

---

**OMBUDSMAN FOR BERMUDA**

**Five-Month Interim Report**  
August 1, 2010 to December 31, 2010

---

*For The  
Good Of  
The Public*



*And Those  
Who Serve  
The Public*

# *Transition to Calendar Year Reporting*

Thus far the reporting year for our operations has been from August 1 (the anniversary date of establishment of the office) to July 31. However, reporting for a calendar year would make it much easier and more efficient to collate and cross-reference the statistics.

Accordingly, this Interim Report is submitted for the period August 1, 2010 to December 31, 2010 to effect a transition to calendar year reporting. Hereafter, reports will be submitted for each calendar year.

This does not affect our financial year-end of March 31 (to align with the Government). Nor will this affect our independent audit which is reported on in The Financial Statements of the Related Organizations and Funds (the Public Accounts) of the Government of Bermuda.

---

## *Table of Contents*

Transmittal Letter to the Speaker of the House of Assembly.....	1
Ombudsman’s Message.....	2
Bermuda Supreme Court Upholds Ombudsman Jurisdiction.....	3
United Nations General Assembly Resolution.....	5
Indicators of Independence.....	7
Selected Summaries of Closed Complaints.....	8
Complaint Process Flowchart.....	12
Statistics.....	13
Final Update: “Atlantica Unlocked”.....	18
Annual Board Meeting of the IOI Hosted in Bermuda.....	23
Presentations.....	24
Ombudsman Act 2004 “In a Nutshell”.....	26
How to Make a Complaint to the Ombudsman.....	28





June 27, 2011

The Speaker, The House of Assembly  
The Hon. Stanley Lowe, OBE, JP, MP  
Sessions House  
21 Parliament Street  
Hamilton HM 12

Dear Honourable Speaker,

I have the honour to present my sixth Report which covers the period August 1, 2010 to December 31, 2010. Please note that future Reports will be for calendar years.

This Report is submitted in accordance with Section 24(1) and (3) of the *Ombudsman Act 2004* which provides:

**Annual and Special Reports**

- 24 (1) The Ombudsman shall, as soon as practicable and in any case within six months after the end of each year, prepare a report on the performance of his function under the Act during that year.
- 24 (3) The Ombudsman shall address and deliver his annual report and any special report made under this section to the Speaker of the House of Assembly, and send a copy of the report to the Governor and the President of the Senate.

Yours sincerely,

Arlene Brock  
Ombudsman for Bermuda

## *Ombudsman's Message*



In our 5th Annual Report, we announced that we would be changing our reporting year to the calendar year. This makes statistical reporting for my staff much easier and allows me to draft the report at a far less hectic time of year. This report is for the period of August 1, 2010 through December 31, 2010. Thereafter, reports will be for the calendar year.

It has been a busy five months. In September, we offered an advanced course in investigations created and delivered by Ombudsman Ontario to the civil service. This idea did not originate with me. Earlier in the year I had been asked by the Ombudsman for Ontario to co-deliver their course in the British Virgin Islands. Both the Complaints Commissioners for BVI and for the Cayman Islands had opened the course to the civil service. The enthusiastic response of participants there prompted me to try the idea in Bermuda. Some 55 civil servants who regularly conduct investigations (fire, immigration, social services, consumer affairs, and so on) attended our course and were equally engaged, challenged and eager to incorporate many of the methods into their own work.

A month later, our office hosted the eighteen members of the Board of Directors of the International Ombudsman Institute ("IOI"). In 2009 the IOI embarked on a new strategy to refocus on institutional development and training in the regions. As regional Vice-President for the IOI for the Caribbean and Latin America, it was a great honour to host the meeting. As always with our visiting Ombudsman, I exert a 'tax' – please give a public presentation. It is important that Bermuda learn about the Ombudsman institution from practitioners other than me alone. This was a wonderful opportunity to gain insight into the vitality and common evolution of Ombudsman work around the world. They were all enchanted by our island and hospitality.

I was asked to speak at the Biennial Conference of the Caribbean Ombudsman Association in Curaçao and at the 1st Forum of Brazilian Ombudsman in San Salvador. It is always fascinating to see how similar our work is – despite different sizes and political and cultural environments.

Although we closed 60 complaints in this period, few had great complexity or educative weight. In this report, we summarize only a limited number. Our job is to persuade. Our Recommendation Reports to complainants and authorities usually aim to put individual complaints into broader contexts, draw on best international practices and stand on human rights principles. The first complaint summary excerpts (rather than merely summarizes) the recommendation. This gives readers a glimpse into how we approach issues and search for broad, enduring improvement.

While I regret that we do still have a few old, outstanding, complex complaints to complete, our work flow is increasingly well-oiled through the exceptional complaint management of our Investigations Officer, Mrs. Kumalae. She is very ably assisted by our Administrative Assistant, Ms. Cassidy, who joined in September and is already handling complaint intakes on her own. As we move toward greater independence in office financing and administration, Ms. Suhartono continues to ensure that the office functions like clock-work. Mrs. Symonds, Administrative Associate, works part-time, and continues to exemplify the spirit of the office. I am constantly complimented on the efficiency, care and genuine passion with which my wonderful staff serves the public. It is my great pleasure and honour to come to work with them each day.

A handwritten signature in black ink, which appears to read "Arlene Brock". The signature is fluid and cursive, with a long horizontal stroke at the end.

Arlene Brock  
Ombudsman for Bermuda

## Bermuda Supreme Court Upholds Ombudsman Jurisdiction

On February 14, 2011 the Supreme Court of Bermuda determined that authorities may reverse decisions upon Ombudsman recommendations. Although this decision was issued in the 2011 calendar year, Court proceedings began in the last quarter of 2010.

In the interest of timeliness, the case is noted in this Interim Report.

*Smith v. Minister of Culture & Social Rehabilitation* [2011] SC (Bda) 8 Civ is a judicial review of a decision by a Minister who declined to accept a recommendation of the Human Rights Commission (“HRC”) to appoint a board of inquiry to hear a complaint of discrimination against another Government Ministry. The HRC initially dismissed the



Photo: Department of Communication and Information

complaint but reconsidered upon recommendation of the Ombudsman. The Minister declined to appoint a board of inquiry on the ground that the HRC cannot reverse itself.

If a HRC decision can be reversed only by an order of the Court, then that decision is considered to be quasi-judicial. This would imply that the Ombudsman could not investigate the HRC in the first place because Courts and Tribunals are outside of Ombudsman jurisdiction. The Judge in the *Smith* case noted that, although there was no explicit submission before him that the Ombudsman had no jurisdiction, this “point was implicitly accepted”.

The Ombudsman was given leave to intervene in this case on the issue of the implied challenge to her jurisdiction to investigate the HRC. She argued that the HRC is not a full or quasi-Court or Tribunal and therefore could not only be investigated but could also reverse a decision upon her recommendation.

The Court agreed and held: “The Acting Minister erred in law that the HRC had no jurisdiction to reconsider a complaint... The principle of “*functus officio*”... only applies in relation to judicial or quasi-judicial tribunals... The HRC reopened the Applicant’s complaint on the basis that non-compliance with s.15(8), which made the

original dismissal a nullity, had occurred. The conclusion reached by the Ombudsman in this regard was accepted by the HRC.”

The *Smith* case relied on earlier Court decisions in Canada and Gibraltar that established the remedial role of Ombudsman recommendations: “There is a clear

conflict between interpreting the powers of the HRC... to dismiss complaints as not capable of being reviewed by the HRC and the powers conferred on the Ombudsman with respect to even final administrative decisions by sections 5(3) and 15(4)(a),(b) of the 2004 [Ombudsman] Act...”

“Unless the Ombudsman’s statutory jurisdiction under the Ombudsman Act 2004 to investigate complaints of maladministration and recommend that offending public authorities reconsider inappropriate administrative decisions is to be materially impaired, the Act must be construed as empowering the HRC to reconsider complaints which it has previously dismissed, especially where it appears that the original decision was invalid. This principle, which has never before been considered as a matter of Bermudian law, is of general application and is likely to apply to administrative decisions made by public authorities generally... The application of the logic of the impugned decision to other statutory contexts could potentially curtail the Bermuda Ombudsman’s remedial jurisdiction altogether.”

