

## **complaint**

Mr C's complaint is that Aviva Life & Pensions UK Limited ("Aviva") changed the terms of his pension, when his benefits were transferred from his occupational pension scheme to an individual deferred annuity contract in 2009. Mr C lost the right to nominate his common law wife to receive a pension on his death, as a result of the deferred annuity being set up on different terms to the occupational pension scheme.

Mr C considers that Aviva materially misrepresented the position to him in correspondence. Mr C has also raised concerns about Aviva's customer service in dealing with his queries.

Mr C would like Aviva to amend the terms of his policy, so that he can nominate his common law wife to receive a pension on his death. He also seeks compensation for his financial loss, as a result of the delay in settling his pension benefits.

## **background**

The background and circumstances of Mr C's complaint are set out in my provisional decision dated 5 September 2014, a copy of which is attached and forms part of my final decision. Therefore, I do not intend to repeat the substance of that document here. In my provisional decision, I set out my reasons for partially upholding Mr C's complaint, and the basis on which I intended to direct Aviva to compensate Mr C.

Both parties have had the opportunity to consider my provisional decision and have provided their responses.

Aviva reiterated the way in which benefits are payable under the policy. It said that it did not agree that the information it provided to Mr C in its letter of 6 May 2009 was incorrect. It acknowledged that some of the wording contained in the supporting booklet could have caused some confusion with regard to Mr C's specific circumstances, but said that essentially it is the policy schedule which confirms how benefits can be paid, and that was correct. It considered that an award of compensation in relation to this issue should therefore be £100 rather than the £300 I had been minded to award.

Regarding the other issues referred to in my provisional decision, Aviva acknowledged their occurrence, but did not agree with the overall compensation sum I proposed to award. It considered that some of the areas I intended to award compensation for individually were actually interlinked. Therefore, Aviva asked that compensation for these 'other' issues be limited to £450, taking its suggestion of total appropriate compensation up to £550. Aviva noted it had already paid Mr C £50, so this would mean it would pay Mr C a further £500. It also agreed to settle Mr C's retirement benefits as I had proposed.

Mr C expressed his disappointment that his primary complaint was still not being upheld. He also expressed dissatisfaction as he considered that my provisional decision had been misleading. He did not agree that my provisional decision departed substantially from the adjudicator's original conclusions (which had been to not uphold his complaint).

Mr C made no comment on the compensation I had proposed. He queried if there was any value in obtaining clarification from the occupational pension scheme founder of its original intention with regard to benefits for dependants, and whether this could make any difference to my decision. He said that, if not, he would accept my decision.

I asked our adjudicator to write to Mr C to confirm that there was nothing to be gained from seeking clarification of intent from the originator of the scheme, as it could not change my provisional decision. This was on the grounds that the Inland Revenue (now HMRC) rules override any intention of the scheme founders. There was therefore no option for the scheme trustees to opt out of the requirement to apply a 'financial dependency' test before paying a dependant's pension. The test applied, regardless of the parties' intentions.

### **my findings**

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I have not been persuaded to depart from the conclusions reached in my provisional decision.

It continues to be my view that it was the intention of the founders of Mr C's occupational pension scheme that a dependant's pension would be payable, in the circumstances set out in that scheme's rules. However, I also consider that the founders intended that a 'dependant' would actually be a person who was in a relationship of financial dependency, or inter-dependency, with the scheme member. This is largely because this was a requirement of the Inland Revenue for an 'approved' pension arrangement at the time Mr C's scheme was set up, so was not an optional aspect of the scheme. It would also have been highly unusual for Mr C's employer not to have wanted to put some conditions on who an employee could nominate to receive a lifetime 'dependant's pension', given the very significant financial cost of providing that benefit.

I have agreed with Mr C that it is highly likely the scheme founders intended for common law spouses to be capable of being 'dependants', but I consider that this was still subject to the common law spouse meeting the Inland Revenue's 'financial dependency' test at the time of the member's death.

In any case, the dependant's pension benefit was taken away from Mr C when his occupational pension scheme was wound up in 2009, and his benefits were transferred to a new policy with Aviva. I have not held Aviva responsible for the change of benefits, as I consider that to have been the responsibility of the trustees of the occupational scheme.

It therefore follows that I do not consider it to be fair or reasonable to uphold Mr C's complaint in full, so as to require that Aviva change its policy terms to include a dependant's pension (or a pension for any person Mr C nominates as his common law wife). This is not what Aviva contracted to provide.

I have carefully considered Aviva's comments regarding the amount of compensation I set out in my provisional decision. I do appreciate that Aviva has acknowledged that certain failings occurred, and has now accepted that Mr C should be further compensated, and should have his pension backdated to March 2012. This is helpful and appropriate in the circumstances.

