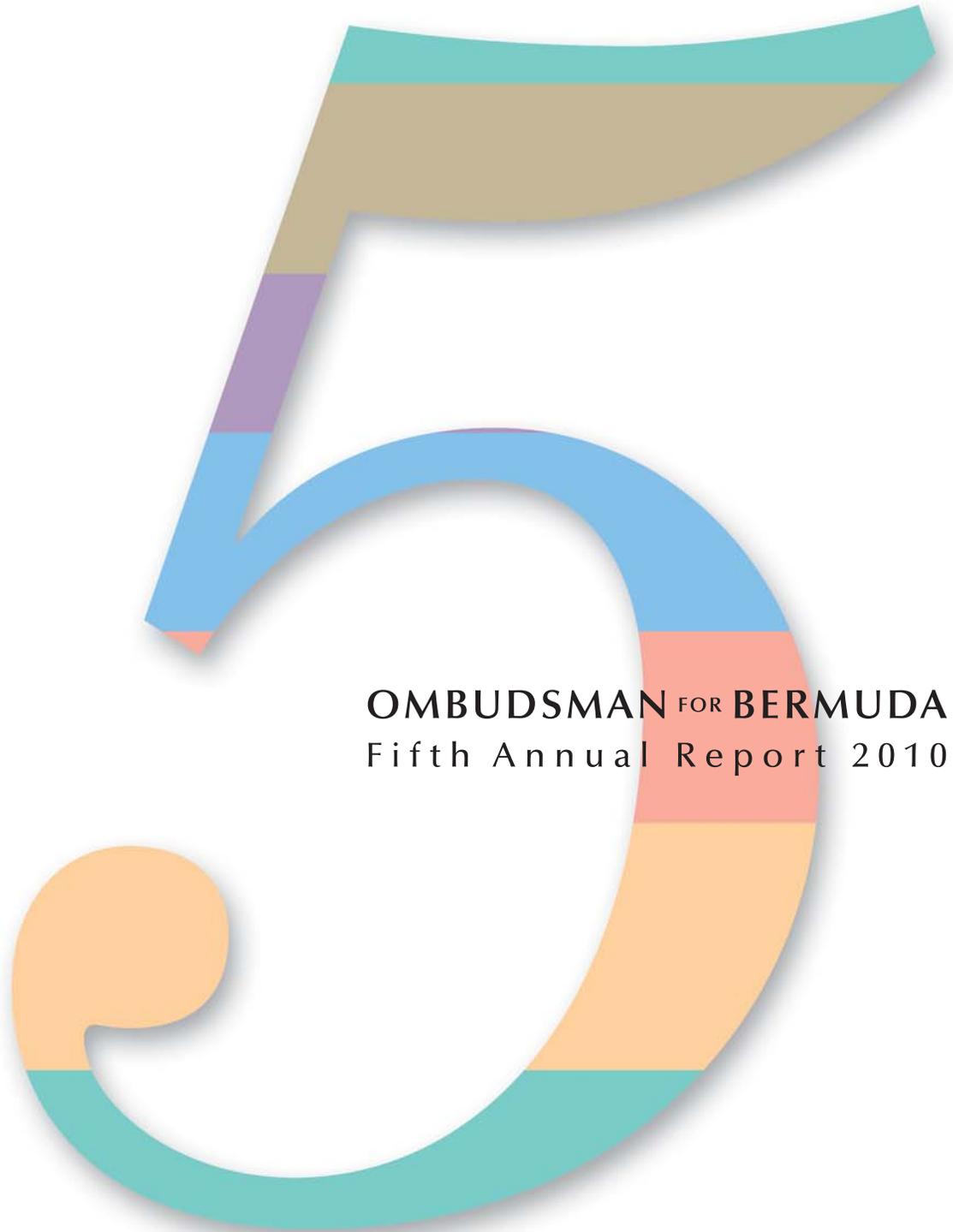
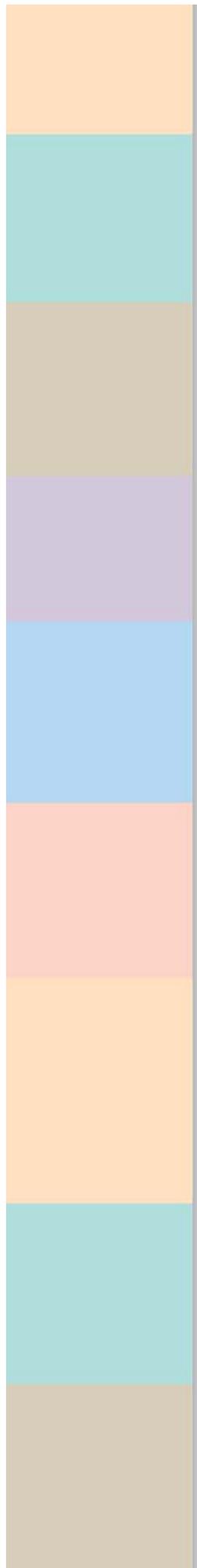