Further, *Smith* advances two UK cases that established that Ombudsman findings should not be disputed without good cause: “It was difficult to apprehend how the policy objectives of

*the Human Rights Act could be advanced by contending for a construction of its provisions which both (a) restricted the scope of relief the HRC could provide in respect of a meritorious complaint, and (b) rendered nugatory the important constitutionally-derived role of the Bermuda Ombudsman."*

The Court in *Smith* noted a potential, if unintended, conflict of interest when more than one Government Ministry is involved in different aspects of a dispute: *"Against the background of the AG's Chambers having previously acted for the respondent... in encouraging the Acting Minister to make the impugned decision, the appearance of the same Chambers on behalf of the Minister responsible for Human Affairs was at times somewhat unsettling. Were the arguments being advanced in furtherance of the policy dictates of the Department of Human Affairs or the policy interests of the respondent to the HRC complaint?"*

*"The decision was made in circumstances where the Attorney-General's Chambers appear to have been unable to provide him with independent advice as Chambers was acting for another Minister who was the respondent to the relevant HRC complaint...in deciding whether there was an appearance of bias, it is necessary to have regard to the history of the complaint and the undeniable fact that the identity of a Government Minister as respondent to the complaint must attract a heightened degree of scrutiny...I have no doubt that the various public actors were acting in good faith and using their best endeavours to act in accordance with law...both the Minister and the Director who briefed him were seemingly deprived of access to independent legal advice."*

Although decisions of Courts in other jurisdictions are merely persuasive and do not carry the weight of precedent, our Courts are sometimes persuaded, especially where there are few or no Bermuda precedents on point. In the *Smith* case, the Court noted: *"I find that the same principles [enunciated by Canadian Courts] ought to be followed in construing the provisions of the Bermudian Human Rights Act 1981: 'The Act must be so interpreted as to advance the broad policy considerations underlying it.' That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as 'not quite constitutional'. By this expression, it is not suggested, of course that the Act is somehow entrenched but rather that it incorporates certain basic goals of our society...the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the Interpretation Act that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects."*

The Court concluded: *"Rather than seeing the present case as a 'flash in the pan' which is never likely to be repeated, it may be viewed as demonstrating how the Minister's role as a filter (or buffer) between the HRC and a board of inquiry contributes to delay and, where another Government Ministry is the respondent to the complaint, creates a legal minefield as well. Bearing in mind that the Ontario legislation on which the Human Rights Act 1981 is substantially based permits the Ontario Commission to refer meritorious complaints directly to an independent tribunal for hearing, the utility of the Minister's section 18(1)(a) role merits policy reconsideration."*

The *Smith* case has been applauded by Ombudsman scholars and lawyers, e.g.:

*"It is a truly significant contribution to Ombudsman jurisprudence in the Commonwealth and elsewhere."*

Dr. Victor Ayeni (Director, Governance & Management Services International, advisor to Ombudsman and Governments worldwide)

*"It is a very useful case of general importance and of very persuasive effect here and in other Common Law jurisdictions."*

Anthony Rich, General Counsel, Legal Ombudsman (this body resolves complaints about the services performed by lawyers in the UK)

# United Nations General Assembly Resolution

*Bermuda is not an independent state and therefore not a member of the United Nations Organization. Nevertheless, it is instructive for us to be aware of the trends and standards that independent nations aspire to. General Assembly resolutions are passed usually only after extensive (sometimes years of) consultation and negotiations. They delineate the general standards that the majority of nations agree to. In 2009, the UN General Assembly adopted Resolution 63/169 regarding the Role of the Ombudsman.*

---



United Nations  
**General Assembly**

**Sixty-third session**      Distr.: General  
Agenda item 64 (b)      20 March 2009

## **Resolution adopted by the General Assembly**

*[on the report of the Third Committee (A/63/430/Add.2)]*

### **63/169. The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights**

*The General Assembly,*

*Reaffirming its commitment* to the principles and purposes of the Charter of the United Nations and the Universal Declaration of Human Rights,<sup>1</sup>

*Reaffirming* the commitment of Member States, in accordance with the Charter, to promote and ensure the respect of human rights and fundamental freedoms, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

*Recalling* the principles relating to the status of national institutions for the promotion and protection of human rights, welcomed by the General Assembly in its resolution 48/134 of 20 December 1993 and annexed thereto,

*Recognizing* the role of the existing Ombudsman, whether a male or female, mediator and other national human rights institutions in the promotion and protection of human rights and fundamental freedoms,

*Underlining* the importance of the autonomy and independence of the Ombudsman, mediator and other national human rights institutions, where they exist, in order to enable them to consider all issues related to the field of their competences,

*Considering* the role of the Ombudsman, mediator and other national human rights institutions in promoting good governance in public administrations, as well as improving their relations with citizens, and in strengthening the delivery of public services,

<sup>1</sup> Resolution 217A (III).

*Considering also* the important role of the existing Ombudsman, mediator and other national human rights institutions in contributing to the effective realization of the rule of law and respect for the principles of justice and equality,

*Stressing* that these institutions, where they exist, can have an important role in advising the Government with respect to bringing national legislation and national practices in line with their international human rights obligations,

*Stressing also* the importance of international cooperation in the field of human rights, and recalling the role played by regional and international associations of the Ombudsman, mediator and other national human rights institutions in promoting cooperation and sharing best practices,

1. *Encourages* Member States:

(a) To consider the creation or the strengthening of independent and autonomous Ombudsman, mediator and other national human rights institutions;

(b) To develop, where appropriate, mechanisms of cooperation between these institutions, where they exist, in order to coordinate their action, strengthen their achievements and enable the exchange of lessons learned;

2. *Also encourages* Member States:

(a) To consider conducting communication campaigns, with other relevant actors, in order to enhance public awareness on the importance of the role of the Ombudsman, mediator and other national human rights institutions;

(b) To give serious consideration to implementing the recommendations and proposals of their Ombudsman, mediator and other national human rights institutions, with the aim of addressing claims of the complainants, consistent with the principles of justice, equality and rule of law;

3. *Requests* the Secretary-General to report to the General Assembly at its sixty-fifth session on the implementation of the present resolution;

4. *Decides* to consider this issue at its sixty-fifth session.

*70th plenary meeting  
18 December 2008*

---

*On March 12, 2010, the ongoing review of how the above General Assembly Resolution 63/169 is operating "Encourages national institutions, including Ombudsman institutions, to seek accreditation status through the International Coordinating Committee." Accreditation requires proof of the independence of Ombudsman offices.*

## Indicators of Independence

The 1993 United Nations Paris Principles established the “base-line standards that national human rights (and Ombudsman) bodies must comply with if they are to be considered legitimate national human rights institutions.” The United Nations defines **Independence** as the “fundamental principle” which all other characteristics (such as pluralism, infrastructure and responsibilities) aim to ensure. Independence is evidenced by a number of legal, structural and operational indicators, for example:

### Institutional Independence

- Should be entrenched in the Constitution or by statute. The Bermuda Constitution 1968 provides that: “*in the exercise of his functions and jurisdiction, the Ombudsman shall not be subject to the direction or control of any other person or authority*”
- The more that an Ombudsman can investigate across all Government operations – i.e. general rather than restricted jurisdiction – then the more independent the office is likely to be
- The governing law must protect against legal liability for actions undertaken in the official capacity. Section 21 of the Ombudsman Act 2004 (“the Act”) provides that no civil or criminal proceedings can be brought against the Ombudsman for the performance of her functions. Further the Ombudsman, staff and professional advisors cannot be required to give evidence in respect of anything coming into their knowledge in the exercise of their functions
- Dismissal should be in strict conformity with all legal substantive and procedural requirements and should not be based on solely the discretion of appointing authorities. The Bermuda Constitution provides that the Ombudsman can be dismissed only for: physical, mental or other inability to discharge her functions; misbehavior; or engaging in any other occupation for reward.

### Functional Reporting Independence

- The Ombudsman reports only to Parliament and is not subject to the control of a Minister. Further, no Minister or other Government official speaks for the Office of the Ombudsman
- The Ombudsman also accounts to the public by way of an independent annual audit which is published in the *Financial Statements of the Related Organizations and Funds (the Public Accounts) of the Government of Bermuda*
- The Ombudsman must be free to deal with the public, schools, research institutions, civil society, international organizations and media to promote awareness, conduct research and teaching
- Advisory or other public participation and access from civil society should reflect pluralism in the country (especially the meaningful participation of women) from a wide range of societal groups.

### Operational Independence

- Funding from external sources should not compose the core funding as it is the responsibility of the state to ensure the minimum activity budget in order to allow the institution to operate towards fulfilling its mandate. Financial systems should be such that the institution has complete financial autonomy. This should be a separate budget line over which it has absolute management and control. The Ombudsman Act provides for funding from the Consolidated Fund and accountability of the Ombudsman through an annual independent audit
- The institution should be given as broad a mandate as possible. The powers that it is vested with (e.g. if it can act on its own initiative) should be concrete and adequate. The institution shall hear any person and obtain any information and any documents necessary for assessing situations within its competence. The Act provides for investigation powers; inspection of premises; summons under oath, and sanctions for non-compliance
- The Act provides for appointment of own staff and professional advice as needed
- The Act provides for the Ombudsman to: regulate investigations as she sees fit; address complaints by mediation, and to initiate own motion investigations in the public interest
- National human rights and Ombudsman institutions should be able to provide advisory functions regarding national legislation. The Act provides that recommendations can include that enactments (laws) be reviewed.

### Personal Independence

- The Ombudsman and any other members of the institution should be free from actual or perceived conflicts of interest and partisanship. The Bermuda Constitution 1968 provides that no person shall be qualified to be appointed as Ombudsman if s/he has been within the preceding three years a Senator or member or political candidate or office holder in any political party
- Appointment should be by a transparent, advertised process. There should be a stable mandate by way of a fixed term and commensurate, full-time compensation
- Office holders should operate without fear or favour.

## *Selected Summaries of Closed Complaints*

### **Special Needs Students**

The complaint was against two authorities: the Department of Education (“Education”) and the Psycho-Educational Committee (“the Committee”) administered by the Department of Child and Family Services. The investigation entailed extensive meetings with both, documentary review and research of best practices through experts in the UK and US.

**Parent A** contended that Education had failed to provide an adequate education in Bermuda for her special needs child in accordance with the Education Act 1996 (“the Education Act”) and the National Policy on Disabilities. Further, she advocated that, as a suitable education was not available in Bermuda, the Government (through Education and/or the Committee) should provide for education abroad.

