Submission on Pensions and Fiduciary Duties to DWP

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Executive Summary

The law on fiduciary duties, notwithstanding the view of the Law Commission, is relatively clear. It is, as the Law Commission accepts, not a breach of fiduciary duties for pension fund trustees or their mandated asset managers to have regard to Environmental, Social and Government (ESG) in investment decision-making, provided it is done as part of a financial sustainability investment risk assessment.

There is some confusion, however, as the Law Commission Report demonstrates, about ESG and ethical considerations where the Law Commission itself muddies the water by attempting to draw a false distinction between ESG factors which are properly a part of financial risk assessment and other non-financial considerations, such as ethical preference, which are nice to have if the members of the pension fund agree but not necessary a part of a financial assessment.

The term, ESG , to be absolutely clear in terms of this submission, is not used in the context of, or to reflect, ethical or political preference. At the outset of this submission, it is necessary to nail this calumny about ESG down. The use of the term ESG considerations in this submission refers only to considerations which are relevant to the financial sustainability of investments. ESG considerations are not a 'nice to have' but a 'must have', if financial sustainability assessment is to be carried out lawfully and fiduciary duties discharged.

There are many investors and company shareholders who have suffered grievous financial loss due to the failure of pension fund trustees and asset managers to have due regard to environmental impacts, human rights abuses and poor governance on the profitability and sustainability of their investments. This can be seen must clearly in repeat of the loss of equity value of stocks in the extractive industries, pharmaceutical industries and energy companies.

In this context regrettably the Law Commission fell into the trap of distinguishing between financial and non-financial considerations. It does not matter, it is submitted with respect, what label is put on investments considerations. What is important is the financial impact of the consideration on investment sustainability. Thus, it is suggested that it is singularly unhelpful to retain a distinction between financial and non-financial considerations as these labels are unhelpful and misleading. Any consideration which has an impact on financial sustainability is relevant and material to investment decision-making. However, it is for the pension fund trustee, advised by asset managers, to determine what weight to give such considerations and the timeframe of the investment strategy.

This view, that investment is a business decision not to be second-guessed by the courts, has been repeatedly stated by the judiciary and leading legal experts on fiduciary duties and pension fund management over many years. Cases cited otherwise, such as *Cowan v Scargill* and the US apartheid cases, are examples merely of an abuse of fiduciary duties for political or ethical reasons rather than investment goals. No matter how worthy a political or ethical end, it is a breach of fiduciary duties for a pension fund trustees to pursue it if, in doing so, the duty of financial prudence is ignored or made subservient to that political or ethical purpose. In other words, it is not for pension fund trustees to play God with the money of investors and beneficiaries.

Most recently, the view that ESG may be taken into account in determining the financial sustainability of investment decisions has been confirmed to be correct by the Law Commission and government ministers, no doubt advised by Treasury solicitors or other government lawyers on the legal issues, in respect of pension fund management and investment decision-making in general.

In concluding that where trustees think ESG issues are financially material they should take these into account, the Law Commission, like the Freshfields Report[1] (which predated the Law Commission Report by almost a decade and is the seminal work on this subject) pulled its punches.

There is, as described below, substantial and corroborated evidence that a failure to consider ESG issues may, in appropriate circumstances, be in itself a breach of fiduciary duties.

The law is sufficiently flexible on the pursuit of long-term profit to allow trustees to have regard to ESG considerations and to allow trustees to reflect the views of scheme members on this matter, provided it is done for *bona fide* financial reasons and there is no risk of **significant financial detriment to the fund.**

However, the need to take account of ESG considerations in financial sustainability risk assessment of investment decisions, is not a message (as the Kay Report correctly identified but, in kindness, attributed to uncertainty rather than avarice) that a significant part of the financial investment industry wishes to hear or is willing to accept.

For example, as the ShareAction submission makes clear the Manchester Local Authorities Pension Fund and the Houses of Parliament Fund still continue to reject this view even after it is has been authoritatively stated to be correct by the Law Commission and by Government Ministers in the House of Commons. (Paul Q Watchman 'Fiduciary Duties in the 21st Century', Fleming and Thorbton, *Good Government for Pensions* (CUP, 2012)

The reasons for denial by pension funds and asset mangers are complex. However, at their heart, it is submitted, is a greed for short-term profits and lack of good pension fund governance. These self-serving reasons bear a striking similarity to the factors which sparked the global financial crisis in 2007 - 2008.