However, I have not been persuaded by the arguments it has made for reducing the compensation to be paid to Mr C.

With regard to my proposed compensation payment of £300 for the misleading information set out in Aviva's letter of 6 May 2009, Aviva appears to have misunderstood the reason for the award.

Aviva's response repeated its explanation of the benefits available under the policy, and noted that the policy schedule was correct. This was not in dispute, and in my provisional decision I had agreed with Aviva's interpretation of the policy wording.

The letter of 6 May 2009 stated (my emphasis): *"It should be noted that whilst the benefits for the members are being transferred into Replacement Policies **this will not have any impact on the benefits applying** and is effectively more of a change in the administrative procedures."*

As I explained in my provisional decision, I consider this statement to have been highly misleading, and in fact incorrect, as an important benefit had been taken away from scheme members, which was a dependant's pension payable on their death (where no spouse or child's pension was payable). I consider that being given this incorrect information caused Mr C to have the wrong impression of the benefits available from his policy for a number of years. It has caused him considerable distress and disappointment to learn of the correct position, and that his common law wife is no longer eligible to be *considered* for a pension. I am therefore satisfied that £300 is an appropriate award for this error.

The total additional compensation I was minded to award to Mr C was £850 (accepting that he had already received £50 from Aviva). This was made up of £300 for the misleading information given to Mr C in 2009, and a further £550 for the numerous errors that occurred after Mr C first raised enquiries with Aviva in late 2011. This was broken down as follows: £300 for the lack of clarity over the issue of the benefits available from the policy, which took a considerable period to definitively determine; and, a further £250 for numerous failings I identified (and which Aviva acknowledged) in the complaint-handling process.

Taking into account all the further events causing distress and inconvenience to Mr C over this period, I am satisfied that, overall, a further £550 is fair and reasonable. I also consider that total additional compensation of £850 is appropriate in all the circumstances of this complaint.

I am not satisfied that Aviva's proposed total further compensation of £500 (in addition to the backdating of Mr C's pension) would provide adequate redress, given the very significant disruption caused to Mr C's retirement, and the distress he has felt at being misled, and then having his complaint mis-handled on numerous occasions.

### **my final decision**

I direct that Aviva Life & Pensions UK Limited ("Aviva") compensate Mr C as follows:

- Pay to Mr C £300 for the distress caused to him by the incorrect and misleading information provided to him in the letter dated 6 May 2009, which led Mr C to mistakenly believe that his partner continued to have a right to be considered for a nominated dependant's pension after his death, and which has subsequently turned out not to be the case.
- Pay to Mr C £300 for the various instances of incorrect, vague and incomplete information he has received from Aviva directly or via this service since first raising queries about his partner's potential entitlement in October 2011, and for the distress and inconvenience this has caused him.
- Pay to Mr C a further £250 for the distress and inconvenience he has suffered as a result of the other identified failings in its complaints-handling process, including various instances of failing

to respond, delays in responding, and making repeated requests for Mr C to submit documentation he had already sent in. This award reflects that Mr C has already received a cheque for £50 for acknowledged service failings.

- Aviva shall backdate Mr C's annuity to his normal retirement date in March 2012. Mr C's tax-free cash shall be paid as a lump sum, with interest added at 8% per year simple calculated from the date it should have been paid to the date of payment. Mr C's net arrears of pension instalments should be paid to him as a lump sum. Interest at the same rate should then be added to reflect late payment from the date each instalment fell due, to the date of payment.

Venetia Trayhurn  
**ombudsman**

## COPY PROVISIONAL DECISION

### complaint

Mr C's complaint is that Aviva Life & Pensions UK Limited ("Aviva") changed the terms of his pension, when his deferred benefits were transferred from his occupational pension scheme to an individual deferred annuity contract in 2009. Mr C lost the right to nominate his common law wife to receive a pension on his death, as a result of the deferred annuity being set up on different terms to the occupational pension scheme.

Mr C considers that Aviva materially misrepresented the position to him in correspondence. Mr C has also raised concerns about Aviva's customer service in dealing with his queries.

Mr C would like Aviva to amend the terms of his policy, so that he can nominate his common law wife/partner to receive a pension on his death. He also seeks compensation for his financial loss, as a result of the delay in settling his pension benefits.

### background

Mr C joined his employer's occupational pension scheme in 1978, and accrued benefits in the scheme until 1992. His deferred benefits remained in the scheme until 2009, when the scheme trustees decided to transfer all the members' benefits to individual policies with Aviva. Mr C's deferred annuity contract entitled him to receive a guaranteed pension of around £10,000 per year. A guaranteed spouse's pension of around £6,700 per year was also payable if Mr C died after his retirement.