She claimed that a failure to do so not only amounted to discrimination but also would doom her child to a life-time of dependency when it was possible to educate him to become a fully functioning contributor to society. After an inconclusive mediation of her initial complaint to the Human Rights Commission, she complained to us. Under the relevant policy, it is in the absolute discretion of the Minister of Education to determine whether to contribute and the amount of any such contribution to overseas education.

Decisions of a Minister or Cabinet are beyond Ombudsman jurisdiction. However, the Ombudsman Act 2004 specifies that we may investigate the administrative actions of officers and employees of departments and other public authorities. Therefore, we could investigate the quality and scope of the information provided by technical officers to the Minister to inform his decision.

**[It may be of interest to note that this is exactly the same question that is being investigated in the 2011 Systemic Investigation into the Special Development Order process, exemplified by the recent Tucker’s Point SDO. What are the quality and scope of information that technical officers should provide to Ministers and/or Cabinet to inform decision-making? ]**

Our investigation revealed:

*With respect to Education:* information regarding the cost of providing a suitable education in Bermuda for this unique special needs student had not been calculated. Therefore, the Minister did not have full information for his original determination of the amount of assistance provided by Education. Further, this investigation pointed to a critical need for Education to establish a clear policy and programs for special needs students to ensure compliance with both the Education Act and the National Policy on Disabilities.

We recommended that Education should provide to the Minister more robust and accurate information about the costs of providing a suitable education for the unique special needs of this student.

Further, we recommended that Education request the Department of Internal Audit to conduct a thorough evaluation of its strategies to determine the most effective and realistic services for all categories of special needs students. That evaluation is being scoped in the second quarter of 2011.

Education was very responsive. The previous Minister visited the overseas school. Armed with better and full information, the new Minister readily made a decision to substantially increase the subsidy for overseas education for this student. She also initiated a review of the policy for all similarly affected students.

*With respect to the Committee:* a review of past practice allocations revealed that this is not a realistic source of supplemental funding for students with multiple disabilities who do not demonstrate severe psychological and/or emotional needs. However, there was a serious gap in the Committee’s 2009 Policy & Procedures Manual. The public had no information about transparent criteria to determine eligibility for funding. The Committee itself had no clear guidelines for how to prioritize and allocate scarce resources amongst eligible students.

We recommended that the Committee first apologize to Parent A for conflicting verbal information. Secondly, the Committee

should establish written policies and/or fill in the policy gaps in its 2009 Policy & Procedures. In doing so, the Committee should consult with the Department of Internal Audit and/or the Accountant General and, if required, the Attorney General's Chambers to ensure that any financial policies, including means testing, are consistent with the Government's Financial Instructions, generally accepted accounting and legal principles and best practices.

We received complaints in the past (and there have been media reports) about gaps in Education's services for special needs students. Over the years of meeting with Education, we were assured that a strategy would be forthcoming. This investigation showed that very little progress had been made or would be likely without external encouragement. Accordingly, we recommended an audit of existing services and a full policy and strategic review. This was the first time that we recommended that the Department of Internal Audit be requested to conduct this kind of review. We flagged some of the specific issues that should be looked at and contextualized this recommendation as follows:

*"In both the US and UK, debate about the relative merits of inclusion versus specialized schools has raged for decades without agreement amongst experts and parents. Baroness Warnock, who headed a UK Government commission that pioneered the concept of inclusion in 1978, famously declared inclusion a failure some 30 years later. Nevertheless, the evidence is clear that inclusion has no chance of succeeding without well-resourced specialized support and accommodations.*

*Bermuda is hardly "another world". Local and national governments almost everywhere are pressured to find fair funding mechanisms for an exponential increase in the need for special education services... Increasingly, parents are placing their special needs children in home schools or other private schools here which may offer more individual attention, but also do not have the specialization required to provide a suitable education. Parents have formed their own organizations to raise awareness and knowledge and even open training to [public school] teachers. There is a palpable cynicism and lack*

*of confidence in Education's resolve, leadership and capacity to tackle the task of providing a suitable education locally for special needs students.*

*Young people in Bermuda are facing unprecedented and pervasive social challenges. This inevitably spills into the school system where teachers are increasingly distracted from teaching by the emotional and social needs of their students. I am informed that larger numbers than imaginable arrive at school hungry and/or unbathed. Numerous children are unprepared for the rigours and excitement of learning because of difficult home and family lives that stress their attention and absorption of content. Therefore, from Education's point of view, it is not fair for other agencies to drop all of the responsibility for addressing special needs onto Education's lap... The [composition of the] Committee is a telling acknowledgement that this is a multi-Ministry problem...*

*The concerns faced by Education, Child & Family Services and the other members of the Committee are legitimate and clearly warrant systematic review. The knee-jerk attempts to isolate problems into silos – is this an 'education' problem or a 'social services' problem or a 'health' problem demonstrates fissures in "At Your Service, Bermuda". As events of this past year demonstrate, Bermuda does not have the luxury for Government agencies to be defensive and protective of their turf. This is a time for accountability and action.*

*While families should certainly contribute to expensive overseas services to the extent that they are able to do so as the coffers of the Bermuda Government are not unlimited, Bermuda should not once again become a place where only people who can afford to pay or who are the most informed or the most tenacious advocates can educate their children with special needs. The country should have an interest in ensuring that all such children receive the training and confidence that will enable them to become functioning, independent, contributing adults. We pay now or we pay later."*

An Ombudsman who merely resolves individual complaints – whilst that is important – is doing only half of her job. Each complaint must be analyzed for possible systemic improvements. This complaint not only provided a resolution for one student, but also more broadly will lead to enduring strategies to ensure that Bermuda improves its educational services for all special needs students.

### **Bermuda Hospitals Board (“BHB”)**

These were two separate but identical complaints. Prior to undergoing their elective medical procedures, **Patients B&C** agreed with Dr. G on the price. Several months after their procedures Patients B&C received notices from the BHB that they owed thousands of dollars. The Patients claimed that it should not be their responsibility to pay the BHB bill because (a) the BHB did not bill them in the time period required by the relevant policy and (b) their surgeon did not notify the BHB for pre-approval as required.

Although I found maladministration due to negligence on the billing issue, I did not make any recommendations as the BHB apologized to Patients B&C and agreed to waive their hospital charges. The BHB also implemented systemic changes which include new and improved policies, procedures and forms. Relevant surgeons are now required to (a) sign amended surgery policies to verify their awareness and understanding; (b) specify all non-emergency procedural changes as contingencies on the Operating Room Permit (“Permit”); and (c) pay the expenses for procedures that are not listed on the Permit.

### **Transport Control Department (“TCD”)**

**Vehicle Owner D** claimed that TCD’s decision not to license his vehicle was based on a mistaken understanding of the purpose and definition of a personal watercraft. Our preliminary inquiries included conducting international research in order to understand best practices.

Obtaining such information very often assists in clarifying the rationales behind certain decisions and providing objective tools

to measure the reasonableness of an Authority’s response. It is not our belief that everything done outside of Bermuda should be imported wholesale but in this instance our research confirmed that the basis of TCD’s decision was consistent with good practices and standards elsewhere.

### **Department of Immigration (“the Department”)**

**Spouse E** complained to the Department that her husband should not be working in a position that was advertised for “Bermudians or Spouses of Bermudians Only” because their marriage had broken down and she had not signed his spousal letter. Although the Department informed Spouse E that she would be contacted in due course she was not contacted.

In response to our preliminary inquiries the Department stated that when the marital circumstances of a non-Bermudian spouse changes and the Department is conducting an investigation, it is the responsibility of the employer of the non-Bermudian spouse to regularize the employment contract. In this instance the employer did so.

Notwithstanding the breakdown of a marriage, the Department does not automatically direct the spouse of a Bermudian to settle his/her affairs and leave Bermuda. The Department has the discretion to issue a work permit in such circumstances. Based upon its review of this instance (including the employer’s and Spouse E’s submission) the Department issued a work permit.

The Department acknowledged that it failed to contact Spouse E however we did not find maladministration because the work permit was issued as a result of the Department following proper processes and exercising its discretion – not as a result of failing to take Spouse E’s complaint into consideration.

This complaint was more straightforward than the marital dramas sometimes faced by the Department. In addition to difficult investigations of sham marriages, officials are often challenged to deal with the emotional see-saw of legitimate marriages. There are

many cases when a Bermudian spouse would inform the Department of estrangement and request that the foreign spouse be required to leave. Then, when there is reconciliation, the Bermudian spouse comes in to reverse the request. The Department is hard-pressed to assess the merits of such requests when there are frequent changes of heart.

### **Ministry of Finance** (“the Ministry”)

**Businessman F**, the majority shareholder of a small company, owed payroll and other taxes. The Ministry obtained a debt judgment against Businessman F in the late 1990s. Shortly after, the Court signed a Consent Order which allowed the debt to be settled by the minority shareholder in the course of liquidation of the company. The Ministry should have informed the Attorney General’s Chambers which would have closed the Court proceedings in the records of the Supreme Court.

A few years later, in 2001, Businessman F learned, in distressing circumstances, that the records of the Supreme Court still showed the debt as outstanding. The lawyer for the minority shareholder sent all necessary proof of settlement of the debt judgment to the Ministry’s Debt Collection Office with the request that the Court records be corrected. This was never done.