COMMEMORATING THE 5TH ANNIVERSARY OF THE ESTABLISHMENT OF THE
OFFICE OF THE OMBUDSMAN FOR BERMUDA • AUGUST 1, 2005 ~ JULY 31, 2010



OMBUDSMAN FOR BERMUDA
Fifth Annual Report 2010

*For The
Good Of
The Public*



*And Those
Who Serve
The Public*

Table of Contents

Transmittal Letter to the Speaker of the House of Assembly.....	1
Ombudsman’s Message.....	2
Selected Summaries of Closed Complaints.....	4
Updates on Previous Reports.....	18
Bermuda or Elsewhere?.....	24
International Links and Colleagues.....	27
Staff.....	30
Presentations.....	31
Statistics.....	33
Evolution of the Modern Ombudsman.....	38
Ombudsman Act 2004 “In a Nutshell”.....	40
Investigation Process.....	42
How to Make a Complaint to the Ombudsman.....	Inside Back Cover
Complaint Process Flowchart.....	Back Cover

BCDC v. BC (Ombudsman) [1984] 2 SCR. 447

“The Ombudsman’s main function came to be the investigation of complaints of maladministration on behalf of aggrieved citizens and the recommendation of corrective action to the governmental official or department involved...Any analysis of the proper investigatory role of the Ombudsman is to fulfill must be animated by an awareness of this broad remedial purpose...

The traditional controls over the implementation and administration of governmental policies and programs – namely, the legislature, the executive and the courts – are neither completely suited nor entirely capable of providing the supervision a burgeoning bureaucracy demands. The inadequacy of legislative response to complaints arising from the day-to-day operation of government is not seriously disputed. The demands on members of legislative bodies are that

they are naturally unable to give careful attention to the workings of the entire bureaucracy. Moreover, they often lack the investigative resources necessary to follow up properly any matter they do elect to pursue...

The limitations of courts are also well-known. Litigation can be costly and slow. Only the most serious cases of administrative abuse are therefore likely to find their way into the courts. More importantly, there is simply no remedy at law available in a great many cases...

The Ombudsman Act of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfill.”



February 4, 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 fifth Annual Report which covers the year August 1, 2009 to July 31, 2010.

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



The first five years of building the Ombudsman institution in Bermuda have been amazing, especially against the backdrop of an ever evolving concept. The other oversight Offices of the Constitution – the Auditor General and Public Service Commission – are well established and understood. Our first hurdle was to assist the Civil Service in defining why and what an Ombudsman is and how we operate. The few pockets of early resistance were in large part resolved by the effort to explain the unique characteristics of this role. Fortunately, in such a small jurisdiction, where Permanent Secretaries act for each other and change Ministries relatively frequently, the understanding has spread quickly. Overall, many in the Civil Service are appreciating that my statutory and personal goal is to help with ways of thinking about and improving how to fulfill the Civil Service mission: “At Your Service, Bermuda”.

My goal was made much easier after early 2007 when Ann Abraham, the UK Parliamentary Commissioner / Ombudsman, developed the Principles of Good Administration. In the first year and a half of our operations, I had been trying to provide guidance about, yet at the same time escape, highly legalistic definitions of maladministration. The UK Principles took a welcome approach. Instead of just pronouncing that a department had been found to be “bad”, the approach became: what would good administration look like? This has been invaluable in analyzing evidence and crafting recommendations. I have: referred to the UK Principles in Annual Reports since 2007; circulated them to the Civil Service Executive and Heads of Departments; and, workshopped them within entire departments as needed or requested. The UK Ombudsman notes that the Principles: *“are not a checklist to be applied mechanically. Public bodies should use their judgment in applying the Principles to produce reasonable, fair and proportionate results in the circumstances. The Ombudsman will adopt a similar approach in deciding whether maladministration or service failure has occurred”*. One great value of the international Ombudsman network is that we do not have to reinvent the wheel. This Annual Report sets out complaint summaries in context and shows how the UK Principles apply.