Mr C's normal retirement date under the policy was in March 2012. In September 2011, he received a letter from Aviva providing information on his retirement options. In October 2011, Mr C wrote to Aviva asking a number of questions. In particular, he noted that he had already nominated his partner to receive any benefits if he died. He asked if he needed to declare her as a 'dependant' also, and whether this meant he was obliged to take out a 'joint life' annuity.

Aviva did not respond to Mr C's letter. Mr C chased Aviva on three further occasions, in December 2011 and January 2012. In January 2012, he also received Aviva's standard retirement pack. Mr C wrote to Aviva (noting he had not yet received a response to his initial questions), complaining that the pack sent was incorrect. This was because the information provided by Aviva said that if Mr C was not married, no dependant's pension was payable.

Mr C explained that his occupational scheme had been set up so that members who were not married could nominate partners to receive the spouse's pension – referred to in the scheme rules as the "*nominated dependant*".

Following a phone call with Mr C, Aviva wrote to him in February 2012 providing its first 'final response letter'. This set out the benefits payable under his policy. Aviva said that if a policyholder died unmarried, the 'spouse's pension' would be paid to any 'dependent children' until they ceased to be dependent. The letter went on to say (my emphasis):

*"I've checked through the policy terms and conditions and can't see any evidence that [name of Mr C's partner] would be able to set up with a spouse's pension as she isn't your spouse, or a dependant adult (please see section 4 of the document enclosed, called 'Deferred Annuity'). Therefore your annuity is only able to be set up as a single life annuity, in your name."*

However, the letter also noted that Mr C was sending a copy of his records confirming that his partner could be nominated for a dependant's pension under the former occupational scheme. Aviva said it was sending Mr C a cheque for £50 in recognition of the inconvenience he had suffered, by not having his queries answered sooner.

Mr C sent in a copy of the occupational scheme rules showing that a pension was payable to a 'nominated dependant'. Aviva wrote again, saying that the policy bought for Mr C had replaced all of the terms and conditions under Mr C's former occupational scheme. Aviva said that under its policy terms, Mr C was only entitled to have his 'spouse's pension' paid to his legal spouse, civil partner or 'dependent children'.

Mr C continued to object, on the grounds that his occupational scheme had allowed for the payment of a pension to an adult 'nominated dependant'. This meant that not all rights under the occupational scheme had been transferred to the new policy. However, Aviva's letter written at the time of the transfer in 2009 had said (my emphasis):

*"It should be noted that whilst the benefits for the members are being transferred into Replacement Policies **this will not have any impact on the benefits applying** and is effectively more of a change in the administrative procedures."*

Mr C wrote to Aviva at the beginning of March 2012, asking it to rectify its error in setting up his policy, and asking it to reissue his retirement pack to reflect the benefits available under his former occupational scheme. He was shortly due to reach his normal retirement age. Aviva responded eight weeks later, at the end of April 2012. It repeated its explanation that the policy replaced his membership of his occupational scheme, and explained the benefits provided under the replacement policy would have been agreed with the scheme trustees. Aviva failed to recognise that Mr C had already sent in the occupational pension scheme documentation he was relying on, so made a new request for him to send it in for its technical department to consider.

Mr C responded early in May 2012, pointing out that he had already provided the requested documentation to Aviva early in February. Mr C raised a further complaint in August 2012, saying that he had received no response to his May letter, despite chasing three times. Mr C noted that his pension had been due to come into payment since March 2012, but despite trying to 'get ahead of the game' by raising queries last October, he had not been able to make progress, because the matter remained unresolved.

Aviva issued a second 'final response letter' in early September 2012. The letter said that Aviva needed a copy of the occupational scheme rules before it could investigate further. It said that if Mr C did not have this documentation, and would still like to proceed with taking his benefits, this would have to be on a 'single life' basis. Aviva noted that Mr C could opt for a guarantee period of five or ten years, which would guarantee payment of 100% of his monthly annuity amount to his estate for the remainder of the term, if he died within the guaranteed period.

Aviva also said that while the information it had provided had been "*factually correct*", it agreed that some of its letters had been "*vague and incomplete*". It offered an apology for this, and for the delays Mr C had experienced and the difficulties he had encountered when trying to get information. No further compensation was offered.

Mr C promptly responded to Aviva to point out that he had supplied it with a copy of the full occupational scheme rules back in February 2012. He enclosed a further copy, and also provided some additional supporting documentation he had found. He also expressed his dissatisfaction at the outcome of Aviva's 'investigation' and its failure to address the issue of its previous 'non-communication' until he had chased numerous times.