Early in 2009, Businessman F had difficulties with a business opportunity when it was again discovered that the Supreme Court records still had not been properly marked. The Ministry put the burden on him to prove that the payment was made a decade earlier. Further, the Ministry informed him that it was his responsibility to ensure that the Supreme Court records were corrected. After six frustrating months, the Ministry finally gave instructions to the Attorney General’s Chambers to do so. Businessman F was aggrieved by the inefficiency, delay and failure of the Ministry to accept responsibility and provide an explanation. He complained to us to find out what went so wrong.

This investigation entailed digging into the Archives of the Magistrates’ Court, Supreme Court, Tax Commissioner, Official Liquidator,

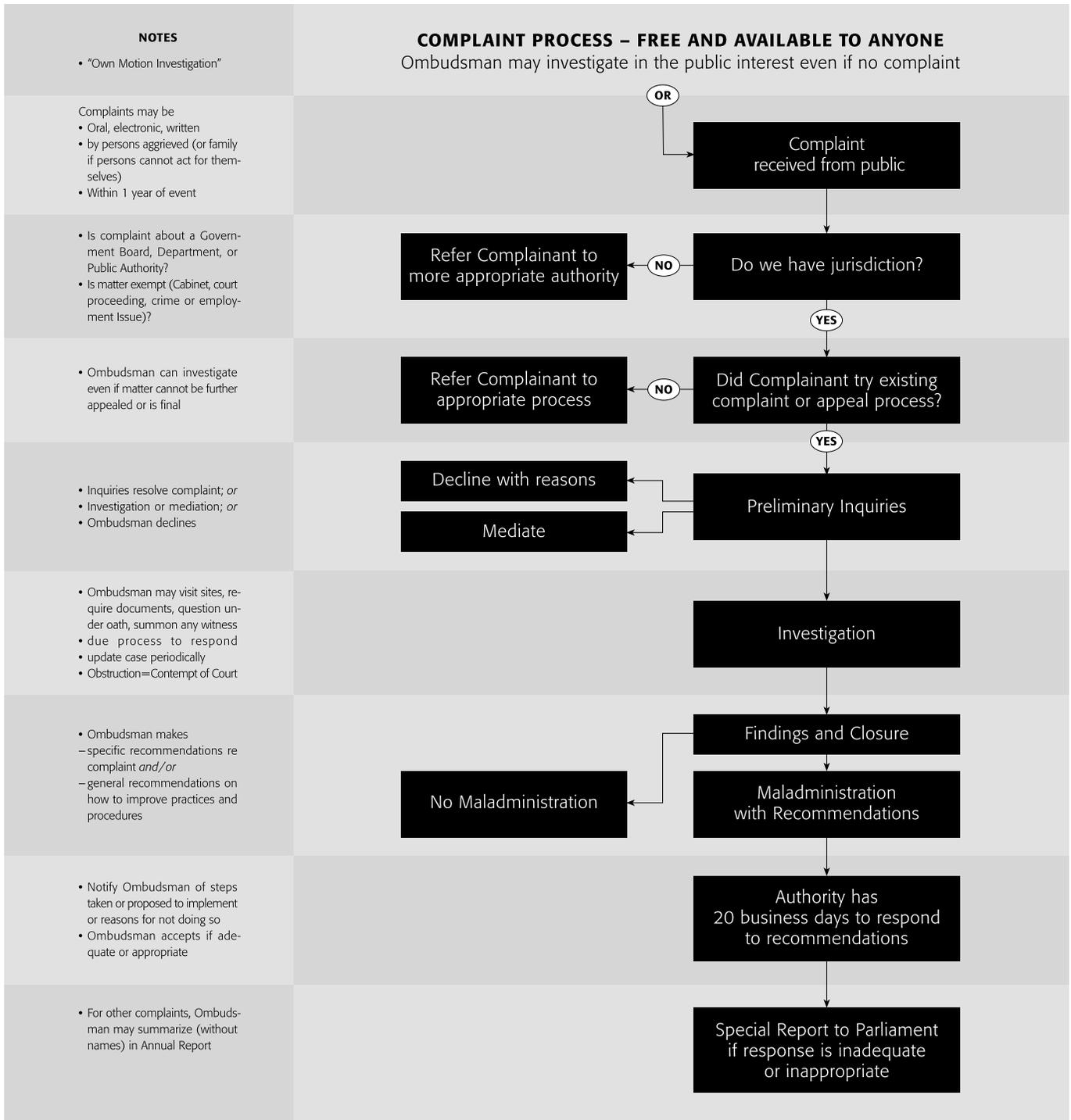
Debt Collection Office, Accountant General and even stored boxes of the law firm that represented the minority owner during the liquidation proceedings. The Supreme Court confirmed that it was the Government’s responsibility to ensure that the records are corrected (as a debtor’s word cannot be accepted by the Court).

After piecing together documents from various sources, we were able to uncover: a copy of the cheque paid by the minority shareholder; a receipt from the Accountant General in the name of Businessman F’s company (and therefore the payment should have been allocated to his debt judgment); and a bank deposit form by the Debt Collection Office for the cheque. We could not locate any internal control documents to show to which account the payment was allocated. Nor was there any evidence of instructions from the Ministry to the Attorney General’s Chambers to correct the records of the Supreme Court. It appears that the Debt Collection Office dropped the ball, both when the payment was made and again in 2001.

While Businessman F could have been more diligent in following up, especially in 2001, the responsibility to correct the records of the Supreme Court was the Ministry’s. The failure to do so, plus the attempt in 2009 to shift the burden of proof and action to Businessman F amounted to maladministration.

Recommendations are intended to put complainants in the place that they would have been in had there been no maladministration. We recommended that the Ministry make a “without prejudice” apology to Businessman F. In addition, as an apology was not an adequate recognition of the frustration and uncertainty that Businessman F had experienced, we recommended a “consolatory payment” in the amount of \$5,000.

***Note:** a consolatory payment is NOT “compensation” for loss of income or out of pocket expenses. Compensation is a legal claim which persons must pursue in the Courts. Consolatory payments are extremely rare but recommended by Ombudsman for those instances where, in all good conscience, an apology is just not sufficient.*

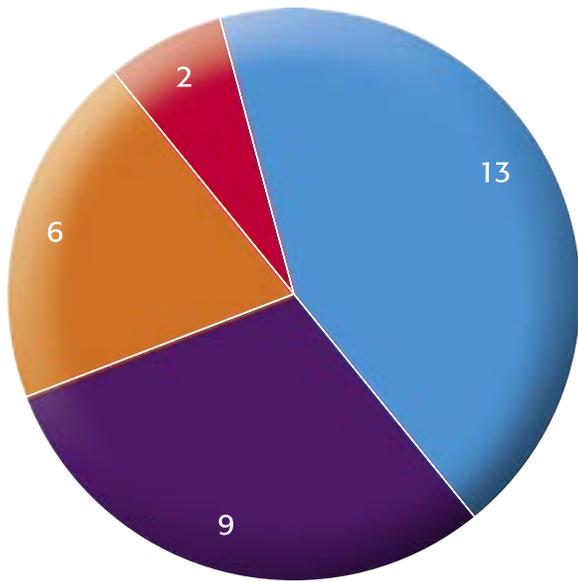


<p><b>FROM THE PUBLIC:</b></p> <p><i>You calmed me down yesterday and you've calmed me down today. Thank you.</i></p>	<p><b>FROM THE PUBLIC:</b></p> <p><i>I just want to thank you for everything you have done for me.</i></p>	<p><b>FROM THE PUBLIC:</b></p> <p><i>I just want to tell you that you're doing a good job and keep up the good work.</i></p>
---	--	--

# Statistics

## COMPLAINTS REFERRED

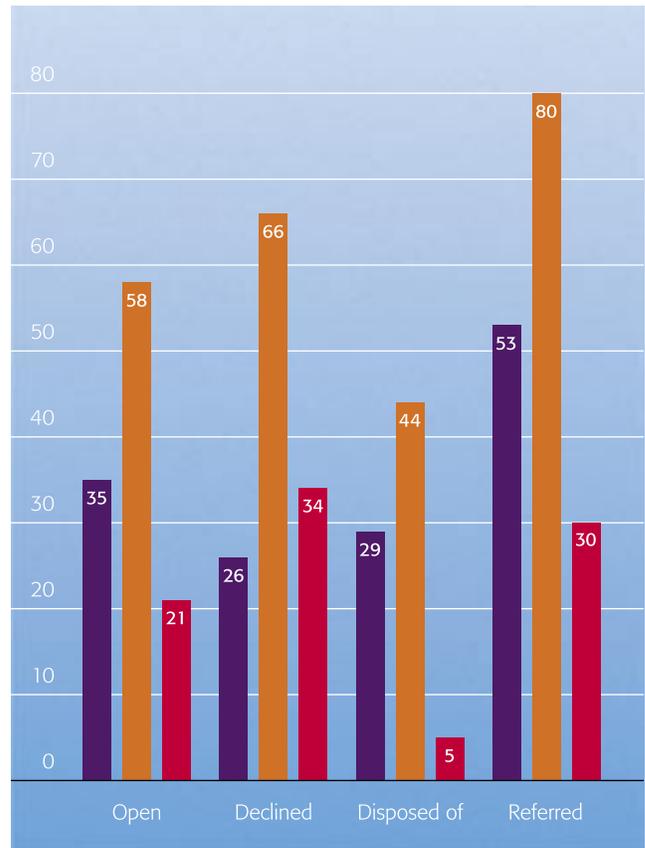
Number (30 total) / Where Referred



- Department of Labour & Training
- Other
- Consumer Affairs
- Immigration

## STATUS OF COMPLAINTS

Number / Status at July 31, 2009 and 2010 and August 1 to December 31, 2010



- Aug 1, 2008 - Jul 31, 2009 – Total Complaints **143**
- Aug 1, 2009 - Jul 31, 2010 – Total Complaints **248**
- Aug 1, 2010 - Dec 31, 2010 – Total Complaints **89**