In the past five years we have also had many opportunities to educate the Civil Service on the relatively few Court decisions about how to interpret Ombudsman statutes, the intentions of Parliament and the appropriate response to Ombudsman recommendations. Even as a lawyer, I was initially surprised about the principles that apply to Ombudsman that are somewhat different from customary administrative law principles. In particular, Ombudsman statutes are construed broadly and liberally rather than restrictively. This Report illustrates this with excerpts from key judicial decisions in the British Commonwealth.

Members of the public often still refer to me as the “Government Ombudsman”. That is probably inevitable as there is no easy shorthand for: ‘the Ombudsman is independent of the Government but takes complaints about the delivery of Government services’. We therefore make a great effort to guard, preserve and demonstrate our independence. We make clear that I am an Officer of the Constitution and report to Parliament, not to a Minister. We have a different reporting year-end and even different operating hours. Our accounts are audited annually as a separate entity from the Government. In celebration of our fifth year, we held “Lunchtime Chats” for the public to come in, peruse our library and ask questions.

In the first four years, we received an average of 136 complaints of which about 35% were referred either back to the authority being complained about or to a more appropriate authority. This past year we received 248 complaints (of which 32% were referred). The increase can probably be attributed to greater public awareness of our work. We often spend time with complainants even for referrals, except for referrals about the Courts, police or employment matters. That is, we try to distill the crux of complaints in formal referral letters so that recipient authorities will understand exactly why we sent complainants to them.

The passage of the Public Access to Information (“PATI”) statute is an excellent development in Bermuda’s democracy. We have had just a handful of complaints in the last five years requesting the disclosure of information (other than reasons for decisions), however there is absolutely no doubt that when the PATI structure is built, requests will come. Ombudsman and other similar investigations are, of course, exempt from disclosure under this law. Confidentiality of investigations is critical in order to ensure the integrity of and public confidence in the institution. Information arising in Ombudsman investigations is legally privileged and protected from disclosure even in the Courts. Therefore, authorities should file and maintain all correspondence with our office separately from their regular files to avoid disclosure by the back door of information that cannot be acquired through the front door.

The most interesting definition of the Ombudsman which is likely to gain currency globally in the next decade or so is the recognition that Constitutional oversight institutions constitute a separate arm of the Government – not Judicial, Legislative or Executive. Research set out later in this Report notes that the concept of: *“the Integrity or Accountability branch of Government is a practical recognition of how constitutions have evolved”*. In Bermuda we also have statutory bodies that should, in practice, operate with similar independence as the Constitutional institutions. Full transparency and accountability in our democracy will be achieved with the structural and functional independence of the Human Rights Commission, Parliamentary Registrar, Police Complaints Authority, impending Information Commissioner as well as administration of the Judiciary and the Legislature.

The strategic plan for the final three years of my tenure include consolidating our systems, processes and training as well as developing systematic complainant feedback. I thank the public for bringing interesting matters to our attention and the Ministries and Civil Service for being willing to accept new ideas for improving the delivery of public services. Our progress thus far would have been impossible without my phenomenal staff – for whom I am daily indebted and thankful.



Arlene Brock
Ombudsman for Bermuda

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, a calendar year would make it much easier and more efficient to collate and cross-reference the statistics.

Accordingly, I will submit a report for the period August 1, 2010 to December 31, 2010 on June 30, 2011. Thereafter, 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*.

Selected Summaries of Closed Complaints

Re Alberta Ombudsman Act [1970] 10 DLR. (3d) 47

"In the past the Courts were the bulwark of individual rights, but the common law has lost much of its flexibility and is no longer an effective instrument for remedying the wrongs of modern administrative action...The purpose of an ombudsman is provision of a 'watch-dog' designed to look into the entire workings of administrative laws...

As an ultimate objective, the ombudsman can bring to the Legislature his observations on the misworking of administrative legislation. He can also focus the light of publicity on his concern as to injustices and needed change. It must, of course, be remembered that the ombudsman is also a fallible human being and not necessarily right. However, he can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process, if not; no harm can be done in looking at that which is good."