Systemic risk, as with Derivatives and Conditional Debt Obligations, is accepted by those who profit by it, provided that short-term profits, bonuses and rewards are paid irrespective of their toxicity. If the pensions industry is to be prevented from experiencing a similar crash to that experienced by the global banking industry in 2007/2008, it is incumbent on the DWP to change the culture of the pensions industry. The first step is to spell out that this view is completely unsupported and is itself a breach of fiduciary duties to long-term pensions investors, as it is based on a breach of the fiduciary duties of loyalty, absence of conflict of interest and prudence.(see Fiduciary Duties in the 21st Century, ibid.)

Given the contrarian position adopted by a number of pension funds, asset managers and their professional advisers, and their belief in, and extreme sensitivity, to the potential burdens associated with fiduciary duties, it must be asked if the ancient judge-made concept of fiduciary duties is in fact, and in practice, fit for purpose. Given an increasingly complex and diverse range of pension products it seems to be eminently arguable that fiduciary duties have served their purpose but now must be discarded to the lumbar room of legal history with concepts such as hamesucken and spuilzie.

It is our submission that the concept of fiduciary duties is obsolete and a fresh start for all parties is required. It is suggested that this could be achieved by a limited number of legal reforms, focused regulation and the implementation of best pension fund industry practices,as described below:

- The concept of enhanced shareholder value under the *Companies Act 2006* should be extended to pension funds. This is a direct and very persuasive, if not binding, precedent. It was introduced to directors' duties for similar reasons to the need to reform and replace fiduciary duties.

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[1]UNEP FI *A Legal framework for the integration of environmental, social and governance issues into institutional investment'* October 2005 known as the 'Freshfields Report'

In short, to clarify the law on the legality of directors taking account of the environmental and community aspects of the activities of their companie. In addition, being a very recent precedent, its fundamental principles have already been debated and approved by the UK Houses of Parliament.

- Legislation should be passed, as it has in other Commonwealth jurisdictions, granting legal immunity to pension fund trustees who have regard to ESG considerations in assessing the risk of financial sustainability assessment. This will give pension fund trustees and their advisers legal comfort that they will not be liable under their new statutory duties to pension fund contributors and beneficiaries for taking ESG considerations into account. This has been done in Manitoba and other Commonwealth legal jurisdictions ((see Freshfields Report and Hawkins(ed.) *Fiduciary Duties* (CUP, 2014)).

- Pension funds should be required to write into their trust deeds, and in their mandate of instructions to asset managers, a requirement to have regard to ESG considerations in making investment decisions. See Second UNEP FI Fiduciary Duties report (2009)[2].

- The long-term nature of pension investment should be recognised as part of the duties of pension fund trustees, and there should be a requirement that this requirement is implemented by their asset managers.{Kay report)

- Codes of practice on the assessment of ESG considerations as well as other relevant financial considerations should be promulgated by the Pensions Regulator, and there should be a statutory duty for pension fund trustees and their asset managers to take these Codes of Practice into account in making investment decisions. This has been done for Waste under the Environmental Protection Act 1990 and FCA regulations.

- Pension fund trustees should be more transparent about the pension fund investment strategy (see Investment Regulations).

- Pension fund trustees should be obliged to publish their investment strategy and to consult annually about it by written communication and meetings with their pension fund members. (ibid)

- Pension fund trustees should have a legal duty to take account and to give written reasons for their decisions but not be bound by the representations of the pension fund members as Ministers of the Crown and Planning Authorities have legislative duties to consult relevant parties and government bodies.

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[2][2] *Fiduciary Responsibility: Legal and practical aspects of integrating environmental, social and governance issues into Institutional Investment* UNEP FI July 2009 Paul Watchman was the legal advisor on this report.

Introduction

The concept of fiduciary duties is of some antiquity, and in the United Kingdom it has been developed almost exclusively by the judiciary in the Chancery Division of the High Court and the Court of Session. However, it is a gothic facade erected on medieval, if not more ancient, foundations, and it is questionable whether this concept remains fit for purpose.

Certainly, questionable in the context of modern pensions administration and the increasing diversity of pensions arrangements.

