it had obligations in relation to the accuracy, completeness, clarity and consistency of its publications **[G/153/5.18]**. Findings had been made in previous Ombudsman's reports that a public body may have acted maladministratively where it "knowingly provided information or advice which was misleading or inadequate or where it had failed to follow its own procedures or policies in relation to the provision of such information or advice." **[G/153/5.20]**

29. It was also central to the Ombudsman's finding of maladministration that the policy intention behind the MFR, and the level at which it was set by the Government, was to provide non-pensioner members with at least a 50% chance of receiving a sum equivalent to their expected pension if schemes would up voluntarily or because a company became insolvent.

30. The Ombudsman referred to a confidential letter written by the DWP to the actuarial profession on 22 November 1995 stating that, "the intention underlying the MFR" is to ensure that schemes have a level of assets which

could "reasonably be expected" to generate a pension for non-pensioner members a sum equivalent to their expected pension, "By reasonable expectation we mean that there should be at least an even chance" **[G/62/4.64]** (emphasis supplied by the Ombudsman).

31. The Ombudsman also emphasised that the DWP knew that the general public was unaware of the risks in the scheme for occupational pensions **[e.g. G/158/5.55]**. It was, in particular, advised of this by the actuarial profession **[e.g. G/55/4.25-7 (1994 and 1995); G/84/4.255 (2000)]** and reached this conclusion in its own research report in April 1998.

The First Finding of maladministration

32. Against this background, the Ombudsman summarised her First Finding of maladministration in the following terms:

> "(i) that official information – about the security that members of final salary occupational pension schemes could expect from the MFR provided by the bodies under investigation – was sometimes inaccurate, often incomplete, largely inconsistent and therefore potentially misleading, and that this constituted maladministration;" **[G/169/5.164(i)]**.

33. The Ombudsman's reasoning and findings relating to specific information are set out at paragraphs 5.36 to 5.74 of her report. She summarised her findings as follows:

> "5.67. I have seen nothing that would make me doubt that the Government's intention behind the MFR was always that it could only provide a limited degree of security to non-pensioner members – which was apparent from its design – and I have seen that the discussions behind closed doors within and between the public bodies responsible for occupational pensions policy generally reflected this.
>
> 5.68. However, this was not properly disclosed to those most affected by such an intention. I consider that the official information given to the public about the degree of security provided by a scheme being funded to the MFR level:
>
> (i) was, prior to September 2000, misleading, incomplete and inaccurate – in that it gave assurances which were incompatible with the design and purpose of the MFR as prescribed by Government – and with its practical operation. These assurances

were that the MFR was designed to ensure that schemes had sufficient assets to meet their liabilities and that a scheme funded to the MFR level would be able to pay cash transfers of accrued rights to non-pensioners. In addition, no disclosure or even mention was made of risks to accrued rights or of the potential effects of statutory priority orders on wind-up;

(ii) was, between September 2000 and April 2004, deficient – in that it lacked any degree of consistency as to what might be expected from the MFR. Some official statements and publications – especially those aimed at the general public – continued not to mention risk and to give a misleading impression as to the security of pension rights, while others began to explain the true position; and

(iii) was only broadly accurate from April 2004 onwards.

5.69. I consider that these findings are reinforced if DWP publications are read in conjunction with other official publications."

Causation of injustice

34. The Ombudsman identified the injustice complained of by the complainants as being the **[G/169/5.165-166]**:

(a) Lost opportunities to make informed choices when considering pensions and savings options, or to take remedial action in relation to funding position of their scheme;

(b) The financial loss of a considerable proportion (in some cases all) of their expected pension;

(c) A sense of outrage; and

(d) Distress, anxiety and uncertainty.

35. The Ombudsman found that maladministration was the cause of the forms of injustice at (a), (c) and (d) above (lost opportunities, outrage and distress) **[G/171/5.179 – 5.191]**.

36. As regards the financial losses, the Ombudsman gave careful consideration to the range of causes of those losses other than the maladministration she had found, including the actions of employers, the legal framework and policy decisions taken by the Government. The Ombudsman concluded that,

(a) while maladministration alone did not cause the financial losses suffered, it was a significant contributory factor in the creation of the financial losses suffered by the complainants, along with other systemic factors **[G/178/5.246]**.

(b) The Ombudsman found, in particular, that had the members of pension schemes known fully the risks to their pensions, many of their financial decisions would unquestionably have been different.

(c) Further, had the true position been known, there would have been a range of actions which employers, trustees and members could have taken significantly to improve the financial position of schemes, which would "most probably have led to lesser, if any, financial loss of this type" **[G/176/5.228–232]**.

The First Recommendation

37. The Ombudsman made a number of recommendations. These reflected the Ombudsman's opinion that there is a need for a "global solution" to wider problem (not just affecting the complainants) and that only the Government is in position to provide such solution. The Ombudsman stated **[G/179-180/6.9]** that her recommendations covered individuals who are,

(a) members of an occupational pension scheme which commenced winding up between 6 April and 31 March 2004 where such schemes had insufficient assets to secure the pensions in payment in full as well as providing a cash sum to non-pensioner members in respect of full accrued pension rights; and

(b) the scheme is not eligible for the pensions compensation scheme (which applies in cases of fraud); and

(c) where the individual has suffered actual financial loses because of a shortfall in contributions, their Guaranteed Minimum Pension or other benefits (such as survivor benefits or life cover provided under the occupational pension scheme)**]**.