Ministry of Economy, Trade & Industry

Department of Labour and Training ("Labour")

Labour aims to be flexible and informal in dealing with employment complaints. However, the failure to write formal closure letters leaves some complainants confused about the disposition of their complaints. Several then come to the Ombudsman in their quest for completion and clarity. The Ombudsman has repeatedly recommended that Labour practice adequate and clear communication in the form of written correspondence (as previously expressed in the 2008 and 2009 Annual Reports).

During this reporting year the Ombudsman again had seven similar complaints. Each time Labour appears to understand the need to be open and accountable and each time agrees to provide clear written communication to complainants. Yet as the following two summaries demonstrate, challenges in this regard persist.

Unfair Dismissal

Employee A was dismissed from his corporate position and felt he was unfairly terminated. He complained to Labour. His former employer offered him several settlement packages but Employee A refused because they would not clear his employment record. For ten months Labour assured Employee A that he would receive updates at specific times but Labour failed to contact him. He was becoming anxious about the delay because the statutory deadline to file a civil case against his former place of employment was looming.

Labour stated that they would send the complaint to the Employment Tribunal ("Tribunal") to be heard. Employee A was not given any indication when the proceedings would begin. Employee A complained to the Ombudsman and she investigated.

The Ombudsman found maladministration on the basis of unreasonable delay for 20 months before the case was heard by the Tribunal. Labour wrote a "without prejudice" apology, and agreed to amend their communication protocols to ensure regular updates to complainants. Labour also agreed to institute adequate and clear communication in the form of written conclusions.

Given her concern about the procedures, the Ombudsman requested that the entire department attend a presentation on the UK Principles of Good Administration.

Department of Labour and Training ("Labour")
Department of Immigration ("Immigration")

Proper Case Handling

In 2009 the Ombudsman conducted a workshop on the Principles of Good Administration developed by the UK Ombudsman for the entire staff at Labour. *Principle four: Fairness* requires that investigation bodies take into account both the law and all available and relevant facts. Proper decision-making should give due weight to all relevant considerations and balance the evidence appropriately. Public bodies should state their criteria for decision-making and reasons for their decisions.

Expatriate Employee B was terminated from her place of employment a week before her contract was up. She complained to Labour about her employer's reasons for termination. Subsequently, she complained to the Ombudsman as she was concerned that her unfair dismissal complaint against her employer was not adequately investigated by Labour. Serious implications resulted from Labour's treatment of her complaint. Immigration had relied on Labour's report and recommended to the Minister that Expatriate Employee B's appeal to reside and seek employment be denied. The Ombudsman investigated and found no maladministration on the part of Immigration.

However, the Ombudsman found that Labour did not set out its conclusion in writing to Expatriate Employee B that the summary dismissal was justified. This is contrary to an Ombudsman Recommendation in 2008 and 2009 that Labour be accountable with writing closure letters in accordance with General Recommendations.

Further, during its investigation Labour did not give Expatriate Employee B the opportunity to respond to all allegations made by her employer. Labour did not fairly consider the responsibilities and relative autonomy under which Expatriate Employee B had worked for about 10 months of her tenure. Finally, Labour did not consider the possible motives of the employer for termination including her claim that the employer may have breached the Employment Act 2000. Moreover, Labour's report to Immigration did not fairly and equally set out the concerns and rebuttals of Expatriate Employee B as well as it set out the concerns of the employer.

The Ombudsman noted in her Report and Recommendation of this matter: *"The Department of Labour is a pivotal handler of complaints in Bermuda. It must often evaluate competing, often diametrically opposed, versions of truth. Accordingly, Labour*

UK Principles of Good Administration: Acting Fairly and Proportionally

Public bodies should always deal with people fairly and with respect. They should be prepared to listen to their customers and avoid being defensive when things go wrong.

Public bodies should treat people equally and impartially. They should understand and respect the diversity of their customers and ensure equal access to services and treatment regardless of background or circumstance.

The actions and decisions of a public body should be free from any personal bias or interests that could prejudice those actions and decisions, and any conflict of interests should be declared. Public bodies should not act in a way that unlawfully discriminates against or unjustifiably favours particular individuals or interests.

People should be treated fairly and consistently, so that those in similar circumstances are dealt with in a similar way. Any difference in treatment should be justified by the individual circumstances of the case.

FROM THE PUBLIC:

I really, really appreciate your help.