Complaints Not Referred	Aug 1, 2005 Jul 31, 2010	Aug 1, 2010 Dec 31, 2010	Total
Complaints Brought Forward at July 31	77	–	<b>77</b>
New Complaints Not Referred	–	59	<b>59</b>
Complaints Closed / Declined	<21>	<39>	<b>&lt;60&gt;</b>
Complaints Open at December 31	56	20	<b>76</b>

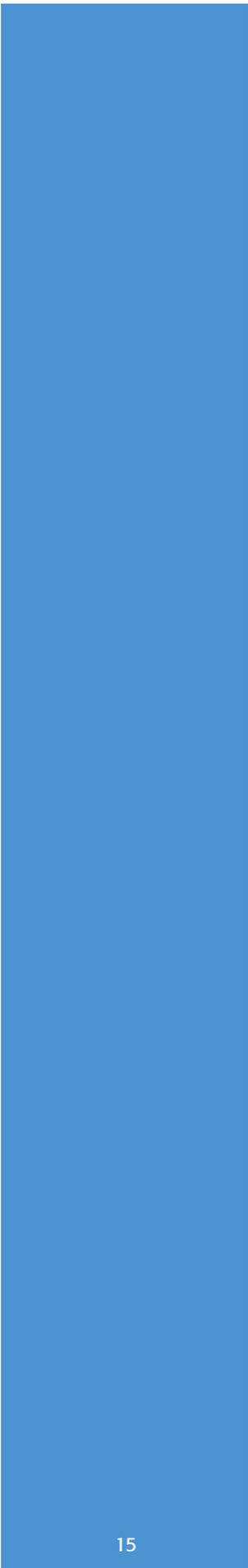
### Open Complaints

“Open” indicates that complaints were still being investigated or a resolution was being considered at the cut-off date of our Dec. 31 year-end.

MINISTRY (01/08/10 - 31/12/10) # of Complaints				
TYPES OF COMPLAINTS		INEFFICIENT	IMPROPER	UNREASONABLE DELAY
<b>Cabinet</b>	<b>1</b>			
Public Service Commission	1			
<b>Economy, Trade &amp; Industry</b>	<b>11</b>			
Department of Immigration – Work Permits	1			
Department of Labour & Training	10			4
<b>Education</b>	<b>2</b>			
Department of Education	2			
<b>Environment, Planning &amp; Infrastructure</b>	<b>10</b>			
Bermuda Housing Corporation	1			1
Department of Land Valuation	1			1
Department of Planning	9	1		2
<b>Finance</b>	<b>5</b>			
Accountant General Office – GEHI	1			
Bermuda Monetary Authority	1			
Department of Social Insurance	1			
HM Customs	1			
Pension Commission	1			
<b>Government Estates &amp; Information Services</b>	<b>2</b>			
Charities Commission *	1			
Registry General	1			
<b>Justice</b>	<b>4</b>			
Attorney General's Chambers	1			
Magistrates' Court	1	1		
Magistrates' Court – Legal Aid	2			
<b>National Security</b>	<b>11</b>			
Bermuda Fire & Rescue Service	2			
Bermuda Police Service	1			
Department of Immigration	7			2
<b>Transport</b>	<b>1</b>			
Marine & Ports	1			1
<b>Youth, Families, Sport &amp; Community Develop.</b>	<b>8</b>			
Department of Child & Family Services	1			
Department of Financial Assistance	5			1
Human Rights Commission	1			
National Sports Centre	1			
<b>Other</b>	<b>4</b>			
<b>TOTALS</b>	<b>59</b>	<b>2</b>	<b>-</b>	<b>12</b>

\* In May 2011 the Charities Commission was moved to the new Ministry of Community Development.

ABUSE OF POWER	CONTRARY TO LAW	UNFAIR/ OPPRESSIVE	MISTAKE OF LAW OR FACT	ARBITRARY	NEGLIGENT/ UNRESPONSIVE	OTHER
						1
		1			4	2
		1			1	
1		1			2	2
					1	
					1	
					1	
	1					1
					1	
					1	
					1	
					2	
2						1
		2			3	
			1		1	3
						1
		1				
						4
<b>3</b>	<b>1</b>	<b>6</b>	<b>1</b>	<b>-</b>	<b>19</b>	<b>15</b>



MINISTRY (01/08/10 - 31/12/10) # of Complaints		DECLINED		
<b>DISPOSITION OF COMPLAINTS NOT REFERRED</b>		Not in Jurisdiction	Existing Process	Time Bar/ Withdrawn
<b>Cabinet</b>	<b>1</b>			
Public Service Commission	1	1		
<b>Economy, Trade &amp; Industry</b>	<b>6</b>			
Department of Immigration – Work Permits	(2)		1	
Department of Labour & Training	6	1	5	
<b>Education</b>	<b>2</b>			
Department of Education	2		2	
<b>Environment, Planning &amp; Infrastructure</b>	<b>6</b>			
Bermuda Housing Corporation	(1)			
Department of Land Valuation	1	1		
Department of Planning	5	1	3	1
Department of Telecommunications	(1)			
<b>Finance</b>	<b>2</b>			
Accountant General Office	(1)			
Bermuda Monetary Authority	–			
Department of Social Insurance	1			
HM Customs	1		1	
Pension Commission	–			
<b>Government Estates &amp; Information Services</b>	<b>–</b>			
Charities Commission *	–			
Registry General	–			
<b>Health</b>	<b>(3)</b>			
Bermuda Hospitals Board	(3)			
<b>Justice</b>	<b>2</b>			
Attorney General's Chambers	1	1		
Bailiff's Office	(1)			1
Magistrates' Court	–			
Magistrates' Court – Legal Aid	1	1		
<b>National Security</b>	<b>8</b>			
Bermuda Fire & Rescue Service	1		1	
Bermuda Police Service	1	1		
Department of Immigration	6		3	1
<b>Transport</b>	<b>1</b>			
Marine & Ports	1		1	
Transport Control Department	(1)			
<b>Youth, Families, Sport &amp; Community Develop.</b>	<b>7</b>			
Department of Child & Family Services	1	1 / 1		1
Department of Financial Assistance	5		2	2
Human Rights Commission	1	1		
National Sports Centre	–			
<b>Other</b>	<b>4</b>	4		1
<b>TOTALS</b>	<b>39 / 22</b>	<b>13 / 1</b>	<b>18 / 1</b>	<b>3 / 4</b>

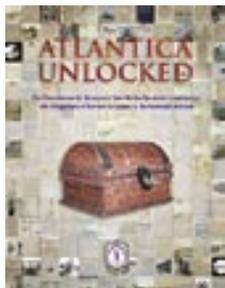
\* In May 2011 the Charities Commission was moved to the new Ministry of Community Development.

CLOSED AFTER PRELIMINARY INQUIRY OR INVESTIGATION				
Mediation/ Informal Resolution	Maladministration		No Maladministration	
	Specific Complaint Recommendation	General Practices Recommendation	Value Added	No Action
			1	
			1	
	1	1		
1				
2			1	
1				
	1			
			1	
2			1	
				1
			1	1
			1	
			1	
1		1		
7	2	2	4 / 4	1 / 1

Figures in red represent complaints remaining open at July 31, 2010 which were closed by December 31, 2010.

Number of dispositions exceeds number of complaints as some complaints had both specific and general resolutions.

## Final Update: “Atlantica Unlocked”



This final update on implementation of the recommendations made in our Own Motion Investigation into Allegations of Barriers to Access to the Bermuda Archives 2009 shows enormous progress (incomplete items are in italics). Researchers have indicated a more helpful, accessible atmosphere and process. While there is still no catalogue, the “Finding Aid to the Finding Aids” produced as Attachment 3 to our Report and the guide produced by a former staff member are now available. Researchers are delighted that they can take their own photographs. The Director, Acting Director (J. Brangman), staff, Archives Advisory Council and relevant Permanent Secretaries should be commended for their steady progress. No further updates are requested.