Particularly this is the case, given that there has been an apparent misrepresentation and distortion of the law of fiduciary duties by a number of pension fund trustees and asset managers and their advisers. A distortion and misrepresentation which unfortunately continues to be voiced.

Notwithstanding the very questionable validity of the orthodoxy that consideration of ESG matters is inconsistent with the fiduciary duties owed to pension fund beneficiaries it is abundantly clear that part of the pension industry clings tenaciously to a self-serving lie which is dressed in the language of uncertainty and ambiguity.

Fiduciary duties arise simply in the context of an extremely asymmetrical relationship between two parties. In essence, fiduciary duties only arise where one party literally reposes total trust in another party to exercise expertise on the first party's behalf which that party does not possess. The party reposing total trust in and that second party has no real control or input as to how that expertise is exercised. The classical context in which these duties arise is Dickensian Bleak House territory in respect of trusts where the trustee acts on behalf of a beneficiary or a number of beneficiaries. As with pension funds management costs and legal costs typically exhausted the resources of the fund leaving the beneficiary with little or nothing.

Fiduciary duties, nevertheless, are relatively straightforward to describe and delineate, notwithstanding the confusion on this matter evinced by the Law Commission report (see Paul Q Watchman, Fiduciary Duties in the 21st Century, ibid.)

Fiduciary duties also are not very onerous notwithstanding the fears of the banking, As Mr. Justice Cardozo described, only one step above the morals of the market place where *caveat emptor* prevails (see Paul Q Watchman, ‘Climate Change and Fiduciary Duties’, A. Calvello, *Environmental Alpha* (John Wiley, 2009)

To prove this point, consider the words of the Law Commission Consultation Paper No 21 ‘FIDUCIARY DUTIES OF INVESTMENT INTERMEDIARIES’

‘5.19 In our 1992 Consultation Paper we divided the duty of loyalty into four categories:

(1) the “no conflict rule” – a fiduciary must not place themselves in a position where their own interest conflicts with the principal;

(2) the “no profit rule” – a fiduciary must not profit from their position at the expense of the principal;

(3) the “undivided loyalty rule” – a fiduciary owes undivided loyalty to their principal, and therefore must not place themselves in a position where their duty towards one principal conflicts with a duty they owe to another principal; and
(4) the “duty of confidentiality” – a fiduciary must not use information obtained in confidence from a principal for their own advantage or for the benefit of another.

However, a fiduciary will not be liable for breach of their duties not to make a profit and to avoid conflicts if its principal gives consent after a full and proper disclosure has been made.' page 70

One additional fiduciary duty is the principal fiduciary duty of prudence. This duty requires pension fund trustees and, as mandated, asset managers, to have regard to the financial sustainability of investments in their decision-making on behalf of pension fund contributors and beneficiaries.

In carrying out such a risk assessment the prevailing financial industry orthodoxy, and one which seems to be held tenaciously by a substantial part of that industry today, as evidenced most recently by the recent statements of the Manchester Local Authorities Pension Fund trustees and the House of Commons Pension fund trustees (see ShareAction submission), is that it is a breach of the fiduciary duties of pension fund trustees in making investment decisions for them to have any regard to ESG considerations. This view of fiduciary duties requirements is not supported by any legal precedent.

This erroneous and baseless view stems from the opinion of Milton Friedman and other America neo-liberals in the 1970s that 'the business of business is business'. Meaning that it was a simple matter of double entry book-keeping, profit and loss account and the devil take the hindmost. Again, the only merit in this view is that it was addressed to Chief Executives and Chairmen of companies who indulged themselves in pet projects at the expense of company shareholders. There are numerous examples of this in modern British corporate practice, such as bank chairmen and chief executives supporting royal charities and good causes using company financial and human resources in the hope of receiving some personal preferment, such as knighthoods and other honours.

It is, however, this narrow and legally unsustainable view that led to the introduction of the enhanced shareholder duty under Section 172(1) of the Companies Act 2006, following intensive campaigns by organisations such as The Corporate Responsibility (CORE) Coalition[3][4], to clarify the law and to end the dominant view amongst companies and a number of legal advisers that fiduciary duties required directors to ignore environmental and community impacts of the activities of their companies.

