

“21st Century Trusteeship and Governance”

Response by the Association of Member Nominated Trustees to the Pensions Regulator’s Discussion Paper of July 2016

The Association of Member Nominated Trustees (“AMNT”) is an organisation run by and for member-nominated trustees, representatives and directors of pension schemes, both defined benefit and defined contribution, in both the public and private sector. Established in 2010, the Association now has over 600 members from occupational pension schemes with collective assets exceeding £600 billion. These pension schemes range in size from £5 million to over £40 billion.

We have chosen to order our response by replying in turn to the questions contained in the discussion paper:

Q.1 Our members take varying views on the formal qualifications to be required of those who are appointed trustees on the basis that they will charge for their services as experts in pension trustee matters. For some of our members it is clear that “professionals” should have specialised qualifications and obligations for continued professional development. Others take the view that a sharp divide between “professional” and “lay” can be overstated and can lead to an abdication of responsibility by the “lay” and/or to an unhealthy dominance by those who, on the basis of some technical knowledge, think they have better judgment than their colleagues.

The current requirements in place relate to trustees who are “independent” within the meaning of section 23(3) of the Pensions Act 1995, as expanded by SI 2005 No 703. They apply only in situations of insolvency, or where a trustee body is to be exempt from the requirement for member representation by virtue of all the trustees (or, in the case of corporate trustees, their officers and key persons) falling within that statutory definition.

Those requirements might be better publicly spelled out, so that for example those appointing trustees for their professional expertise could better judge whether tPR would regard the key persons involved as having “sufficient relevant experience of occupational pension schemes” to qualify as “independent”. A good proportion of our members are not convinced, though, that passage of exams ought to be a passport to the pension scheme leadership for which professionals are valued, for all that the early acquisition of basic qualifications by all trustees is pretty well universally supported by our members.

Unless a greater range of pension schemes are to be required to have such statutorily “independent” professional trustees, it would be hard to much purpose in extending mandatory requirements for those holding themselves out as professionals. For those appointing a trustee, her/his possession of a formal qualification may be reassuring, so the proposed PMI diploma will be useful, but it should not lead those making appointments to concentrate on that ahead of other qualities. If they appoint somebody who holds her/himself out as a professional without a particular formal qualification, that should not bring their diligence into question.

A requirement for all schemes to have one or more “professional” trustees would add a financial burden to schemes that would not be justified. A difficulty is of course that it may be schemes that are failing in governance, even though not insolvent, which would particularly benefit from trustees with greater and more expensive expertise. It is undeniable, however, that there is a huge variation, so it should in normal circumstances be left to the scheme to decide whether it requires a “professional” trustee.

Q.2 AMNT members share tPR’s appreciation of the nature and importance of leadership by chairs of trustee boards. They do not generally believe that the skillset required of a good chair is demonstrated by formal qualification. Rather, a trustee should be chosen by the majority of

her/his colleagues on the board to chair it, and if appropriate removed from the chair by them. AMNT would certainly not agree with any proposal that the chair should ordinarily be a “professional”.

It seems to members that there is less guidance than used to be on what tPR expects of the chair of DB trustee bodies. More extensive guidance would be welcomed.

Q.3 AMNT members would support a requirement for chairs of DB scheme trustee bodies to report on compliance with governance standards, though there is some concern that it might be a fruitless addition to a pile of reports that do little more than gather dust. The purpose must be in part to concentrate the mind of the chair on governance; but if that role is to be fulfilled, a way must be found to see that schemes do not pay somebody else to write it and stick it in front of the chair for her/him to sign without digesting it.

QQ. 4 to 6 The best single way to ensure awareness of the need for TKU is to make completion of the toolkit a prerequisite for trusteeship – or directorship of a corporate trustee – of any pension scheme regulated by tPR (perhaps with a grace period not exceeding six months from first taking up appointment). AMNT members would support that requirement, provided that it was not applied, either in theory or practice, only to MNTs and MNDs, and provided that the standard of knowledge initially required was not raised so as to risk narrowing the range of participants that the best schemes now have.

As things stand, there are two key elements to ensuring that trustees complete the toolkit: their recognition that it is important for them to do, and assuring them the time to do so.

Understanding TKU would be greatly assisted if trustees employed by sponsors were entitled to a reasonable amount of paid time off to study the TKU toolkit and receive other pensions training. Trustees should be remunerated for undertaking, and preparing for, their duties. This can be achieved by direct payment where a trustee is no longer employed by the sponsor. It can be achieved by a reasonable amount of paid time off by those who are still employed by the sponsor, for the recruitment and retention of trustees would also be assisted by paid time off for trustee duties where the position of trustee is not itself separately remunerated.

Section 58 of the Employment Rights Act 1996 assures trustees “the right to time off for the performance of their duties as trustees and for trustee training”; but not only does it not specify that any of the time must be paid, but nor does it fail to give any minimum time or any guidance as to the scope of the right. This often leaves trustees having to argue the justification for every commitment they make to training, particularly ongoing training.

This is an extremely important matter. Trustees are drawn from a wide spectrum of the workforce and indeed should probably be drawn more than they are from jobs other than in senior positions where they can arrange their work schedule as they wish. There is far too little, far too difficult to find, on tPR’s website about even such rights to time off as already exist.

AMNT believes that by appearing to presume that fitting in trustee duties is unproblematic, and not engaging with scheme sponsors on this matter, tPR is missing a trick; it could be mounting a campaign to impress on sponsors why it is in their interests that their pension scheme trustees are appropriately trained.

It would also help if tPR were empowered to require the contact details of trustees, and if it were to use that information to communicate more directly with trustees about training needs.