38. The Ombudsman's First Recommendation **[G/181/6.15]** was,

> "First recommendation
> 6.14. My first recommendation relates to remedying the financial injustice suffered by those who have complained to me and also those in a similar position as those individuals.
>
> 6.15. **I recommend that the Government should consider whether it should make arrangements for the restoration of the core pension and non-core benefits promised to all those whom I have identified above are fully covered by my recommendations – by whichever means is most appropriate, including if necessary by payment from public funds, to replace the full amount lost by those individuals."** (emphasis added)

39. The Ombudsman went on at paragraphs 6.16 to 6.22 of her Report to provide further detail of this recommendation. In brief, the Ombudsman explained that,

(a) although compliance with her recommendation would be a significant commitment, it would be one that could be discharged over a number of years **[G/181/6.16]**;

(b) it might be possible to mitigate the cost to the taxpayer by looking to other bodies (e.g. employers) that have contributed to the losses; but that in such a case, the government should itself take action to recover contributions, rather than expecting trustees and scheme members (such as Mr Baker) to do so themselves **[G/181/6.17]**;

(c) the Government should consider using scheme assets to pay members' pensions, rather than encouraging trustees to purchase annuities, since this could allow payment to be made more speedily and also avoid paying profit margins to an insurer **[G/181/6.18]**;

(d) the Government should have regard to parallels with its decision to honour the pension arrangements of public sector employees who had made employment and financial decisions on the basis of information they were given about their pensions **[G/181/6.20]**;

40. The Ombudsman's Second Recommendation ("the Second Recommendation") was that the Government should, (a) consider whether to make consolatory payments as "tangible recognition of the outrage, distress, inconvenience and uncertainty that they have endured"; and (b) apologise to scheme trustees for the distress that they have suffered from passing on and acting upon the misleading information disseminated by the DWP **[G/182/6.24-25]**.

DECISION TO REJECT THE OMBUDSMAN'S REPORT

41. The Secretary of State responded to the Ombudsman's report on the day after it was laid before Parliament. On 15 March 2006, the then Minister for Pensions Reform made a statement to the House of Commons. It rejected the Ombudsman's findings that maladministration had occurred or that the losses were the responsibility of the Government **[H/3-7]**. In particular, it was said:

> "The Government do not consider that any of the named leaflets or quoted statements could have formed a proper basis for scheme members, still less trustees who were professionally advised, to assess the security of their individual pension schemes. The leaflets were general and introductory in nature. They were not a full statement of the law. They made both those points clear. In addition, the Government believe that the report fails to demonstrate that decisions taken by individual scheme members were influenced by the information which the Government did, or did not, make available.
>
> As far as the 2002 decision on the Minimum Funding Requirement is concerned, the Government believe that we acted wholly responsibly in implementing the recommendation of the actuarial profession which had received the backing of the Government Actuary's Department.
>
> Against this background, the Government have considered carefully the Ombudsman's first four recommendations – which involve considering whether to restore the lost pension rights of affected scheme members, making consolatory payments and apologising to scheme trustees. As the Government are unable to accept the findings

> on which those recommendations are based and do not consider that it would be in the wider public interest for taxpayers to fund all lost pension benefits we do not believe that it would be appropriate to take the action suggested."

42. The Government accepted the Ombudsman's recommendation to review the time taken to wind up occupational pension schemes.

43. At Prime Minister's question time on the same day, the Prime Minister made further statements elaborating on the reasons for rejecting the Ombudsman's First Recommendation **[H/1-2]**.

44. The decision to reject the findings of maladministration and injustice, and the recommendations in the Report was further elaborated upon by the Secretary of State in the House of Commons on 16 March 2006 **[G-3-7]**.

45. The Government's reasons for rejecting the findings and recommendations in the Report were set out at greater length in the Defendant's Full and Final Response document dated June 2006 **[G/8-54]**.

PASC REPORTS OF 20 JULY 2006 AND 10 MAY 2007

46. In the light of the Government's response, which had been communicated to the Ombudsman before she published her Report, it appeared to the Ombudsman that an injustice had been caused by maladministration which had not been, and would not be, remedied. She therefore laid her Report before Parliament under section 10(3) of the 1967 Act.

47. The report was fully considered, together with the Defendant's response to it, by the Public Administration Select Committee ("PASC"). On 20 July 2006, PASC published a report ("the PASC Report", HC 1081) **[I],** which concluded that PASC agreed with the Ombudsman that maladministration had occurred. Government information about pensions was deficient, and reasonable people would have been misled. PASC further concluded that the Government should have considered the Ombudsman's recommendations properly, rather than immediately assuming that they would place large burdens on the public purse. It stated that the Government should reconsider the Ombudsman's recommendations.