Section 172 of Companies Act 2006 Duty to promote the success of the company

> *(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—*
>
> > *(a) the likely consequences of any decision in the long term,*
> > *(b) the interests of the company's employees,*
> > *(c) the need to foster the company's business relationships with suppliers, customers and others,*
> > *(d) the impact of the company's operations on the community and the environment,*
> > *(e) the desirability of the company maintaining a reputation for high standards of business conduct, and*
> > *(f) the need to act fairly as between members of the company.*[5]

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[3] CORE is the UK civil society network on international corporate accountability. http://corporate-responsibility.org

[4] *The Companies Act 2006: Directors' Duties Guidance* David Chivers QC published by CORE, October 2007

[5] http://www.legislation.gov.uk/ukpga/2006/46/section/172

Refutation of the Financial Market Orthodoxy

The neo-liberal interpretation of fiduciary duties has been refuted repeatedly over almost half a century by leading jurists. But it seems to make no difference to those who promote the financial market orthodoxy that it is a breach of fiduciary duties to consider ESG matters in making investment decisions. Even Peter only denied Christ on three occasions and he was in fear for his life.

It has firstly, and perhaps most importantly, been refuted by Sir Robert Megarry, the judge who decided the case of *Cowan* v *Scargill,* which is the case most cited by those who support the position that it is a breach of fiduciary duties to have regard to ESG considerations.

'Megarry himself took the unusual stop of revisiting his judgement in print in 1989. He stated it was a 'dull case' that would not have been given any attention but for the lack of authority and added that in his opinion it decided nothing new. He explained that *Cowan* v *Scargill* did not support the thesis that profit maximisation alone was consistent with fiduciary duties of a pension fund trustee. However, he has been ignored or misrepresented by those who wish to shun ESG, like the newspaper editor Dutton Peabody *(in The Man who shot Liberty Valance)* who preferred to "print the legend rather than the facts".'[6]

It was secondly, refuted in other cases decided in the light of *Cowan v Scargill (see The Law Commission Report).*

It was refuted thirdly almost 10 years ago by the influential Freshfields Report[7].

It has been refuted repeatedly by the leading legal experts in this field of pensions law including Professor Brian Richardson, Rosie Thornton in the Cambridge Law Review, Clare Molinari in Jim Hawkins (ed.) Fiduciary Duties, (CUP, 2014), and by Watchman and Anstee-Wedderburn an article in the Journal of European Planning and Environmental Law and by Watchman in Fleming and Thornton *Good Governance for Pensions (*CUP) amongst many other leading legal academics and lawyers working in this field in Europe, North America and Australia. .

The one potentially dissenting voice to be fair is the highly influential voice of John H Langbein of Yale University. However, to understand his concern, it must be seen in its historic context and to note that Langbein cites no leading legal precedent for his view.

Writing in 1970s and 1980s at the time when a number of major U.S. Pension funds were unlawfully divesting shares in companies, which were viewed to support apartheid in South Africa and when neo-liberalism held sway in the USA, Langbein's view is hardly surprising[8].

In fact, it is not really inconsistent with the view that having regard to ESG as part of financial risk assessment of the sustainability of investment by pension funds and asset managers is not a breach of fiduciary duties. ESG considerations must have a nexus to financial risk assessment. They cannot be pursued for political goals or on the basis of ethical preference alone. That is, if not the *ratio decidendi,* certainly the crux of Cowan v Scargill, Edinburgh v Marin and other cases cited in the Law Commission Report on Fiduciary Duties. It would be foolish and fly in the face ideal authorities to argue otherwise.

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[6] UNEP FI 'A Legal framework for the integration of environmental, social and governance issues into institutional investment', October 2005 p9 known as the 'Freshfields Report'

[7] UNEP FI 'A Legal framework for the integration of environmental, social and governance issues into institutional investment', October 2005 known as the 'Freshfields Report'

[8] Langbein, John H. and Posner, Richard A., "Social Investing and the Law of Trusts" (1980). *Faculty Scholarship Series.* Paper 490. http://digitalcommons.law.yale.edu/fss_papers/490

Most importantly and most recently, it was refuted by the Law Commission, and on at least two occasions in Parliament by Ministers of the Crown, doubtlessly advised by the Treasury Solicitors or other government lawyers .