UK Principles of Good Administration: Acting Fairly and Proportionally

When taking decisions, and particularly when imposing penalties, public bodies should behave reasonably and ensure that the measures taken are proportionate to the objectives pursued, appropriate in the circumstances and fair to the individuals concerned.

If applying the law, regulations or procedures strictly would lead to an unfair result for an individual, the public body should seek to address the unfairness. In doing so public bodies must, of course, bear in mind the proper protection of public funds and ensure they do not exceed their legal powers.

FROM THE PUBLIC:

I thank the Ombudsman for her attention to this matter and to Ms. Dill for her assistance. I am happy with the result. I hope your investigation brought to the fore the necessity for improvement in the Department's procedures.

cannot focus on narrow, technical constructions of the issues. In all cases, to the extent that it is possible to inquire into and understand the full context, then Labour must do so. When a complaint is about 'unfair dismissal' Labour must not look only at the strict construction of narrow points of law but must also be alert to whether 'grey areas' in the evidence might contribute to the assessment of whether or not there has been a breach of the Act. Accordingly, Labour should be diligent to seek out all relevant facts."

In this regard, the Ombudsman noted a decision of the Federal Court of Canada for human rights investigations: *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 at paragraphs 55 and 56 sets out a duty of procedural fairness in investigations: "An HRC decision on whether a complaint is warranted must be based on a thorough investigation of the complaint. Such investigation may lack the legally required degree of thoroughness if the investigator failed to pursue obviously crucial evidence."

Fair Treatment of Guest Workers

The situation of Expatriate Employee B raised another issue with broad implications for all agencies and persons who must deal with our increasingly diverse workforce. In a Bermuda that has accepted so many people of other cultures and language capabilities, Labour is tasked with investigating increasing complaints by guest workers. In these cases, Labour's reports to Immigration affect not only whether complainants can hold onto their jobs, but also whether they will be required to return to their home countries.

Labour thus acts as the first and often only line of defense against oppression and intimidation of workers who may not feel comfortable approaching other levers of power that Bermudian workers may feel more able to access (e.g. Parliamentary representatives). Labour must therefore ensure that its investigations are cognizant of power imbalances between employers and guest workers. Accordingly, Labour should be careful to evaluate evidence provided by such complainants in the context of cultural reticence and intimidation when dealing with Government authorities.

In this regard, the Ombudsman noted research in the UK regarding the non-assertiveness of immigrants in tribunal hearings. The study found that in the waiting rooms, minutes before entering tribunal hearings, certain populations (especially from South Asia) fluently articulated their concerns. However, once inside – when faced with authority figures – they literally lost their tongues, failed to assert their rights and gave the impression of being confused, even non-credible witnesses: "Observation during hearings revealed

deep and fundamental differences in language, literacy, culture, education, confidence and fluency, which cross ethnic boundaries and significantly affected users' ability to present their case." [Tribunals for Diverse Users: Professor Hazel Genn, Ben Lever, Lauren Gray with Nigel Balmer and National Centre for Social Research, 2006] http://www.dca.gov.uk/research/2006/01_2006.htm (click "Executive Summary").

GENERAL RECOMMENDATIONS: DEPARTMENT OF LABOUR & TRAINING

The Department should study the Principles of Good Administration and Good Complaint Handling with respect to being Open and Accountable as delineated by the Parliamentary and Health Service Ombudsman of the UK (see http://www.ombudsman.org.uk/improving_services/principles/index.html) with a view to ensuring: (a) written communication that clarifies the stages of the Department's processes; (b) full and accurate references to governing statutes; and (c) reasons for all decisions and conclusions.

The Department should develop a clear process for responding to Complainants who may have questions about the substance or implementation of a Tribunal decision. Complainants should be given accurate information about the next stage of the complaint process. The Department may benefit from a review of Principles of Good Complaints Handling (www.ombudsman.org.uk).

All reports and referrals sent to the Tribunal should be properly dated. In particular, referrals to the Tribunal should specify the date sent.

Competent administrative support for the Tribunal should be provided.

Information regarding the complaint process and deadlines should be accurately communicated to Complainants.

Labour should review employment contracts as a matter of course when investigating complaints. Labour's reports to Immigration should fairly state the context of complaints with their findings and reasons for their conclusions. Labour must honour its agreement to my previous General Recommendations that all complaints are closed with formal explanatory letters.