48. A Second PASC Report was published on 10 May 2007 **[L]**. That report, inter alia, criticised the DWP's continued failure to include all schemes with solvent sponsoring employers within the FAS.

JUDGMENT IN *BRADLEY*

49. In a judgment delivered on 21 February 2007 **[J/293-320]**, Mr Justice Bean upheld a judicial review challenge by four claimants who have suffered pension losses, including the First Claimant Mr Parr and the Third Claimant, Mr Duncan, Bean J held:

    (a) It was unlawful (paragraph 50-55) and (in part) irrational (paragraph 66) for the Government to reject the Ombudsman's First Finding of maladministration. The Secretary of State's decision to do so was quashed.

    (b) The Secretary of State's rejection of the Ombudsman's First Recommendation was therefore also unlawful and was quashed because it was premised on the Secretary of State's rejection of the Ombudsman's First Finding (paragraph 85).

    (c) The Secretary of State was ordered to reconsider the Ombudsman's First Recommendation "in the light of the Ombudsman's First Finding of maladministration and of this judgment" (paragraph 85).

50. The Secretary of State has appealed the first of those findings but has not challenged the quashing and mandatory orders granted by Mr Justice Bean in relation to the Secretary of State's rejection of the Ombudsman's First Recommendation.

51. In addition, Mr Justice Bean dismissed the claim in the following respects:

    (a) The Secretary of State had not unlawfully rejected the Ombudsman's finding that the maladministration she found had caused injustice, insofar as the Ombudsman held that injustice had been caused to people

who had neither read the official guides nor relied on advice from colleagues who themselves relied on the guides (paragraph 70).

(b) The Secretary of State had not unlawfully rejected the Ombudsman's Third Finding of Maladministration (which concerned a decision to change the MFR level in 2002: this is not material to the present claim).

(c) The Secretary of State had not breached the Claimant's rights under Article 1 of the First Protocol (paragraph 92).

52. The Claimants have appealed those findings and the appeal is due to be heard by the Court of Appeal on an expedited basis on 25 July 2007.

FINANCIAL ASSISTANCE SCHEME

53. The Pensions Act 2004 established a scheme called the Pension Protection Fund ("PPF") to pay up to 90% of pension entitlements where occupational pension schemes are wound up without sufficient assets to meet their liabilities (this 90% is not limited to the FAS definition of "core" entitlements, which is different from that used by the Ombudsman and considered further below). The PPF applies to schemes that commence winding up from 6 April 2005. It does not apply to the 125,000 people who have lost pensions whose schemes commenced wind up before that date. The Secretary of State therefore also established the FAS to provide financial assistance to members of schemes winding up prior to this date. The FAS was announced before the Ombudsman commenced her investigation and was established well before its conclusion. It was not established as a response to the Government's maladministration as found by the Ombudsman.

54. The FAS was established by delegated legislation on 19 July 2005 (SI 2005/1986) and was amended by further delegated legislation on 15 December 2006 (SI 2006/3370). Currently the financial assistance provided by the FAS is limited in a number of ways:

(a) It only applies to schemes where the sponsoring employer has become insolvent.

(b) It only applies to schemes that commenced winding up between 1 January 1997 and 5 April 2005.

(c) No payments are made until individuals reach the age of 65 even if their scheme pension age was earlier. This even applies to those who are in very poor health, who cannot receive anything under the FAS unless they obtain certification that they have less than 6 months to live.

(d) The FAS pays beneficiaries a percentage of the FAS definition of their "core" pension. This particular definition of "core" pension is a newly-defined term introduced specifically for the FAS. The notion of "core" pension excludes some significant benefits which are part of a normal occupational pension, namely, (i) the tax-free lump sum, (ii) additional payments for life cover, (iii) inflation linking, (iv) a portion of the normal widows' benefits. It will be noted that "core" benefits as defined for the purposes of the FAS are not identical to those so described by the Ombudsman in her recommendation (see paragraph 38 above).

(e) The percentage supposed to be paid by the FAS when a person reaches 65 is 80% of the FAS definition of "core" pension to those who were within 7 years of scheme pension age on 14 May 2004; 65% to those who were between 7 and 11 years of their scheme pension age on that date; and 50% to those who were between 11 and 15 years of their scheme pension age at that date; nil to those who were more that 15 years of their scheme pension age.

(f) The FAS is capped at £12,000 per year and subject to a de minimis payment of £520 per year.

(g) The cap and the benefits payable under the FAS are not inflation-linked, whereas at least part of the pension payable under a final salary pension scheme would be.

55. In its first year of operation (to April 2006) the FAS had made only 87 payments to 33 scheme members, all of which were "initial payments" of 60% of "core" pension. As at 22 December 2006 only 718 people had received payments from the FAS. Of these 594 were "initial payments". the latest estimate is that only about 1,250 people have received any money from the FAS despite over 10,000 qualifying individuals being over pension age.

56. The Ombudsman considered the limitations on the initial scope of the FAS and concluded that they meant that the FAS was not capable of remedying the injustice that she had found **[G/170-171/5.174]**.