RECOMMENDATIONS	ACTION TAKEN TO GIVE EFFECT
<b>ADMINISTRATION</b>	
<p><b>1</b> Establish and/or publicize written access policies regarding</p> <p><b>(a)</b> updated search room procedures, including handling of documents</p> <p><b>(b)</b> which collections are freely available for view, duplication and use</p> <p><b>(c)</b> which collections are subject to access restrictions</p> <p><b>(d)</b> procedures, where applicable, for requesting permission to restricted documents</p>	<p><b>1(a)</b> A brochure on general guidelines for search room policies was produced and made available to the public in 2010.</p> <p><i>1(b) Website currently under development to be finalized by end of calendar year</i></p> <p><i>1(c) and 1(d) Access &amp; Use statements are being compiled.</i></p>
<p><b>2</b> Submit annual, itemized accounts of the Special Purpose Fund to the Archives Advisory Council (“AAC”) [parag 90 / Rebuttal 49]</p>	<p><b>2</b> The AAC was provided with reports of itemized accounts of the Special Purchase Fund in July 2009 and February 2011.</p>
<p><b>3</b> Update donor and loan agreements and advise donors of current archival standards</p>	<p><b>3</b> A sub-committee of the AAC comprising members with donor affiliations was established and developed a standard deposit agreement which was approved by the full AAC in September 2010. One agreement (of three) was signed by donor organization. <i>Others are pending the collections audit. Final agreements expected to be ready by end of calendar year 2011.</i></p>
<p><b>4</b> Develop step-by-step user friendly guidelines and/or flowcharts about how to do historical and genealogical research</p>	<p><i>4 Guidelines are currently being developed for release on upcoming website.</i></p>
<p><b>5</b> The AAC should</p> <p><b>(a)</b> act as a recourse to receive complaints from the public and advise the Minister on resolution of disputes about access</p>	<p><b>5(a)</b> There is no legal basis for the AAC to act as a conduit for complaints. However, pursuant to Section 4 of the Archives Act 1974, AAC agreed that a “suggestions” box for complaints be placed in the Public Reading Room to channel complaints to the Chairman of the AAC (<i>Cedar box currently under construction</i>). <i>The complaints procedures of the UK National Archives were tabled at the last meeting of the AAC for consideration at the next meeting.</i></p>

RECOMMENDATIONS	ACTION TAKEN TO GIVE EFFECT
<b>ADMINISTRATION</b>	
<p><b>5</b> The AAC should</p> <p><b>(b)</b> include members who are engaged in promoting heritage but may not be part of the traditional research community (for example, include representatives of the Departments of Education and Cultural Affairs as ex-officio members)</p> <p><b>(c)</b> assist in establishing policies for deaccessioning (public records may not be deaccessioned, but in the absence of donor agreements, private records may be)</p>	<p><b>5(b)</b> AAC recommended that an ex-officio representative from Education be appointed to grow archival outreach to schools and has no objections to an ex-officio from Cultural Affairs. <i>The Minister appoints.</i></p> <p><i>5(c) This must await guidance that may become available from the Deaccessioning and Reappraisal Report of the Society of American Archivists due shortly.</i></p>
<b>RESOURCES</b>	
<p><b>1</b> Prioritize</p> <p><b>(a)</b> Adlib catalogue project, using available expertise as needed and resolve security issues that might prevent web access</p> <p><b>(b)</b> accessioning of unaccessioned collections</p> <p><b>(c)</b> updating finding aids</p>	<p><i>1(a) The Department of E-Government is assisting to resolve outstanding technical/performance issues with Adlib. Clerical staff has been assigned to assist with simple data input.</i></p> <p><i>1(b) Two Bermudians have recently graduated with a Masters of Archival Science and are assigned to work on accessioning. Regimental records were completed end of March, 2011.</i></p> <p><b>1(c)</b> Updating of finding aids is on-going.</p>
<p><b>2</b> Establish and post a policy to allow for digital photography and scanning</p> <p><b>(a)</b> provide a space with adequate lighting for photography</p> <p><b>(b)</b> purchase a flatbed or book scanner</p> <p><b>(c)</b> digitize (at highest resolution) and catalogue negatives, photographs and film reels. (Negatives still deteriorate even in the conservation conditions of the Archives)</p> <p><b>(d)</b> allow the Department of Communication and Information to photograph images for any Government project</p>	<p><b>2(a)</b> Self-service photography is now possible. <i>Policy &amp; Guidelines for use of self-service photography to be developed and agreed by AAC. Archives claims that ambient lighting has proved adequate. Researchers would prefer a photographic stand with proper lighting.</i></p> <p><i>2(b) Waiting release of Capital Acquisitions funds from Budget Office to purchase scanner. Using existing photocopier/scanner for public copies. [The Archives Special Purchase Fund was over \$100,000 in 2009 and perhaps could be used.]</i></p> <p><i>2(c) The Archives made an unsuccessful Budget proposal for a digital imaging lab. The Archives is now a member of MIGAN to which funding applications may be made.</i></p> <p><b>2(d)</b> The Department of Communication and Information is now permitted to film images for Government projects under the same conditions that govern public use, except that there is no charge for the service.</p>
<p><b>3</b> Establish a policy and system for access to materials in process of arrangement and description</p>	<p><b>3</b> Unprocessed backlog collections may be made available upon special request to the Archivist &amp; under appropriate supervision. Every effort will be made to provide preliminary processing so as to make them readily available. Recently graduated Archivists assigned to work on backlog.</p>

RECOMMENDATIONS	ACTION TAKEN TO GIVE EFFECT
<b>RESOURCES</b>	
<p><b>4</b> Install a computer terminal on-site for user access to</p> <ul style="list-style-type: none"> <li><b>(a)</b> Hallett Civil Records CDs</li> <li><b>(b)</b> the donated Slave Register index (with appropriate caveats)</li> <li><b>(c)</b> negatives database</li> <li><b>(d)</b> Adlib as it comes online</li> </ul>	<p><b>4</b> The Hallett Civil Records CD, the donated Slave Register index and negatives database are now installed on-site for public access.</p>
<p><b>5</b> AAC should review, consult with the Archives and advise the Minister</p> <ul style="list-style-type: none"> <li><b>(a)</b> whether usage fees should be charged for items in the public domain</li> <li><b>(b)</b> whether there should be a waiver for scholarly and cultural works</li> <li><b>(c)</b> of a more practical and intellectually rigorous definition of 'commercial' use (to exclude break-even ventures of cultural value to the country)</li> <li><b>(d)</b> on criteria for discretion by the Archives to place other restrictions on use</li> <li><b>(e)</b> criteria and strategy for purchases, solicitation of collections, archival recovery (of Bermuda related material overseas), including: <ul style="list-style-type: none"> <li>• guidelines for what is of "historical value"</li> <li>• clear agreements for joint purchases regarding responsibility for conservation, restrictions on access, permissions for use</li> <li>• public disclosure of what is purchased and cost [an expert advises that it is doubtful whether this information could be denied under Public Access to Information Act ("PATI")]</li> </ul> </li> <li><b>(f)</b> on appropriate preparation for PATI</li> </ul>	<p><i>5(a) to 5(d) The Archives has assigned a professional staff member to prepare a report on the current fee schedule and will submit to AAC and the Minister by the end of the calendar year.</i></p> <p><b>5(e)</b> The AAC recommended that donor agreements should be drawn up for joint purchases. <i>AAC agreed to draft guidelines for "historical value" in consideration of the Archives legislated mandate and its acquisition policy.</i></p> <p><b>5(f)</b> The AAC understands that the thirty year rule in the Archives Act 1974 will be superseded by the requirements of PATI. <i>The Archives is currently refining personal data and access criteria of its collections in anticipation of PATI implementation. Work is an on-going part of appraisal and scheduling of backlog.</i>  AAC agreed that subject to PATI, public disclosure of cost was possible. However, AAC concluded that publicizing costs could be damaging to the Archives' bid on the open market and might very well push the market up. Members of the AAC also found the local market to be extremely competitive especially for Bermudiana containing visuals such as maps, pictures, photographs, stamps and first editions.</p>
<p><b>6</b> Establish guidelines for staff to assist them to respond to public queries about</p> <ul style="list-style-type: none"> <li><b>(a)</b> acquisition policies</li> <li><b>(b)</b> restrictions on access</li> <li><b>(c)</b> copyright</li> </ul> <p><b>(d)</b> use fees</p>	<p><b>6(a)</b> acquisition policy has been approved by AAC and Minister.  <i>6(b) access restrictions to be entered in cataloguing system.</i></p> <p><b>6(c)</b> Registrar General will conduct a workshop on the new Copyright and Designs Act 2004 for Archives staff and will invite Bermuda and College Library staff to attend.</p> <p><b>6(d)</b> Use fees posted on bulletin board in public search room.</p>

RECOMMENDATIONS	ACTION TAKEN TO GIVE EFFECT
<b>RESOURCES</b>	
<p>■ <b>6</b> Establish guidelines for staff to assist them to respond to public queries about <b>(e)</b> archival research</p>	<p><i>6(e) Director preparing guidelines for conducting research at the Archives for the website.</i></p> <p><i>Staff without professional education who provide reference service are being sponsored to undertake on-line graduate degrees in Archival Science to be completed within two years.</i></p>
<p>■ <b>7</b> Partner with other heritage entities and venues for exhibits and other public education</p>	<p><b>7</b> Since Ombudsman's report, there have been increased events, including: archival display at the Music Hall of Fame, travelling exhibit at Cedarbridge Academy, exhibit on piloting in conjunction with the Post Office, exhibit in Dame Lois Browne-Evans Building, participation on National Heroes Day Committee.</p>
<p>■ <b>8</b> Update and post guidelines regarding search room procedures and how to handle documents (the latter is set out on the current web page)</p>	<p><b>8</b> The Archives undertook a conservation survey of its collections which will guide Handling and Access procedures in the search room. Report received in May, 2011. <i>Reference staff will receive full orientation to the report and finding aids will be updated accordingly.</i></p>
<p>■ <b>9</b> Conduct annual audits of the stacks to ensure that materials are in proper locations</p>	<p><b>9</b> The Archives closed for two weeks and a start was made on the shelf audit. Two staff have been assigned to work on the task which is deemed essential in order to progress arrangement &amp; description.</p>
<p>■ <b>10</b> Discontinue charging veterans copying costs for their own service records</p>	<p><i>10 The Government Fees Regulations 1976 were not amended in the current budget. [Ombudsman encourages the Permanent Secretary to determine whether this can be done by policy change rather than statute amendment.]</i></p>
<b>PEOPLE</b>	
<p>■ <b>1</b> The Archives should work with the Department of Human Resources to <b>(a)</b> institute best practices for training, mentoring and experiential learning of staff</p> <p><b>(b)</b> offer management training and mentoring to the Director to improve skills in strategic and workflow planning, staff development and public relations</p>	<p><b>1(a)</b> Two sponsored trainees graduated with MA's in Archival Science and are currently completing their training contract at the Archives. <i>Two non-professional staff will be sponsored to undertake on-line degrees commencing in the fall of 2011.</i></p> <p><b>1(b)</b> Since transitioning to a new Ministry in January 2011, the Director has had the benefit of working with hands-on and supportive Permanent Secretaries, for which she is most grateful.</p>
<p>■ <b>2</b> The Archives should expand on relationships with other depositories in the local heritage community especially in order to leverage exhibit opportunities</p>	<p><b>2</b> See 7 above for excellent progress</p>