Aviva responded to Mr C four weeks later. This letter did not refer to the occupational scheme rules and supporting documentation Mr C had supplied. It did however refer to the terms and conditions of his policy with Aviva. It quoted Section 6 of the policy, which defines the technical term 'dependant'. This definition largely replicated the definition used by Her Majesty's Revenue & Customs ("HMRC"), and *included* financial dependants who were not married to the policyholder, in a civil partnership, or a dependent child of the policyholder.

The letter went on to say (my emphasis):

*"I apologise that my penultimate sentence in paragraph 5 was unclear [referring to the information supplied about the option to include a five or ten year guarantee period]. It was a continuation of the previous sentence confirming that you're only able to take the benefits of this pension on a Single Life basis unless you can prove that your partner [name] is financially dependent upon you. As previously explained, you are able to take a Guaranteed Period of 5 or 10 years, which means in the event of your death within this time it would continue to a nominated person or your estate for the remainder of that set period."*

Mr C wrote again, noting that Aviva had not addressed what the occupational scheme rules said about paying a dependant's pension. Mr C said: *"in the occupational scheme there were no conditions attached to the dependant's status, other than nomination by the scheme member"*. He requested that this point be addressed. He also noted that Aviva's 'non-communication' alone had delayed receipt of his pension by three months, and that he had still not had this matter addressed, despite requesting a response on this several times.

Aviva wrote again in late November 2012, acknowledging that there had been some customer service failings. It agreed that Mr C had not received the standard of service he should expect from Aviva. This was because there had been delays in replying and also that there had been times when the information in its letters had been unclear. Aviva accepted that Mr C had suffered a financial loss as a result of its failings (due to settlement of his pension being delayed), and offered to correct this if Mr C now wished to take his pension benefits.

Regarding Mr C's main complaint, Aviva reiterated that its policy terms had replaced the occupational scheme rules in 2009, and therefore the old scheme rules had ceased to apply. Aviva said: *"When membership ceased in 2009, we wrote to you with details of your replacement policy and its conditions. These conditions gave details of who we would class as a dependent in order for a Joint Life Annuity to be set up. I can see [Aviva representative] has provided details of this dependency condition in her previous letter dated 10 October 2012."* (my emphasis)

Aviva recommended that Mr C contact the Financial Ombudsman Service for an independent review, if he remained unhappy. Mr C referred his complaint to this service in January 2013.

### **our investigation**

The adjudicator who investigated Mr C's complaint wrote to Aviva asking why Mr C's partner was excluded from being considered for a dependant's pension. Aviva initially responded to say that only spouses, civil partners or dependent children would receive a pension. It also noted that if Mr C was to marry after retirement, the spouse's pension would still be payable providing the marriage took place more than six months before his death.

The adjudicator then queried why Mr C's partner could not be considered for a pension under the definition of a dependant set out in Section 6 of the policy, which applied to a person not married or in a civil partnership with the policyholder. Aviva responded saying:

*"Mr [C]’s common law wife could indeed fall under the category of someone who is financially dependent, but Aviva would need to be satisfied that his common law wife is financially dependent on Mr [C] when he dies."*

*Currently Mr [C] and his common law wife appear to live at separate addresses, so it would be questionable if his common law wife is financially dependent on him. Obviously this situation may change in the future, so the position would need to be considered as and when the need arises."*

The adjudicator then asked for Aviva's comments on its letter to Mr C sent in 2009, which said that no changes were being made to benefits by the replacement policies. Aviva responded to note that the letter had also said that the new policy replaced all Mr C's rights under his occupational pension scheme. It noted that the scheme trustees had accepted the new terms on behalf of Mr C, and these were the terms which now applied to Mr C's benefits. It reiterated its comments that Mr C's partner could fall under the category of a financial dependant, but this would have to be considered as and when the need arose.

The adjudicator asked Mr C to comment on the level of his partner's current financial dependency. Mr C provided some information indicating a degree of financial dependency, although he did not live with his partner. Mr C also explained that it had been his employer's express intention from the start of the occupational pension scheme that 'common-law partners' would benefit. He noted that he had always kept the scheme administrators informed of his partner's details, and this had never before been challenged. He considered that by creating this 'financial dependency' requirement, Aviva was attempting to impose a condition that did not apply previously.