UK Principles of Good Administration: Seeking Continuous Improvement

Public bodies should review their policies and procedures regularly to ensure they are effective; actively seek and welcome all feedback, both compliments and complaints; use feedback to improve their public service delivery and performance; and capture and review lessons learned from complaints so that they contribute to developing services.

FROM THE PUBLIC:

I was pleased to receive in today's mail the brochure from the Rent Commissioner. This is another example of a Govt. Dept. giving information freely. In this case it is the Ministry of Energy, Telecommunications & E-Commerce under which the Dept. of the Rent Commissioner falls.

In response to reading of our involvement in this matter in our fourth annual report.

**R. v. Commissioner for
Local Administration, ex
parte Doy, QBD Case No.:
CO/2243/2000**

"The principles of law that must be applied are well known and clear. In essence, the Ombudsman and not the court is the arbiter of what constitutes maladministration. The court's supervisory role is there to ensure that he has acted properly and lawfully. However much the court may disagree with the ultimate conclusion, it must not usurp the Ombudsman's statutory function. It is likely to be very rare that the court will feel able to conclude that the Ombudsman's conclusions are perverse, if only because he must make a qualitative judgment based upon his [department's] wide experience of having to put mistaken administration onto one side of the line or the other. I have to say that in this case I would not have made the same judgment as the Ombudsman; but I am not asked to make any personal judgment and the real question is whether any reasonable Ombudsman was entitled to hold the view expressed in this careful report."

General Post Office ("GPO")

Mail DELIVERED!!!

The GPO had a sometimes rocky transition to the new delivery procedures resulting from the 2009 amendments to the Post Office Act 1900. The intention was to make postal delivery more efficient by requiring individual residential postal boxes to be as close as possible to the main road and cluster boxes for multiple unit businesses and residences.

With respect to cluster boxes, **Retailer C** complained that the 2009 amendments were arbitrary, unreasonable and oppressive. She stated that her business as well as others in the multilevel commercial property were being penalized because the property owner had not installed cluster boxes. She was not able to notify her vendors and other contacts (especially overseas) of a suitable address. Further, she believed that the deadline for commercial businesses to comply with the legislation was insufficient.

The Ombudsman made inquiries of the GPO who agreed to accommodate the businesses in this location. In this case the Ombudsman concluded that the deadline was not reasonable but did not further investigate as the GPO agreed to fair and flexible processes to resolve this complaint.

There are also concerns that the "Return to Sender" policy is far too strict for a small jurisdiction like Bermuda when compared with overseas best practices. My conclusions on a complaint in this regard will be reported in next year's Annual Report.

Ministry of Environment, Planning & Infrastructure

Department of Planning ("Planning")

Our Mistake...Application Rectified

An Ombudsman who recommends resolutions only for individual complaints may be doing a decent job, but only half of her job. Individual complaints invariably uncover opportunities to improve processes generally.

Developer D was aggrieved that Planning did not respond for months to repeated requests for status updates of his application. After inquiries by his agent Planning stated that due to an administrative oversight the application had not received a building permit. The application would be fast tracked to make up the delay. After an additional 10 weeks of not having the documents returned, Developer D complained to the Ombudsman.

The Ombudsman found maladministration for the delay in processing the application and in responding to Developer D's inquires. In fact, Planning failed to comply with s.7 (6) and (9) of the Building Act 1988 which states Planning shall, within eight weeks from the deposit of the plans, or such extended period which is agreed in writing (but not exceeding six months), notify the person for whom the plans were deposited whether they have been rejected or passed. The Department wrote a "without prejudice" apology to Developer D. Further, as a result of this complaint Planning agreed to conduct a weekly cross-check of the application register and the applications placed in the Approval Box to ensure applications are processed sequentially. In addition, a Permits Processor was hired whose responsibilities will emphasize proper processing of applications.

Department of Planning ("Planning")

Principle of the Matter

One benefit of being in a small jurisdiction is that not much is hidden. People are very quick to complain about public officers who appear to have a "do as I say, not what I do" approach, even if the alleged infraction by the public officer is minimal.

Homeowner E complained that his neighbour, a planning officer, erected a PVC pole within the setback boundary of his property without his consent and without Planning permission. Planning's investigation found that the pole was only 3" in diameter and was not a matter about which they would ordinarily take any type of formal action. Homeowner E approached the Ombudsman's Office aggrieved at the principle of a civil servant not fully complying with the law.