RECOMMENDATIONS	ACTION TAKEN TO GIVE EFFECT
<b>PEOPLE</b>	
<p><b>3</b> The Director must refrain from making: disparaging comments about staff in front of researchers, and similarly, comments about researchers to staff; and also from making unproven allegations about the professionalism of other exhibit spaces (one comment made to our on-site expert without any current evidence could severely damage public confidence in that space if believed)</p>	<p><i>3 Ombudsman's Note: there has been discernible improvement.</i></p>
<p><b>4</b> The Archives should follow international standards and best archival practice. In particular, deposits should not be re-arranged without consultation with the depositing authority to confirm the factual, rather than theoretical, provenance of the records</p>	<p><i>4 Ombudsman's Note: the recent graduate Archivists will be able to contribute their up-to-date knowledge and skills.</i></p>
<p><b>5</b> The work of the Records Centre is a priority which has entailed the use of overseas experts in 2001 and 2008 to train Government departments in how to manage records for eventual deposits to the Archives. It appears that retention schedules (guidelines to determine items of enduring historical or administrative value) have been completed for only four Government departments (the Director claims 21 – but these are not up to standard). Retention schedules have yet to be done for some 61 departments and quangos (five are in process). This area of archival work is important because the modern records become the historical depository of the future. This is a monumental task to which the Archives must assign senior resources</p>	<p><b>5</b> The needs assessment survey is now complete (a year long project). <i>As part of its records management programme, the Archives will offer practical training in preparation of records schedules so that departmental staff can draw up their own schedules. This will enable a larger number of departments to be served at the same time. Significant staff time (of Deputy Archivist, Appraisal Archivist and two recently graduated Archivists) are allocated to this task.</i></p>
<p><b>6</b> Accordingly, both the Director and new Deputy Director should focus on the Records Centre tasks for a period of one year, if that is required to tackle the tasks noted above. General policies and procedures of the Records Centre are likely to require some adjustments to respond to the introduction of PATI and this should be taken into account in achieving the tasks above</p>	<p><i>6 The Archives is currently consulting with other Caribbean archives to better understand how the Archives can support PATI. The Archives' survey will itself assist departments with preparation of PATI Section 5 Information Statements.</i></p>
<p><b>7</b> An overseas archivist with expertise in administration, auditing of repositories, cataloguing and PATI should be contracted to manage the Archives over-all for a period of not less than one year. Tasks for this person would include</p> <ul style="list-style-type: none"> <li><b>(a)</b> auditing the state of tasks required to bring both the Repository and the Records Centre to efficiency</li> <li><b>(b)</b> developing and/or updating all relevant policies, procedures and tools</li> <li><b>(c)</b> rationalizing and speeding up the current five year plan for electronic access</li> <li><b>(d)</b> training staff in accessioning, appraisal, arrangement, cataloguing and outreach tasks as well as reference interviews</li> <li><b>(e)</b> developing an orientation module for new staff</li> <li><b>(f)</b> supervising the strategy to prepare for PATI legislation, including any implications for the Records Centre</li> <li><b>(g)</b> mentoring the Director in administration, public relations and management of people</li> </ul>	<p><b>7</b> This management (not staff numbers) issue is being closely monitored by successive Permanent Secretaries. Researchers and staff report improvements in the research climate. Due recognition must also be given to the three month contribution late in 2010 when the Director of the Libraries was assigned as Acting Director. The Director of the Archives is also to be commended for her efforts to implement the recommendations and promote staff education.</p>

## *Annual Board Meeting of the IOI Hosted in Bermuda*



*IOI Board of Directors – standing (l-r): Alan Lai, Hong Kong; Diane Welborn, USA; Peter Kostelka, Austria; John Walters, Namibia; Rafael Ribo, Spain; André Marin, Canada; Jaeoh Lee, South Korea; Caroline Sokoni, Zambia*  
*Sitting (l-r): Arne Fliflet, Norway; Lynette Stephenson, Trinidad & Tobago; Chronox Manek, Papua New Guinea; Mats Melin, Sweden; Amina Ouedraogo, Burkina Faso; Beverley Wakem, New Zealand; Arlene Brock, Bermuda*

The International Ombudsman Institute (“IOI”) is an independent, non-political organisation established in 1978 with 150 members from 75 countries. The IOI is organised in regional chapters: Africa, Asia, Australasia and the Pacific, the Caribbean and Latin America, North America and Europe.

In June 2009 at the quadrennial conference of the IOI Arlene Brock, Ombudsman for Bermuda, was elected to the 18 member Board of Directors until 2012. The other two representatives for the Latin American and Caribbean chapter are Mexico and Trinidad and Tobago. Ms. Brock was also chosen as the Regional Vice-President.

In October 2010, Bermuda was honoured to host the Annual Meeting of the Board of Directors. The Grotto Bay Hotel provided a sun-filled backdrop for four days of intensive meetings. The Board made considerable progress on its strategy to refocus on training, the support of academic research and a stronger cooperation with international organisations. Directors did have an opportunity to visit the Dockyard including a much appreciated tour of Commissioner’s House by Dr. Edward Harris and Graham Foster’s riveting discussion of his mural.

Board Members gave interesting presentations to a meeting for the public about oversight and integrity developments in their countries – Austria, Namibia, New Zealand, Papua New Guinea, South Korea, Sweden, Trinidad & Tobago and the United States. Thank-you to Dr. Duranda Greene and Bermuda College staff for their courtesy.

## *Presentations*

### **“Sharpening Your Teeth:” Advanced Investigative Training for Administrative Watchdogs**

“Sharpening Your Teeth”, created and delivered by Ombudsman Ontario, is taught all over the world, usually for investigatory (such as police) and oversight (mainly Ombudsman) bodies. While this is a skills-building workshop for oversight agencies, it is also useful to help civil servants understand the principles and processes applied when the Ombudsman is investigating them.

There are a number of departments in Government services that must conduct investigations. Too often, people have to learn how to investigate on the job, without specialized training. Although originally designed for systemic investigations, this workshop is invaluable for conducting daily, individual investigations.

In September 2010, 55 eager and hard-working civil servants took this two day interactive course that explored the following



#### **EIGHT PRINCIPLES OF EXCELLENT INVESTIGATIONS:**

1. Investigators must be as independent as possible
2. The investigators must be trained and experienced
3. All potentially relevant issues must be identified and, where appropriate, pursued
4. The investigation must be sufficiently resourced
5. All relevant physical evidence should be preserved, collected and examined as necessary
6. All relevant documentation must be secured and reviewed
7. All relevant witnesses must be identified, segregated where practical and thoroughly interviewed on all the issues under investigation
8. The analysis of all the material gathered in the investigation should be objective and based solely on the facts

---

#### **Local Presentations by Ms. Brock:**

- Student Leadership Development Program
- Community Education Program
- Bermuda Health Council

#### **International Presentations:**

- “The Ombudsman in the Human Rights Framework” (Program on Human Rights and the Global Economy Institute; Northeastern University School of Law, Boston)
- “The Ombudsman as an Agent of Change” (Caribbean Ombudsman Association 6th Biennial Conference, Curaçao)
- “The Importance of International Ombudsman Networks” (1st Forum of the Americas of Ombudsman, Brazil)

**Mrs. Kumalae** participated in the Aspen Institute Roundtable Leadership Seminar on Racial Equity (study on how to contribute to dialogue and equity in Bermuda)

## Systemic Investigations

An Ombudsman who is just resolving individual complaints is doing only half her job. The second most important aspect of the Ombudsman's work is making recommendations for systemic improvement. One of the most important indicators of the independence of an Ombudsman is the authority to launch "own motion" investigations in the public interest. In considering where to start, what issue to pick and how to justify not conducting an own motion investigation, Ombudsmen are fortunate to have the Systemic Identification Template developed by Ombudsman Ontario. This template is an aid, not an edict. Not every category applies in every case. There may be circumstances where just one or two of them are relevant. Investigations are rarely clear-cut in any respect. Deciding if a matter has a systemic component is no exception. While the template is customized for administrative fairness investigations, it can easily be adapted to meet the needs of other types of investigations. [Extracted from *Conducting Administrative, Oversight & Ombudsman Investigations*, Gareth Jones 2009 (Director, Special Ombudsman Response Team, Ombudsman Ontario) ]