The adjudicator asked Aviva to confirm if Mr C needed to set up his annuity now on a 'single life' or 'joint life' basis, given that it was not yet known whether Mr C's partner would qualify as a financial dependant at the date of Mr C's death. Aviva said:

*"As [Mr C's partner] is not yet classed as Mr [C]'s spouse we would not be able to set the policy for her to receive the spouses benefits. Unless Mr [C]'s partner can satisfy our dependency criteria we would only offer a single life annuity in Mr [C]'s name. He can though choose a single life pension with a guarantee period. He could then make provision in a will, if he should die within the guaranteed period, to direct his executors as to who any benefits remaining under the guarantee period should be paid to."*

The adjudicator considered that he had sufficient information to reach an opinion on Mr C's complaint. He sent a letter to Mr C in July 2013 concluding that it could not be upheld. He reached this conclusion because he did not consider that Mr C's partner would have met the test for being a dependant under the rules that had previously governed the occupational pension scheme. He noted that this would have been a decision for the scheme trustees to make, but felt that the trustees were unlikely to have been convinced that Mr C's partner had a sufficient degree of financial dependency.

The adjudicator also noted that the occupational scheme rules did allow for amendments. He considered that Aviva was entitled to issue new terms and conditions. He noted that the definition of financial dependency was introduced by Aviva to bring the policy terms and conditions in line with new regulations in 2006, which set out HMRC's requirements for payment of an authorised dependant's pension.

Mr C did not agree with the adjudicator's conclusions. He responded to say, in summary:

- Aviva had grossly misrepresented the position in 2009 when it stated that the replacement policy would *"not have any impact on the benefits applying"*. There *had* been an impact on benefits, and Aviva was attempting to change the rules in an adhoc fashion by changing the previous practice in relation to common law wives. Aviva might have the right to issue new terms and conditions, but it was not reasonable for it to do so and at the same time say that this had no impact on benefits.
- Aviva had never said to him that a common law wife may not count as a dependant because she is living at a different address, nor did this condition ever exist in the original scheme rules.
- His ex-employer and the scheme trustees had accepted his partner as his common law wife and therefore his 'nominated dependant'.
- Nowhere in the scheme rules or definitions does it specify that this person needs to live at the same address as the individual receiving the pension, and the trustees' acceptance of his change of address notifications substantiates this.

- The original scheme rules simply required him to have a common law wife (or rather a 'nominated dependant') at the time of death, not that further assessment of dependency would be carried out at that time.
- The 2006 HMRC rules appeared to him to be irrelevant if they did not specifically exclude common law wives, when the original scheme rules specifically did include them. The adjudicator had already accepted that his common law wife was partially financially dependent on him. She was very likely to continue to be so. Therefore, the 'nominated dependant' definition was met.
- The original intention of the scheme was to ensure that common law partners were treated the same as married partners. The scheme was written with the aim of being fair, realistic and humane, and to take into account the relatively new attitudes to adult relationships. It deliberately far exceeded the minimum standards of the time.
- It appeared to Mr C that Aviva (and the adjudicator) were acting contrary to both the spirit and the letter of the original scheme. He suggested it might be useful to ask the former scheme trustees about the original intentions and actual practice.

As Mr C did not agree with the adjudicator's conclusions, the complaint was referred to our appeal stage, which is a final decision by an ombudsman. Whilst waiting for allocation to an ombudsman, the adjudicator considered the complaint further, and contacted Aviva about making an offer of compensation to Mr C for distress and inconvenience in connection with his complaint. Aviva agreed to pay Mr C a further £150 compensation for its service failings. In October 2013, this offer was put to Mr C. Mr C noted the offer, but did not consider that it changed his decision to have his case reviewed by an ombudsman.

When the case was allocated to me, I asked the adjudicator to find out more information from Aviva. In particular, I noted that Aviva had said that Mr C's partner might qualify as a financial dependant, but this would need to be assessed at the time of Mr C's death. I therefore wanted to know if and why Aviva would need to set up Mr C's annuity on either a 'single life' or 'joint life' basis at this stage, when it would only be known at Mr C's death whether his partner was entitled to a pension – either as a spouse (if they had by then married), or as a financial dependant, if she then met the test set out in Section 6 of the policy.

Aviva initially responded to say that it would want information on any spouse or dependants (to see if they would meet its dependency criteria) at the time Mr C applied for his retirement benefits. Aviva said: *"If the individual nominated by Mr [C] does not meet our dependency criteria we will not quote a joint life pension. As such we would only look to offer a single life pension, as has been the position on this particular case."*

I asked the adjudicator to seek further clarification from Aviva, as I considered that the correct approach under the definition of 'dependant' in his policy, and under HMRC's requirements, was for Mr C's partner's dependency to be assessed at the date of Mr C's death, not his retirement.