57. The PASC concluded that the FAS "remains inadequate", for reasons which are summarised at paragraphs 52 – 54 of the PASC Report **[I/23-24].**

THE CHALLENGED DECISIONS

58. The judgement in *Bradley* was handed down on 21 February 2007. On 22 February 2007 the Secretary of State indicated to Parliament that "it is absolutely right and proper that we take the time to study this judgment and consider its implications in detail." However, on 14 March 2007 he filed an appeal against the order made in that case alleging *inter alia* and for the first time that the Ombudsman's first finding was "irrational" **[J/365-380].**

Statement of the Secretary of State on 28 March 2007

59. In his budget speech to the House of Commons, the Chancellor of the Exchequer the Rt Hon Gordon Brown MP announced that the FAS was to be extended.

60. On 28 March 2007 the Secretary of State made a statement **[K/16-17]** ("the 28 March Statement") in which he provided reasons for the announcement by the Chancellor of the Exchequer about the FAS and made clear that the decision to extend it had been made by himself. This was confirmed by letter dated 24 April 2007 from the Office of the Solicitor for the DWP **[M/3-7]**. It also

confirmed that the entirety of the reasons for the decision were contained in the 28 March Statement made by the Secretary of State **[M/3]**. The Office of the Solicitor was invited in terms **[M/1]**, but declined, to add to those reasons **[M/3]**. The letter went on to indicate that there had been no consultation with the Ombudsman prior to the decision being made.

61. Despite the confirmation in the letter from the Office for the Solicitor for the DWP dated 24 April 2007 that full reasons for the Secretary of State's decision were contained in the Secretary of State's 28 March statement, on 23 Mary 2007 [**M/16-26**] the Department for the Solicitor responded at length to the Claimants' pre-action protocol letter on 23 May 2007, amongst other things, introducing new reasons for the challenged decisions which are not contained in the Secretary of State's 28 March statement ("the New Reasons"). The Claimants will contend that the New Reasons are *ex post facto* rationalisations and should not be treated as valid reasons for the decisions. Notwithstanding and without prejudice to this contention, the New Reasons would not cure any of the grounds for judicial review set out below.

62. The Secretary of State stated that his 28 March statement was made pursuant to, and in purported fulfilment of, the order of Mr Justice Bean.

63. The Secretary of State announced the following changes to the FAS:

    (a) All persons who are eligible for financial assistance will receive 80% of their so-called "core" pension entitlement

    (b) The cap on annual payments from the FAS was increased from £12,000 to £26,000.

    (c) The minimum payment of £10 per week was removed.

64. The Secretary of State also announced a "review" to report by the end of the year to examine,

(a) how to make best use of the assets in pension schemes with an insolvent employer;

(b) determine whether scheme assets and other sources of funding could be used to increase assistance for affected scheme members;

(c) consider any suggestions from interested and concerned parties.

65. The terms of reference of this review state, **[K/27-28]**:

> "Scope
> - The Review will focus on those pension schemes that are eligible for assistance from the Financial Assistance Scheme. That is, those schemes that started winding up between 1st January 1997 and 5th April 2005 as a result of the sponsoring employer becoming insolvent.
> - The Review will include those schemes where, in the same period, agreements were signed to compromise pension scheme debt in order to prevent an employer insolvency.
> - The Review will (other than the above) <u>not</u> include schemes that were wound up by a solvent employer; schemes that are eligible for the PPF, or schemes that wound up prior to 1997.
>
> Objectives
> …..
> - To determine whether there are other pension schemes (in addition to those with compromise agreements) which although the sponsoring employer did not undergo an insolvency event, it would not be reasonable to expect the employer to have a continuing responsibility for supporting an under funded scheme. "

66. The terms of reference are not consistent on their face. On the one hand, consideration of the position of solvent schemes without a compromise agreement is expressly excluded from the scope of the review. On the other hand, whether or not such schemes should qualify for financial assistance is expressly stated as an objective of the review. The Claimants presently make no claim in relation to this inconsistency on the basis of an assurance contained in a letter from solicitors for the Secretary of State dated 4 June 2007 [**M/31-32**]. That letter stated that the review has been asked to consider whether solvent employer schemes "should be brought within the FAS … This task is focused

on clarification of the scope of the extension of the FAS itself, and ensuring that it is consistent with the policy intention that led to the establishment of the FAS and the extension." However, for reasons developed below, the Claimants contend that there is no rational reason for this matter to have been made subject to review in response to the Ombudsman's First Recommendation, because such schemes are in materially the same position as those schemes that qualify for the FAS.

67. In addition, the letter dated 24 April 2007 indicated that the Secretary of State also proposed to increase interim payments from the FAS from 60% to 80%.

Statement of Mr Purnell on 18 April 2007

68. In a statement to Parliament on 18 April 2007 **[K/18]** the Minister for Pensions Reform announced a second decision also extending the FAS. He stated,

> "… we can announce today that we will further extend the FAS to cover members of schemes that began winding up between 1 January 1997 and 5 April 2005—I believe that covers the Tinsley Brigde scheme—when a compromise agreement is in place and when enforcing the debt against the employer would have forced the employer into insolvency. We estimate that that will benefit an additional 8,000 members of some 15 schemes." (Hansard, Col. 326)

69. Mr Purnell went on to state that,

> "When people talk about solvent employers, I believe that they are talking about the category that we have identified today. We have no intention of doing anything other than delivering for those schemes."