During the passage of the Pensions Bill in 2008, Lord McKenzie made the following comments on pension fund considerations and the *duty* to have regard to ESG considerations:

> 'There is no reason in law why trustees cannot consider social and moral criteria in addition to their usual criteria of financial returns, security and diversification. This applies to trustees of all pension funds.'[9]

Given the overwhelming consensus amongst government ministers, judges and jurists that it is not correct that having regard to ESG considerations breaches of fiduciary duties and, arguably, it may be a breach to fail to have regard to ESG considerations provided it is part of a financial risk assessment and not rooted purely in political or ethical subsoil, it is reasonable to ask first, why has this orthodoxy continued to prevail in the face of overwhelming evidence to its complete lack of substance and second, what must be done to displace this market shibboleth?

Why the Orthodoxy Prevails?

- The lack of agency is key i.e. the lack of direct involvement/influence in decision making by the ultimate owners of the money. Pensions are still seen as 'too difficult to understand so best left to experts' even by well educated members of the general public.

- The current remuneration system in the City which is based on short-term profit taking and the frequent trading of shares. Any attempts to curtail or change this will be fiercely contested by the vested interests. The changes to the law on annuities is evidence that the government recognises that financial institutions do not put the best interests of the ultimate owners of the money above their own search for profits.

- The misinterpretation of fiduciary duties is intentional. By failing to acknowledge the importance of any considerations other than short-term returns, as Kay observed, asset managers ensure short-term bonuses for themselves and fail to see the essentially long-term nature of pension investment which, as already stated, with drawdown and greater pension freedoms can last from 20 - 50 years. We would refer you to the work of ShareAction on this matter, *Protecting our best Interests* (2011) and *The Enlightened Shareholder* (2012) together with the seminal work on *Conduct Costs and Banking* carried out by the LSE[10].

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[9]*Fiduciary Responsibility: Legal and practical aspects of integrating environmental, social and governance issues into Institutional Investment* UNEP FI July 2009 Paul Watchman was the legal advisor on this report.

[10]' £150 billion in five years – new league table throws new light on cost of banking misconduct' http://www.lse.ac.uk/newsAndMedia/news/archives/2013/11/ConductCostsProject.aspx

Why should something be done?

If pension trustees do not take account of ESG in their decision making they will be placing their funds at risk of lower returns and decreasing long-term capital value.

- For example, Climate Change is now accepted scientifically. The policies and actions of governments globally to reduce, or limit, its impact will have an increasing affect on business practices[11]. Companies that do not plan to reduce their carbon footprint will be disadvantaged as fossil-fuel energy costs increase and carbon labelling on products becomes more established. Oil and gas companies risk having stranded assets[12]. The Norwegian Sovereign Fund, for example, has already made the decision to divest oil and gas companies.

- The increasing scarcity of water is now widely recognised as a business issue by the world's global brands, as evidenced by the signatories to United Nation's CEO Water Mandate. Those companies which started addressing the issue a number of years ago will hold a competitive advantage; in a similar way to companies that foresaw the banning of CFCs in the 1970s and invested in different refrigeration technology.

- Companies that refused to acknowledge the impending impact of the USA's Dodd Frank Act in their sourcing policies on gold - small amounts of which are found in most IT products for example - will find it challenging to find verifiable conflict-free gold in products manufactured in China, for example, and could find the US market closed to them. Unless it is part of the pension mandate, how will pension fund trustees know that consideration of human rights issues are being factored into investment analysts' the risk assessment process?

- The dramatic increase in the last 15 years of the availability of ESG research resources provided by companies such as Trucost, EIRIS, MCSI ESG Research, FTSE4Good demonstrate that ESG can be factored into analytical financial risk assessment of companies. There is also increasing evidence that far from producing lower returns, consideration of ESG can actually enhance performance even under the current short-term assessments[13].

The data is available but financial analysts are choosing to ignore it. Why? Because it suits the vested interests and the current reward system based on short-termism.