After further consideration, Aviva responded, saying: *"We could look to set the policy up with an assumed future spouse, to account for the main pension and the spouse benefits attaching. This would mean that whoever the client is married to at the time of his death/deemed as his financial dependant could be considered to receive the spouse benefits available. We would gather confirmation of those details at that time of death. If Mr [C] did pass away after taking benefits, considering he and his common law wife are not currently married and do not reside together, his common law wife still has the opportunity to prove that she is dependent and therefore, if she would be entitled to receive some income. This would have to be determined though and is no guarantee in the future (upon the policy holder's death after retirement), that his common law wife is entitled to receive the spouse pension."*

I asked for the adjudicator to confirm with Aviva that Mr C would receive no reduction to the amount of his annuity now, to take account of an “*assumed future spouse*”. I also asked for clarification as to whether it was a specific requirement of Aviva that the partner must live at the same address as the policyholder to qualify as a financial dependant.

After referring the matter to its legal team, Aviva responded with a change in approach. Aviva now reverted to its previously stated view (though contradicted on numerous occasions) that Mr C’s partner could not be considered for a dependant’s pension. Aviva said that the only pension payable to anyone other than the policyholder under the policy terms was a pension payable to a legally married spouse, a civil partner or a dependent child. It said:

*“The definition of dependant in the Section 6 does not confer any rights on any individual to receive any benefit under the policy. It’s merely a definition of what a dependant could be - the fact that ‘dependants’ scheme pension’ is separately defined means that in relation to the actual policy schedule it has no real relevance and therefore should not be considered.”*

Aviva apologised for providing incorrect information previously, when it had indicated that it could consider Mr C’s partner as a potential beneficiary of the guaranteed spouse’s pension under the definition of dependant in Section 6 of the policy. Aviva confirmed that it would pay the guaranteed spouse’s pension if Mr C married or remarried after retirement, provided he had been married for at least six months at his date of death.

Aviva said that as the policy provides for a guaranteed pension and also a guaranteed spouse’s pension, any retirement quotations issued would allow for both of these benefits. It also noted that Mr C’s policy catered for a five year guarantee period, so he could make provision in his will for any pension due within the guaranteed period to be paid by his estate to his partner.

In the light of this further submission from Aviva, I decided that it was appropriate for me to issue a provisional decision, setting out my preliminary conclusions on Mr C’s complaint.

### **my provisional findings**

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I consider that there has been considerable confusion about the correct position, under law, regarding both Mr C’s previous occupational pension scheme, and his current policy with Aviva. I will therefore start by setting out my views on the correct position, before going on to explain what I consider this means for Mr C’s complaint.

When Mr C’s occupational pension scheme was set up in 1978, it had to be ‘approved’ by the Inland Revenue, in order for it to benefit from the favourable tax treatment granted to pension schemes. This is why, in the introduction section at the start of the scheme rules, it says: *“The Scheme will be controlled by the Rules, in which will be set out the detailed provisions of the Scheme and the approval of the Inland Revenue will be obtained under Chapter II of Part II of the Finance Act 1970.”*

The Inland Revenue set out rules and limits on the way that benefits could be accrued in ‘approved’ pension schemes. The benefits structure of Mr C’s occupational scheme was designed to fit within those complex rules. One of the requirements of Inland Revenue approval in 1978 was that pensions on death of the scheme member could only be paid to a person who was ‘financially dependent’ on that scheme member. This applied unless it was being paid to the legal widow or widower or a dependent child (in which case, they were treated as automatically financially dependent, regardless of the individual circumstances). The Inland Revenue’s guidance on the test for financial dependency was amended in 1996, to allow ‘financial *interdependence*’, recognising that non-married partners might have a degree of *mutual dependence*, rather than one being dependent on the other (as indeed could be the case for married couples). The test was then amended again in 2006, with the new regulations setting out HMRC’s requirements for the ‘dependency’ condition.

I am not aware of either the Inland Revenue or HMRC's tests for financial dependency actually requiring that the dependant live at the same address as the scheme member or policyholder. That does not prevent the scheme or policy being set up with that as an *additional* requirement (or the trustees or policy provider making it an additional requirement if they have some discretion to do so).

The reason that this historical background is important is that Mr C's partner's rights under the occupational scheme were restricted by the requirement to comply with the Inland Revenue rules. An essential part of keeping Inland Revenue 'approval' was that benefits would only be paid out in accordance with its rules and limits, even if there was flexibility to be more generous under the rules. It is also the case today that any rights Mr C's partner might have under the policy with Aviva would be subject to compliance with HMRC's rules.