### SYSTEMIC ISSUE IDENTIFICATION TEMPLATE

Issue(s)	Briefly describe the issue(s) and briefly address the following questions: Who / What / When / Where / Why and How?	Are the facts at issue and/or would the likely fact gathering process be complex or protracted?	<ul style="list-style-type: none"> <li>• are the facts in dispute</li> <li>• will the issue likely require in-depth field investigation to ascertain the facts</li> <li>• are there a large number of potential witnesses</li> <li>• are there a large number of potential documents to gather and review</li> <li>• is more than one Ministry/ABC involved</li> <li>• will an investigation be looking at best practices in other jurisdictions</li> </ul>
Does the case have possible systemic implications?	<i>Factors to consider include:</i> <ul style="list-style-type: none"> <li>• number of complaints received on broadly similar issues</li> <li>• clearly apparent systemic issue(s)</li> <li>• does the issue encompass a range of policies/processes</li> <li>• are a large number of individuals potentially affected</li> </ul>	Would the investigation be a judicious use of resources?	Likely cost in time and other resources versus the benefits of any likely recommendations (preliminary observations – we would complete a detailed analysis before requesting the green light from the Ombudsman)  <i>Factors to consider:</i> <ul style="list-style-type: none"> <li>• location of potential witnesses</li> <li>• number of potential witnesses</li> <li>• complexity of issues</li> <li>• age of the complaint</li> </ul>
Sensitive/high profile	<ul style="list-style-type: none"> <li>• does the complaint relate to a sensitive/high profile issue</li> <li>• is the issue being debated in the legislature/media</li> </ul>	Informal resolution	Are the issues such that they will not likely be resolved informally?
Is it in the public interest to investigate?	<i>Factors to consider:</i> <ul style="list-style-type: none"> <li>• is the alleged injustice so egregious (on the face of it) that an investigation is clearly necessary</li> <li>• what other organizations are involved or investigating</li> <li>• are there any limitations to their investigation (re: Ombudsman Ontario jurisdiction; is any aspect of the issue under investigation by another org?)</li> <li>• has the issue been raised in other public forums</li> <li>• will the case likely result in significant recommendations if the complaint is substantiated in whole or in part</li> <li>• is it an issue in the legislature</li> <li>• media profile of the issue</li> </ul>		

# *Ombudsman Act 2004 “In a Nutshell”*

## **Chapter VI A, s.93A of the Bermuda Constitution 1968**

provides

- For appointment of the Ombudsman by the Governor, after consultation with the Premier who shall first have consulted the Opposition Leader.
- For removal by the Governor for inability to discharge the functions of office, misbehaviour, or engaging in any other unauthorized occupation.
- That in the exercise of her functions, the Ombudsman shall not be subject to the direction or control of any other person or Authority.

**The Ombudsman Act 2004** provides that the Ombudsman

- **Section 2** may investigate administrative decisions, acts, recommendations; failure to do an act or make a decision or recommendation; and failure to provide reasons for a decision or action.
- **Section 2** determines if there is evidence of “Maladministration” which includes actions which are inefficient, bad, improper, unreasonable delay, abuse of power (including discretionary), contrary to or mistake of law, mistake of facts, irrelevant grounds, unfair, oppressive, improperly discriminatory, arbitrary procedures, negligent.
- **Section 3** reviews administrative actions of all Government departments and boards, Public Authorities, other bodies established by Legislature or a Minister or whose revenues or fees derive from money provided or authorized by Legislature.
- **Section 5** The Ombudsman investigates administrative action of an Authority
  - pursuant to a specific complaint or on her own motion – notwithstanding that no complaint has been made – where there are reasonable grounds to carry out an investigation

in the public interest; and

- makes recommendations about the specific complaint and generally about ways of improving administrative practices and procedures.
- **Section 6** The Ombudsman may not investigate
  - until existing procedures or appeals have been exhausted unless she determines that it was not reasonable for the Complainant to have resorted to such procedures; or
  - those matters listed in the Schedule to the Act, including: administrative actions that may not be inquired into by any Court; actions taken by Cabinet, Ministers or Junior Ministers; pardon power of the Governor; action taken for investigation of crime or protecting security of Bermuda; conduct of proceedings before a court of law or tribunal; personnel and employment matters.
- **Section 7** Complaints may be made orally, electronically or in writing by a person aggrieved (or other suitable person) about actions within the last 12 months.
  - Persons detained or confined are entitled to be given a sealed envelope to write to the Ombudsman.
- **Sections 8 & 10** The Ombudsman may make preliminary inquiries before launching a formal investigation or mediation.
- **Section 9** The Ombudsman may decide not to investigate if the Complainant knew of administrative action more than one year prior to complaint; existing law or administrative procedure provides adequate remedy and there is no reasonable justification for the Complainant not to have availed himself of the remedy; the complaint is frivolous, vexatious or not made in good faith or has been settled.
- **Sections 11-13** After notifying the Authority of the intent to investigate, the Ombudsman may obtain information from

such persons and in such manner as she considers appropriate, including inspecting premises, summoning persons and examining them under oath.

- **Section 14** All information given to the Ombudsman is privileged. It is not a breach of any relevant obligation of secrecy to provide information to the Ombudsman. No person may be penalized or discriminated against in their employment for complaining or giving information to the Ombudsman.
- **Section 15** The Ombudsman makes such recommendations as she sees fit including that an omission be rectified, decision be cancelled or altered, reasons be given, practice or course of conduct be altered and an enactment be reviewed.
- **Section 16** Within 20 days of receiving the Ombudsman's recommendation, Authorities must notify her of action taken or proposed to give effect to the recommendation or reasons for failure to implement. She may submit a Special Report to Parliament if she deems the response inadequate or inappropriate.
- **Sections 17 & 24** The Ombudsman submits an Annual Report and any Special Reports to the Speaker of the House of Parliament with a copy to the Governor and a copy to the President of the Senate. The Ombudsman may not make any adverse statements in reports without giving the Authority an opportunity to be heard.
- **Sections 20 & 21** The Ombudsman and staff must maintain secrecy and are privileged from Court proceedings.
- **Sections 25 & 26** Any obstruction of the Ombudsman in the performance of her functions constitutes the offence of Contempt of Court. Intentional misleading or false statements are summary offences.

#### MANY THANKS TO:

**Dame J. Smith, W. Jones and W. McDonell**, *Ministry of Education* – for fair and compassionate review.

#### DID YOU KNOW?

##### FOR ANY COMPLAINT:

It is easier for the Ombudsman to investigate your complaints if you keep copies of your applications, receipts and other relevant documents.

When you wish to make a complaint to a Ministry – it is a good idea to address the correspondence to the Department Head and copy the Permanent Secretary.

#### MANY THANKS TO:

**Dr. D. Ming**, *Department of Immigration* – for comprehensive responses and updates.

#### DID YOU KNOW?

##### PENSION COMMISSION:

Permanent Residency Certificate holders are not eligible to participate in the Contributory Pension Plan. Must be Bermudian/Spouse of Bermudian, over 23 years of age and work more than 720 hours per year.

#### MANY THANKS TO:

**P. Sousa**, *Pension Commission* – for comprehensive and helpful response.

# How to Make a Complaint to the Ombudsman

## How do I make a complaint?

By letter, in person, telephone, fax or email:  
Suite 102, Dundonald Place, 14 Dundonald  
Street West, Hamilton HM 09

Monday - Thursday 9:00 a.m.-5:30 p.m.  
Friday 9:00 a.m.-5:00 p.m.

Tel: 441 296 6541 • Fax: 441 296 7734

complaint@ombudsman.bm  
info@ombudsman.bm  
www.ombudsman.bm

*NOTE: Please submit relevant documents  
when making your complaint.*

## What can I complain about?

- Any administrative action\* – that is, a decision, recommendation made or act done or omitted (including failure to provide reasons for a decision);
- Administrative action that appears to be bad, unfair, arbitrary, discriminatory, unreasonable, oppressive, inefficient, improper, negligent, unreasonably delayed or based on a mistake of law or fact;
- Please complain only after you have already tried to work things out with the Authority or resolve the matter through existing remedies (unless it is unreasonable to expect you to resort to such remedies).

*\* Administrative action was done within the 12 months prior to complaint*

## Who can make a complaint?

Anyone who feels personally unjustly treated by an administrative action of an Authority. A family member or other suitable person may make the complaint if you cannot.

The Ombudsman can also investigate matters on her “own motion” in the public interest although there is no specific complaint.

## How long does it take?

The Ombudsman investigates complaints as quickly as possible and therefore requests timely responses from Authorities. Many complaints can be resolved in a few weeks, but more complex complaints can take much longer.

## How much does it cost?

Services are free and available to anyone.

### DID YOU KNOW?

GOVERNMENT HEALTH INSURANCE PLAN (HIP):  
Before benefits activate you must be fully paid up  
and there cannot be a break in coverage.

### FROM THE PUBLIC:

*Thanks for being there.*

### DID YOU KNOW?

DEPT. OF PLANNING: If a house has been demolished the property is then deemed a vacant lot and the owner needs to reapply for a building permit.



*Learn more about us at*  
**[www.ombudsman.bm](http://www.ombudsman.bm)**