70. Despite the welcome extensions made to the FAS, the DWP has not fully accepted the Ombudsman's Recommendations. As stated above, the DWP is not required in law to accept the Ombudsman's recommendations but it must act lawfully in deciding not fully to accept them.

GROUNDS OF JUDICIAL REVIEW

First ground of review: The purported reconsideration failed properly to take account of the maladministration found by the Ombudsman and was undertaken on a wrong basis

71. In his 28 March Statement, the Secretary of State stated,

> "In its judgment in the judicial review relating to the ombudsman's report, the High Court directed me to reconsider my response to the ombudsman's first recommendation on the basis that maladministration had occurred. I have undertaken my reconsideration on that basis."

72. The Secretary of State is completely silent as to, (a) what maladministration he accepts occurred, (b) when that maladministration occurred, (c) who was responsible for that maladministration. This is inadequate as a reasoned response to the Ombudsman's First Recommendation.

73. It is no answer for the Secretary to State to say, as he does in his pre action protocol response letter **[M/20, first paragraph]**, that no reasons are required. That is an astonishing assertion in the context of a public body's response to a High Court judgement and an Ombudsman investigation, particularly one that has committed itself to making the arrangements it has for redressing maladministration "public" (see paragraph 20 above). Furthermore, full and cogent reasons for rejecting all or part of the Ombudsman's recommendation are required, (a) in fairness to the complainants, and (b) in order to ensure the Secretary of State complies with his legal obligations properly to consider the Report, and (c) to facilitate the Government's accountability to Parliament in relation to redress for maladministration.

74. The response is particularly inadequate given that:

    (a) The Secretary of State had previously rejected the Ombudsman's First Finding of maladministration and maintained this position before the House of Commons Select Committee on Public Administration and in resisting the claim brought against the decision in *Bradley*.

(b) The Secretary of State continues to maintain that the DWP was not guilty of maladministration in his appeal from the judgment of Mr Justice Bean.

(c) Moreover, in that appeal the Secretary of State is now alleging that the Ombudsman's finding of maladministration was flawed and irrational and peripheral despite having never previously advanced such a contention. Far from accepting the Ombudsman's finding of maladministration, the Secretary of State's rejection of it has become even more trenchant and extreme. The Secretary of State has, moreover, made these allegations as to the rationality of the Ombudsman's First Finding despite that finding being upheld by PASC and Mr Justice Bean.

(d) There is no indication that anything at all will be done to prevent repetition of the maladministration which, it is said, has been accepted.

(e) There has been no apology, let alone a "sincere and meaningful" one of the kind the Secretary of State has committed himself to offering in circumstances where maladministration is accepted.

75. In addition to being flawed for an absence of reasons, it must be inferred that the decision has not been made on the basis of proper considerations and/or is irrational. Further, it is inconsistent and irrational for the Secretary of State to have purported to reconsider the Ombudsman's First Recommendation on the basis that he accepted the Ombudsman's First Finding of maladministration whilst pursuing an appeal in the terms set out above.

76. Further, statements made by the Minister for Pensions Reform show that the DWP has fundamentally misunderstood, both (a) the Ombudsman's Report, and (b) the judgment of Mr Justice Bean; such that the decisions are irrational and based on material errors of fact and law. Moreover, the statements also clearly show that reconsideration of the Ombudsman's First Recommendation was not undertaken on the basis of an acceptance by the Government of the maladministration found by the ombudsman:

(a) Mr Purnell stated to the House of Commons on 18 April 2005 that:

> "The Government have organised a remedy, but let us be clear why we have had to do so. ….As the judicial review found, the 1996 leaflet published by the then Tory Government was misleading and maladministraive." (emphasis supplied) (Hansard, Col.323)

He also stated:

> "the judicial review only asked us to reconsider the decision. Given that the courts had made it clear that the Conservative Government's decisions that we have defended had been wrong, we decided that it was time to come up with a scheme that would provide at least 80 per cent. and to listen to the suggestions that the hon. Gentleman, other Opposition Front Benchers, the ombudsman and my honourable colleagues have been making and set up a review. (emphasis supplied) (Col.324).

(b) In fact, the First Finding made by the Ombudsman related to information provided by the DWP over the entire period between 1996 and 2004: it did not just refer to decisions under the Conservative Government (see paragraph 33 above). The Secretary of State ought to have made his decisions on the basis that it accepted that the DWP had been guilty of the maladministration found by the Ombudsman in her First Finding to its full extent. The failure to do so means that the decisions were taken on a fundamentally flawed basis and were irrational.

77. In his pre-action protocol response letter dated 23 May 2007, the Secretary of State claims that the comments made by Mr Purnell were made in the context of criticism of the previous Government [**M/20**]. However, it is clear from the passages cited above that the reason for the extension of the FAS was that the Government considered that the information provided by the Conservative Government had been wrong. The Secretary of State cannot now be heard to say that the reason for the extension of the FAS was also that it accepted that the decisions of the Labour Government had been wrong. The pre-action letter also states that the 28 March statement is "very clear". On the contrary, the 28

March statement is silent as to what maladministration the Secretary of State accepts.