Rule 6(C)(ii) on page 8 of the occupational scheme rules sets out the pension payable when a member dies in retirement. It refers to a pension being payable to a widow, a widower or a 'nominated dependant'. This term is not defined in that section, although it is defined within the rule covering death in service with the employer, prior to retirement. That definition says:

*"Nominated Dependant" means any person who shall be nominated by the Employer, who is wholly or partially dependent upon the member for the necessities of life.'*

Elsewhere in the occupational scheme rules, there is a reference to "a dependant nominated by you". In a guidance note that appears to have accompanied the scheme rules, the "death in retirement pension" section has a footnote which says: "for widows, widowers, divorcees with dependent children and dependent children and common law wives and husbands".

Although the term 'nominated dependant' is not defined in the context of Rule 6(C)(ii), it seems clear to me that it was intended to mean a person nominated by the member to the employer and/or trustees, which was intended to allow for the nomination of 'common law' spouses. I therefore consider that Mr C's recollections of the intentions of his former employer and the trustees when setting up the scheme are correct.

However, when referring to 'common law' spouses as being within the category of potential 'nominated dependants', I am satisfied that it was the intention of Mr C's then employer and the trustees that this would always be subject to the particular common law spouse meeting the Inland Revenue's 'financial dependency' test at the relevant time. This was necessary to retain Inland Revenue 'approval' for the scheme. It also prevented a scheme member from nominating a person who was not in fact financially dependent in any way eg a close friend or neighbour. It was reasonable to assume that any person who the member considered to be their common law spouse would have some degree of financial dependence (later clarified to be financial interdependence).

Therefore, I consider that it has never been the case that Mr C was entitled to nominate someone as his 'common law wife', and so his 'nominated dependant', without that person also needing to meet the Inland Revenue (later HMRC) test for qualifying dependency. Mr C has referred to the fact that nobody had previously questioned his nomination of his partner. That does not seem strange to me, as it would only be necessary to test whether his partner qualified as a financial dependant at the date of Mr C's death.

When HMRC's new dependency test was introduced in 2006, this applied to any benefits Mr C's partner might have been entitled to under the occupational scheme then.

When the trustees decided to wind up the occupational scheme in 2009, and transfer deferred member benefits into individual contracts with Aviva, they were responsible for the benefits bought for members (and other potential beneficiaries). I do not consider that Aviva as the new policy provider was responsible for ensuring that benefits were replicated. It is possible that Mr C could have a claim against the trustees of the occupational scheme, for failing to ensure the benefits were replicated when the new policies were bought. However, Mr C would need to raise this complaint with the

Pensions Ombudsman, as the correct organisation to handle complaints against trustees of an occupational pension scheme. Mr C should note that the Pensions Ombudsman's Office has its own procedures and time limits.

Having carefully considered the wording of the policy Mr C has with Aviva now, which the trustees were responsible for purchasing, I take the view that the policy does *not* include a dependant's pension for anyone other than a legal spouse, civil partner or a dependent child.

The definition of 'dependant' set out in Section 6 of the policy is highly misleading, as it refers to the test for dependency in relation to an unmarried partner. This more or less replicates HMRC's definition in full, so it appears to have been included to ensure the rules are compliant with HMRC's requirements. However, this has not been helpful, as it has led even a number of Aviva's own staff to believe that a 'dependant's scheme pension' could be paid to an adult dependant who is not married to Mr C. What is missing from the policy is any 'operative provision' which actually gives Mr C the right to have his partner considered for a 'dependant's scheme pension'. Instead, the policy schedule and policy booklet only refer to a 'dependant's scheme pension' being paid to a spouse or civil partner (or to dependent children if there is no spouse or civil partner).

I therefore reluctantly conclude that Mr C now has no entitlement for his partner to be considered for a dependant's pension on his death, unless they decide to marry (and are married for at least six months before his death).

This being so, I consider that Aviva has made the following errors:

- It provided an incorrect and misleading statement in 2009 informing Mr C that the transfer of his benefits to the new policy would not have any impact on the benefits applying. This led to Mr C having a period of two and a half years when he believed his partner was still (potentially) entitled to a pension if he died in retirement. I do not consider that Mr C should have spotted the change in benefits, given Aviva's statement in 2009, and the reference to the financial dependency test for unmarried dependants set out in Section 6 of the policy. He would have reasonably concluded from this information that the references to 'guaranteed spouse's pension' in the policy included a pension for an adult dependant (as some Aviva employees concluded).
- It gave a number of incorrect or misleading responses when providing Mr C with information about his partner's potential entitlement (or lack of). It was unclear about whether Mr C would need to set up a 'single life' annuity or 'joint life' annuity, considering he was unmarried but might marry in the future. I accept that at times Mr C was given the 'correct' information about the benefits under his policy, but this was then contradicted on other occasions by different information he received. The same occurred when this service was trying to obtain clarity on Mr C's policy entitlements.
- It provided a number of vague and incomplete responses to Mr C's legitimate queries when trying to establish his correct entitlement, and what had gone wrong in 2009. In particular, no explanation was provided for the misleading information given in 2009 suggesting the benefits had not been impacted, when they clearly had been for Mr C. Aviva's only response on this has been to refer to the fact that the policy issued in 2009 replaced all the previous terms and conditions for Mr C's pension entitlement, which did not answer his point. Aviva has acknowledged that inadequate responses were provided to Mr C on a number of occasions.
- Its failure to respond adequately (and in some cases, at all) to Mr C's queries have delayed his retirement by over two years. Mr C first made enquiries in October 2011, to clarify the position regarding his partner's potential entitlement. If Mr C's queries (and subsequent complaint) had been dealt with in a timely and comprehensive manner, Mr C would have known that he could take his pension at his normal retirement date in March 2012, on a 'single life' basis. His complaint regarding the change to his partner's potential entitlement could have then progressed to this service, if necessary, without any delay to his pension coming into payment.