Knowing how to apply TKU is to some extent a matter of experience; some of our members suggest that prospective trustees might be allowed, subject to suitable assurance of confidentiality, to observe trustee board meetings for a while with a view to seeing how things work in practice before they have to assume accountability for decisions there. We are aware that this practice exists in some pension schemes and it has proved beneficial for the prospective trustees.

While being able to do exams on trustee knowledge may not demonstrate somebody's common sense and integrity, which are if anything more vital characteristics, tPR is going to have to rely largely on those who appoint trustees correcting any mistakes they make as they do so – subject of course to the extreme cases provided for by statute.

That said, while the certificate of completion of the trustee toolkit is an appropriate entry level test, AMNT seeks to have more MNTs and MNDs sit the basic trustee examinations set by PMI and on a modest scale arranges bespoke training for its members followed by special sittings of those exams. It could well be seen as helpful and within its remit for tPR to give more publicity to the availability of PMI exams and the like

QQ. 7 & 8 AMNT has found the material produced by tPR to assist trustees of great and growing value to our members and have been proud to have the opportunity to comment on some materials in draft (hopefully making them, if anything, still better!)

It may well be that trustees should be required to update their TKU by doing the toolkit again at intervals, given especially that its scope and emphasis changes over time.

Other development of skills can be acquired of course from a number of sources if trustees are given time to access them. AMNT is itself active in this area.

Our members' suggestions include that tPR might arrange independent webinars on topical matters and training in soft skills such as negotiation and communication.

Q.9 The regulatory guidance on conflicts of interest needs to be followed. Thought needs to be given to ways in which tPR might monitor guidance in this area, and to effective sanctions that might sanction bad behaviour. AMNT is fully convinced, however, that the solution is not to divorce trustees from involvement with the sponsor and/or with the beneficiaries: we are quite clear that schemes are improved by trustees understanding, from within, the point of view of stakeholders.

If trustee boards do not meet frequently in person, the chances of maintain proper standards of governance in this area, as in others, are vastly reduced.

Q.10 A key challenge is asymmetry of information. The terms on which administrators and advisors provide services are very frequently opaque. Regulators and indeed Government may have to bring to bear pressure to require a better supply of information to registered pension schemes, perhaps including bringing small schemes within the scope of unfair contract terms legislation.

Improvement in that respect would enable trustees to find the time to put really adequate diligence into the appointment and management of their advisors and service provide.

Regarding investment governance, AMNT is alarmed at the failure of investment consultants to assist a large proportion of their client trustee boards to fulfil their fiduciary duties with regard to responsible investment as described by the Law Commission in 2014. AMNT's latest survey of its members indicated that a substantial number of their trustee boards had never had that topic raised with them by their advisors at all.

The guidance from tPR to DC trustees makes it implicitly clear that it involves them take full account of the Law Commission's findings in this area. TPR should put its weight behind trustees who are attempting to do the right thing by making it clear that investment consultants, and indeed fund managers, should be actively assisting their clients in that endeavour rather than assuming that trustee boards will, or should, just delegate all issues of "responsible investment" to fund managers. Trustee boards should be enabled to vote consistently across different manager mandates rather than finding their shares voted against one another on controversial company resolutions; fund managers should not deny, as they sometimes have denied, the right of clients to adopt their own responsible investment policy, including AMNT's Red Line Voting

Initiative. TPR should make clear that obstructing trustees in the pursuit of their duties is not acceptable.

Q.11 AMNT does not dispute that there are schemes, or that they are mostly small schemes, which struggle to provide standards of service that fulfil their fiduciary and/or statutory duties.

Evidently, the consolidation of such a small scheme into a larger one could provide better pricing power and economies of scale in technology and service provision. A cost must, however, generally be paid in removal of flexibility. It is far from straightforward to ensure that accrued rights of members are genuinely respected, without introducing increased complexity rather than simplicity, unless sponsors not only meet the financial and administrative cost of the merger process but also the cost of rounding up benefits. AMNT would strongly oppose altering the law so as to sacrifice members' interests to this end, and would do so even though this might turn out to negate the cost-effectiveness of some consolidations.

Some affected members see the consolidation within the Local Government Pension Scheme as having undesirable and unforeseen consequences; while the particular case is outside tPR's remit, this observation underlines the need for broad examination of any merger proposals.

Where pension bodies are wilfully or incorrigibly lacking in competence to discharge their trusts properly, tPR needs to intervene. For this to be effective, it may be that tPR's statutory power to appoint an independent trustee might be expended beyond cases where section 22 of the Pensions Act 1995 applies. Similarly, where failures are wilful or reckless, tPR may need use of civil penalties under section 10 of the 1995 Act and conceivably have their potential scope extended. In either case, however, AMNT would wish to give further consideration to the details of any such proposal. If such steps were undertaken, one would wish to be sure that tPR could devote adequate resource to monitoring the position to render further measures sufficiently credible to influence the behaviour of people under pressure.

Q.12 Generally, AMNT members think we should answer "Yes". Some are concerned, though, that trustees should not be led to believe that just the high level guidance will always be sufficient, while others' concern is that they should not infer that every box should be ticked, even one that is in the particular circumstances immaterial.

Q.13 A number of members believe that there needs to be an enhanced duty for advisors, as well as trustees, to further the interests of the underlying beneficiaries; they are perceived to be too often aligned to the interests of sponsors at members' expense. However, AMNT would not wish trustee responsibilities diluted, but rather a framework to allow and encourage trustees to discharge those responsibilities more efficiently and effectively.