78. Furthermore, the pre-action letter lends support to the Claimants' assertion that the Secretary of State accepted maladministration only in relation to the 1996 PEC 3 leaflet. The letter states that PEC 3 was "the only leaflet singled out for specific criticism as being "inaccurate and misleading" by Bean J". This is incorrect and irrelevant. It is irrelevant because Bean J ordered reconsideration on the basis that all of the information within the Ombudsman's First Finding was inaccurate and misleading. It is incorrect because Bean J did not single PEC 3 out for criticism: he relied upon it by way of example only, because it, "attracted most criticism in oral argument [by Miss Rose QC]" and because his Lordship, did "not consider that it is necessary to go through each item of official information which was scrutinised by the Ombudsman." (paragraphs 59 and 66). Bean J did not imply that PEC 3 was the only misleading Government publication.

79. The Secretary of State's response to the Claimants' pre-action protocol letter claims that reliance on the statements of Mr Purnell breach Article 9 of the Bill of Rights 1689. However, the statements are relied upon as a true statement of the reasons for the decisions under challenge. Article 9 of the Bill of Rights is irrelevant.

Second Ground of Review: Failure to address the actual recommendation made by the Ombudsman.

80. The reasons given in the Statement of 28 March 2007 entirely fail to give any explanation as to how the Secretary of State's reconsideration addresses the Ombudsman's First Recommendation. Although the Secretary of State says that he was ordered to "reconsider the ombudsman's first recommendation", and has done so, he does not give any particulars of that reconsideration at all. He merely provides a conclusive statement that "As a result of that reconsideration" he has decided to extend the FAS (emphasis supplied). The 28 March Statement is completely silent as to the nature, extent and content of the

Secretary of State's reconsideration of the Ombudsman's Recommendation. This amounts to a failure to provide cogent or any reasons for not accepting an Ombudsman's recommendation.

81. In particular,

(a) there is nothing whatsoever to suggest the process of analysis to which the Secretary of Stare and central government generally have committed themselves in order to ensure consistency in the treatment of cases where maladministration has been identified and redress is considered appropriate (of which one key principle is to ensure that victims of established maladministration are put in the same position as they would have been in had such maladministration not occurred) ;

(b) the 28 March Statement does not address the Ombudsman's recommendation that the Government should consider restoring the non-core pension entitlements of individuals (with this "core" pension not defined to exclude the elements which the FAS definition omits) and the "full amount lost" by them **[G/181/6.15]**; nor does it provide cogent (or any) reasons for not accepting that recommendation;

(c) nor does it address the Ombudsman's recommendation that redress be provided to all those who suffered pension losses, including those below the age of 65 but past their scheme pension age (such as Mr Parr), who will not receive assistance until they are 65, and those who are members of schemes with solvent employers (such as Mr Baker); nor does it provide cogent (or any) reasons for not accepting those recommendations.

Third Ground of Review: Absence of reasons and irrationality in relation to the injustice found by the Ombudsman

82. The purpose of the recommendations made by the Ombudsman is to suggest to the Government ways of remedying injustice that she has found to have

been caused by the maladministration. The injustice that she found to be caused by the maladministration is set out above.

83. The decisions of the Secretary of State and the Minister for Pensions Reform are bad in law because:

(a) They are silent on the question of whether or not the Secretary of State accepts that his Department's maladministration caused any of the financial losses or other injustice found by the Ombudsman. The failure to provide such an explanation is particularly grave given that,

(i) in *Bradley* the Secretary of State defended his rejection of the Ombudsman's First Recommendation on the basis that he did not accept the Ombudsman's finding that financial losses had been caused by the Government's maladministration;

(ii) the Secretary of State continues to maintain these arguments on appeal. This is considered below.

(b) Further, the reasons given by the Secretary of State in his 28 March Statement do not address any of the non-financial losses found to have been caused by the Ombudsman, such as outrage and distress and lost opportunities to make informed decisions. In his Full Response document dated June 2006, the Secretary of State rejected the Ombudsman's Second Recommendation that it should make consolatory payments for these forms of injustice on the basis that no maladministration had occurred (paragraph 60). The Secretary of State should therefore have reconsidered and specifically addressed, (i) why he does not now accept this recommendation, and (ii) whether the Government accepts that the non-financial injustice that the DWP's maladministration has caused should be taken into account in extending the assistance available under the FAS: he has done neither.

(c) The Secretary of State has also failed to explain how the extensions to the FAS are related to the maladministration that occurred. On their face, the extensions appear to bear no rational relation to the maladministration given that, (i) they will not improve the position of most individuals who are already entitled to 80% of the FAS definition of their "core" pension entitlement, (ii) they will not provide assistance to members of solvent employer schemes which do not meet the compromise agreement conditions set out by the Minister for Pensions Reform (see the Fourth Ground of Review below), (iii) they will not provide assistance to retired persons below the age of 65 who were expecting to retire at a scheme pension age younger than this, (iv) they will not apply to members below age 65 who are in serious ill-health unless they can certify that they have less than 6 months to live.