Mr C's complaint has been with this service for some time. There was inevitably some delay while the case was awaiting allocation to an adjudicator, and then to an ombudsman. Aviva will be aware that such delays do unfortunately occur, due to the volume of complaints referred to this service in recent years. Other instances of delay have occurred due to Aviva providing incorrect information in response to our further enquiries, which prevented the complaint from being resolved at an earlier stage. I do however recognise that the Aviva representatives were acting in good faith in providing some of the incorrect information, as they were likewise misled as to the benefits available under the policy terms.

Mr C would like me to make a direction that Aviva should alter his policy terms, to allow his partner to be eligible for a dependant's pension (in addition to financial compensation for the other aspects of his complaint). Whilst I am very sympathetic to Mr C's desire to have the dependant's pension option reinstated, I do not consider that it would be appropriate for me to make that direction. This is because, in my provisional conclusions, I have not found Aviva to be at fault for the terms under which Mr C's policy was set up. As I have said above, I consider that this was the responsibility of the trustees of his occupational scheme.

Nonetheless, I do consider that Mr C should be compensated for the other errors on Aviva's part. I set out the compensation I propose to award below. In particular, I consider that Mr C has suffered substantial distress and inconvenience, as a result of Aviva's failure to properly respond to his complaint, and for the impact of the delay to his pension being settled.

During the course of this service's investigation of Mr C's complaint, there has been some discussion about whether Mr C's partner would meet the test for financial dependency, either under the occupational scheme rules, or under HMRC's test. I consider this issue to be irrelevant. This is partly because Mr C's partner no longer has an entitlement to be considered for a dependant's pension. It is also because even if she did still have an entitlement, the assessment would have needed to take place at the time of Mr C's death. It is therefore not possible to predict now whether she would or would not have met the required test for dependency at that future date.

### **my provisional decision**

I am currently minded to uphold Mr C's complaint in part. In awarding compensation to Mr C, I am seeking, so far as possible, to put him back into the position he should have been in, if he had received correct and timely information about his and his partner's entitlements under the policy. I consider that the matter should have been cleared up in time for him to start receiving his pension in March 2012 (at least so that he was aware he could take his pension and pursue his complaint about the loss of the dependant's pension as a separate matter). In setting out my proposed redress below, I have assumed that Mr C would have taken his pension with Aviva at his normal retirement date, rather than opting for the open market option or delaying taking his pension. If Mr C disagrees, he should let me know.

I intend to direct that Aviva Life & Pensions UK Limited should compensate Mr C as follows:

- Pay to Mr C £300 for the distress caused to him by the incorrect and misleading information provided to him in the letter dated 6 May 2009, which led Mr C to mistakenly believe that his partner continued to have a right to be considered for a nominated dependant's pension after his death, and which has subsequently turned out not to be the case.
- Pay to Mr C £300 for the various instances of incorrect, vague and incomplete information he has received from Aviva directly or via this service since first raising queries about his partner's potential entitlement in October 2011, and for the distress and inconvenience this has caused him.

- Pay to Mr C a further £250 for the distress and inconvenience he has suffered as a result of the other identified failings in its complaints-handling process, including various instances of failing to respond, delays in responding, and making repeated requests for Mr C to submit documentation he had already sent in. This award reflects that Mr C has already received a cheque for £50 for acknowledged service failings.
- Aviva shall backdate Mr C's annuity to his normal retirement date in March 2012. Mr C's tax-free cash shall be paid as a lump sum, with interest added at 8% per annum simple calculated from the date it should have been paid to the date of payment. Mr C's net arrears of pension instalments should be paid to him as a lump sum. Interest at the same rate should then be added to reflect late payment from the date each instalment fell due, to the date of payment.

Venetia Trayhurn  
**ombudsman**