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[11] 'The Case for Climate Change as the Paramount Fiduciary Issue for Institutional Investors' in A. Calvello (ed.), *Environmental Change: Institutional Investors and Climate Change* (Wiley Finance, 2010)

[12] 'Carbon reserves held by top fossil fuel companies soar' *The Guardian* 20 April 2015

[13] http://www.theguardian.com/money/2014/oct/20/ethical-funds-green-what-offer
http://www.canstar.com.au/managed-investments/performance-of-ethical-investments/
a 2012 study by **Deutsche Bank Group Climate Change Advisors** found that incorporating environment, social and governance (ESG) data in investment analysis is "*correlated with superior risk-adjusted returns at a securities level*."

What needs to be done?

The DWP has posed two questions which are unnecessarily narrow and cannot be separated usefully.

The first is the amendment of regulation 2(3)(b) of the Investment Regulations so that is more clearly reflects the distinction between financial and non-financial factors.

This distinction between financial and non-financial considerations, as stated above, is unhelpful. There are relevant and material considerations and irrelevant and immaterial considerations.

How, for example, is a distinction to be made in terms of the sustainability of financial investment between a bank or a mining or an oil and gas company which has a poor reputation or brand because of financial mismanagement and a similar type of company which has a poor reputation or brand because of environmentally damaging activities, human rights abuses or bribing government officials or health authorities?

It is financial impact, such as an inability to obtain exploration licences or finance, not the label attached to the matter which impacts on the financial sustainability of the investment which is relevant. If banks, as many appear to do, pay billions of pounds in fines and other conduct costs they are reducing substantially the profitability of the banks and returns to investors.

Does it really matter in terms of financial loss to a pension fund, rather than how to address the issue, if the source of the loss is fraudulent activities of individual bankers, poor governance by bank boards, corrupt practices such as bribery, lack of adequate due diligence, environmental damage leading to unsustainable investment or financing companies which use of slavery or child labour or destroy precious habitats or local industries.?

All these matters may go to the bottom line. To describe as non-financial the use of child labour or trading in conflict diamonds or conflict metals is hardly helpful or relevant to investment.

It may be that there are different assessment matrices but there are proven methodologies which allow ESG considerations to be assessed in terms of financial impacts as well as other relevant considerations. Climate Change and stranded assets is an example of this practice. It is not weird science or rocket science, it is prudent financial risk assessment.

Equally, on Stewardship Codes the DWP must be aware of how many investors have signed up to national and international initiatives, such as the Principles of Responsible Investment (PRI), the *UN Guiding Principles on Business and Human Rights* (known as the Ruggie Principles), the Equator Principles and UN treaties. The problem is not getting companies to sign up to such initiatives but compliance and enforcement. Is it really possible that government has so quickly forgotten the financial crisis and the business friendly, light touch or light headed financial regulation which resulted in the financial crash of 2007/2008?

The third question can only be answered after a decision has been made about the first two questions. However, the confusion set out in the DWP Paper does not augur well for practical reforms.

- The concept of enhanced shareholder value under the Companies Act 2006 should be extended to pension funds. There is a direct precedent. It was introduced to directors' duties for similar reasons; to clarify the law on the legality of directors taking account of the environmental and community aspects of the activities of their companies; and its fundamental principles have already been debated and approved by the UK Houses of Parliament.

- Legislation should be passed, as it has in other Commonwealth jurisdictions, granting legal immunity to pension fund trustees who have regard to ESG considerations in assessing the risk of financial sustainability assessment; to give them comfort that they will not be liable under their new statutory duties to pension fund contributors and beneficiaries for taking such considerations into account.

- Pension funds should be required to write into their trust deeds, and in their mandate of instructions to asset managers, a requirement to have regard to ESG considerations in making investment decisions.

- The long-term nature of pension investment should be recognised as part of the duties of pension fund trustees, and there should be a requirement that this requirement is implemented by their asset managers.

- Codes of practice on the assessment of ESG considerations as well as other relevant financial considerations should be promulgated by the Pensions Regulator, and there should be a statutory duty for pension fund trustees and their asset managers to take these Codes of Practice into account in making investment decisions.

- Pension fund trustees should be more transparent about the pension fund investment strategy.

- Pension fund trustees should obliged to publish their investment strategy and to consult annually about it by written communication and meetings with their pension fund members.

- Pension fund trustees should have a legal duty to take account and to give written reasons for their decisions but not be bound by the representations of the pension fund members as Ministers of the Crown and Planning Authorities have legislative duties to consult relevant parties and government bodies.

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