84. Amongst the New Reasons contained in his response to the Claimants' pre-action protocol letter, the Secretary of State claims that the First Recommendation was one of "macro-economic and political questions as to the allocation of resources which it is appropriate to consider at the general level" rather than by reference to the circumstances of individual cases **[M/21]**. This is not to the point. The Ombudsman's recommendation was clearly and directly related to the losses suffered by individuals. The Secretary of State did not accept that recommendation, despite the fact that his only original reasons for rejecting it was that he did not accept maladministration and that the losses were not caused by maladministration. Instead, the Secretary of State proposed a different remedy for the maladministration and injustice: an extension to the FAS. It is therefore incumbent on him to, (a) explain how that redress relates to the maladministration and injustice, and (b) ensure that the redress is rationally and reasonably related to it.

85. The Secretary of State's response to the Claimants' pre-action protocol letter also alleges that the Secretary of State was not required to reconsider the non-financial losses caused to individuals **[M/21]**. However, the Secretary of State rejected the Ombudsman's recommendations relating to non-financial loss solely on the grounds that he did not accept maladministration. Accordingly,

given that his rejection of maladministration was unlawful and irrational, when reconsidering the redress that should be afforded to affected individuals, the Secretary of State must rationally reconsider his position in relation to non-financial losses. Indeed, amongst the New Reasons supplied by the Secretary of State, he now claims that the Ombudsman's recommendation relating to consolatory payments was reconsidered but that, "the Government considered it appropriate to concentrate payments of public funds" on FAS payments. The Secretary of State's position is plainly inconsistent. Moreover, the Secretary of State's has failed, (a) to state the extent of his reconsideration of non-financial losses, (b) state to what extent he accepts them, (c) explain how they relate, if at all, to the proposed extensions to the FAS. To the extent that extended FAS payments are intended to remedy non-financial losses, this renders all the more arbitrary the fact that large numbers of affected individuals will not benefit from the extensions and many will continue to be excluded from any financial assistance at all.

Fourth Ground of review: The exclusion of solvent employer schemes from the FAS is arbitrary, irrational and discriminatory

86. As announced by the Minister for Pension Reform on 18 April 2007, some schemes which have a solvent sponsoring employer will be eligible for the FAS where they meet the compromise agreement condition. An Indicative list has since been issued **[K/23]**. However, this condition leaves certain other schemes ineligible for the FAS. The Second Claimant, Mr Baker is an example of a member of such a scheme. Like the First Claimant, Mr Parr, he has lost a substantial part of his expected pension, but unlike Mr Parr he will not receive any assistance from the FAS. The continued exclusion of such schemes is itself irrational, arbitrary and discriminatory because,

(a) the schemes are covered by the Ombudsman's First Recommendation in that they commenced wind-up before 2004;

(b) the members of such schemes, such as Mr Baker, are in materially the same position as members of qualifying schemes in having suffered injustice in consequence of the Government's maladministration. They

have read and relied upon the official information to the same extent as members of non-qualifying schemes. Their financial position is no better than that of members of qualifying schemes. The non-financial losses that they have suffered are identical. Despite this, members of non-qualifying schemes with solvent employers, such as Mr Baker, will receive no assistance from the FAS.

87. There is no good reason for the exclusion of such schemes. Moreover, the Statement of 28 March 2007 does not provide any reasons. Indeed, the schemes that have specifically been excluded are ones in which the employer fulfilled its legal obligations and funded its scheme up to the Government's MFR level. It must be inferred that there are no rational reasons and the decision is irrational.

88. The Statement of 28 March is also flawed and irrational on its face and discloses an erroneous factual premise on which the limited extension of the FAS to solvent schemes was based.

(a) The Secretary of State stated that, "we expect that all of the estimated 125,000 people with losses will be helped".

(b) This statement of fact is, on the DWP's own figures, false. The figure of 125,000 affected individuals was explained by the DWP in the Annex to its Full Response document dated June 2006. The DWP stated that it estimated 125,000 individuals are covered by the Ombudsman's recommendation, i.e. they satisfied the conditions set out in paragraph 30 above. Those conditions do not include a requirement that solvent employer schemes have entered compromise agreements with the employer to avoid insolvency.

(c) The Full Response document was perfectly clear that the 125,000 figure reflected all scheme members covered by the Ombudsman's recommendations whether the scheme had entered into a compromise agreement or not:

> "The recommendations cover schemes which started to wind up between 1 April 1997 and 4 April 2005. This includes pension schemes with solvent sponsoring employers which are not covered by either the Financial Assistance Scheme or the Pensions Protection Fund.
>
> …The following assumptions were used to estimate the cost of the Ombudsman's proposals:
> - 125,00 eligible pensioner and non-pensioner members" **[H/42/43]**

(d) The Minister for Pensions Reform repeated this factual error in his speech announcing the extension of the FAS to solvent employer schemes satisfying the compromise agreement condition. He stated that "I want to set out …how the scheme will now guarantee 80 per cent of expected core pensions to all 125,000 people affected."

89. Accordingly, the decision to impose a condition for the qualification of solvent employer schemes is flawed because it was not supported by cogent, rational, or indeed any, reasons. Indeed, the schemes that have been specifically excluded are those where the employer fulfilled its legal obligations to fund the scheme to 100% of the MFR level.

90. Amongst the New Reasons contained in his response to the Claimants' pre-action protocol letter, the Secretary of State claims that the relevant difference between schemes with a solvent sponsoring employer is that "additional funds may still be available from such employers" and that including such schemes within the FAS would be a disincentive to trustees to pursue such an option. This reason (apart from being an ex post rationalisation and therefore invalid) is irrational for several reasons:

(a) The Government has recognised in its response to the Second PASC Report **[L/24]** that trustees of schemes with solvent employers have no legal recourse against their employers—whether or not a compromise agreement was in place—for additional funds where the scheme was wound up funded to 100% of the MFR level,

> "No legal recourse would be available in relation to the employer debt legislation for pre 11 June 2003 wind-ups, if solvent employers had met their legal obligations to pay the debt calculated in accordance with the legislation".

(b) Therefore the position of schemes with a solvent sponsoring employer who have not entered a compromise agreement is materially the same as those schemes which have solvent employers but no compromise agreement: in both cases the employer could make additional contributions to the scheme voluntarily if it wished to do so. The distinction drawn by the Government is therefore arbitrary and irrational.

(c) In any event, it is not realistic to anticipate solvent employers (some of whom, such as in Mr Baker's case wound-up schemes run by their predecessor company) to voluntarily (without either compulsion from the Government) make payments into pension funds that have wound up or are in the process of winding up; still less that they will do so to FAS levels. In the circumstances, there is no realistic prospect of individuals in the position of Mr Baker recovering any of their lost pension. As such, the injustice suffered by individuals in Mr Baker's position is equivalent to members of schemes that qualify for the FAS.

(d) It is also irrational to say that trustees would have no incentive to approach solvent employers (if they thought this might be productive) given that the FAS falls far short of providing financial assistance equivalent to a person's expected pension.

Fifth ground of review: Fettering of discretion to consider the circumstances of those who have established loss

91. A further flaw in the decision making process has emerged as a result of the pre action correspondence. Through his solicitor's letter of 23 May 2007 **[M/18]** the Secretary of State asserted that "causation had not been made out in individual cases" and that the reconsideration exercise proceeded on that basis. He later added that it would be inappropriate to consider the circumstances of the Claimants to the judicial review, and attempt to ensure these were addressed by the reconsideration exercise compelled as a result of their case because

> "With respect, that was not the nature of the order made by Bean J. That order was to reconsider the First Recommendation. That recommendation relates to up to 125,000 individuals. It was not necessary, nor would it have been appropriate, for the Secretary of State to have reconsidered the First Recommendation on the basis of the particular circumstances of the four individual Claimants. The First Recommendation is concerned with macroeconomic and political questions as to the allocation of resources which it is appropriate to consider at a general level, by reference to broad categories of case rather than by reference to the detailed and particular circumstances of individual cases."

92. It follows that the decision represents a significant departure from the principled approach described in the Guide to Financial Redress for Maladministration of considering "all cases in detail and on their individual merits" **[D/30/second bullet]**.

93. It would be correct to say that causation had not been established in every case covered by the Ombudsman's recommendations. Yet she also considered 200 individual complaints in detail and, the cases of Mr Baker and Mr Duncan were highlighted in particular as representative of others. It is wholly artificial and an unlawful fettering of his discretion to offer redress to individual victims of maladministration for the Secretary of State to "reconsider [his] response to the ombudsman's first recommendation on the basis that maladministration had occurred" without any regard to the circumstances of those who had established they were victims to the Ombudsman's satisfaction. Yet that is precisely what the Secretary of State has done.

REMEDIES

94. The Claimants claim:

(a) A declaration that the decisions announced on 21 March 2007 (by the Chancellor of the Exchequer) and on 28 March 2007 (by the Secretary of State) and on 18 April 2007 by the Minister for Pensions Reform failed properly to address the Ombudsman's recommendations.

(b) A mandatory order requiring the Secretary of State to reconsider the Ombudsman's Recommendations on a proper basis.

(c) Costs

No quashing order is sought and for the avoidance of doubt no relief is sought that would frustrate or impede the extensions to the FAS announced by the Government.

PROTECTIVE COSTS ORDER

95. As is apparent from the correspondence (especially letters dated 31 May and 8 June 2007) the Claimants are currently seeking an agreement from the Secretary of State that he will not seek costs against them. In his letter dated 8 June 2007 the Secretary of State has requested supporting evidence that the Claimants satisfy the conditions for a protective costs order set out in *R (Corner House) v Secretary of State for Trade and Industry* [2005] EWHC Civ 192, as clarified in later cases, in addition to the information already supplied to him by the Claimants. Accordingly, it would be disproportionate for the Claimants to apply for a protective costs order at this stage; however, they reserve the right to do so should agreement with the Secretary of State not be reached. The Claimants have made their position in this respect clear to the Secretary of State in correspondence.

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12 June 2007