Since the harm of the PVC pole was negligible, the Ombudsman found no maladministration on the part of Planning. The Department did speak to staff about the need to be sensitive to public perceptions and to act in private matters at the highest professional standards.

UK Principles of Good Administration: Being Open and Accountable

Public administration should be transparent and information should be handled as openly as the law allows. Public bodies should give people information and, if appropriate, advice that is clear, accurate, complete, relevant and timely.

Public bodies should be open and truthful when accounting for their decisions and actions. They should state their criteria for decision making and give reasons for their decisions.

Public bodies should handle and process information properly and appropriately in line with the law. So while their policies and procedures should be transparent, public bodies should, as the law requires, also respect the privacy of personal and confidential information.

Public bodies should create and maintain reliable and usable records as evidence of their activities. They should manage records in line with recognised standards to ensure that they can be retrieved and that they are kept for as long as there is a statutory duty or business need.

Public bodies should take responsibility for the actions of their staff.

**Ainsworth v. Ombudsman
(1988) 17 NSWLR 276**

"It has always been considered that the efficacy of the [Ombudsman] Office and function comes largely from the light [he] is able to throw on areas where there is alleged to be administrative injustice and where other remedies of the Courts and the good offices of Members of Parliament have proved inadequate. Goodwill is essential. When intervention by an Ombudsman is successful, remedial steps are taken, not because orders are made that they may be taken, but because the weight of its findings and the prestige of the office demand that they be taken."

UK Principles of Good Administration: Being Customer Focused

Public bodies should treat people with sensitivity, bearing in mind their individual needs, and respond flexibly to the circumstances of the case. Where appropriate, they should deal with customers in a co-ordinated way with other providers to ensure their needs are met; and, if they are unable to help, refer them to any other sources of help.

Ministry of Finance

*Government Employee Health Insurance ("G.E.H.I.")
Office of the Accountant General*

80% Reimbursement on Insurance Claim and Change in Procedure

Section 5(1)(b) of the Ombudsman Act 2004 provides that pursuant to an investigation the Ombudsman can make recommendations to the authority concerning any administrative action that formed the subject of the investigation and, generally, about the ways of proving its administrative practices and procedures.

The following is a good example of a situation where the resolution of a single complaint led to an improvement in general practices and procedures.

During her pregnancy **Patient F** received five chicken pox vaccines. When she submitted her reimbursement claim to G.E.H.I. she received only \$50. She was told that this was the set payout rate for that particular type of vaccine. Patient F was not satisfied with the amount of her reimbursement and made numerous requests for a copy of G.E.H.I.'s reimbursement policy. She never received it.

Patient F sought the help of the Ombudsman. In response to the Ombudsman's inquiries, G.E.H.I. stated that because Patient F's Current Procedural Terminology "CPT" code which is usually provided by physicians was missing, her application for reimbursement was not processed. In addition G.E.H.I. was not familiar with her private clinic. As a result of the Ombudsman's inquiries G.E.H.I. referred the claim to the Health Insurance Association of Bermuda who confirmed that the vaccinations were necessary for the health of the unborn baby.

The Ombudsman found maladministration on the part of G.E.H.I. for failing to adequately explain the reimbursement policy and not returning Patient F's phone calls. The Ombudsman recommended that G.E.H.I. write a "without prejudice" letter of apology to Patient F. She was also reimbursed 80% of the cost in accordance with G.E.H.I.'s Schedule of Benefits. As a result of this complaint G.E.H.I. has improved its procedures for monitoring phone calls. G.E.H.I. also met with Patient F's clinic to clarify required information.

*Government Employee Health Insurance ("G.E.H.I.")
Office of the Accountant General*

Over \$17,000 Paid to Cover Medical Expenses

Authorities often feel as if they are between a rock and a hard place. Sometimes they feel compelled by law or policy to deny a benefit to someone facing hardship. While the Ombudsman would not recommend that an authority do something contrary to its law, the Ombudsman must sometimes stand as a reminder of reason against "Rule-itis". André Marin, the Ombudsman for Ontario, argues:

"The slavish adherence to rules is the source of many of the most egregious problems we see...I appreciate the importance of rules, policies and guidelines. I know the dangers that untrammelled discretion poses. If there is one thing I learned in my prior incarnation as a lawyer, it is that rules, policies and guidelines exist for a reason. They are meant to prevent arbitrary treatment and to enable correct and sound decisions to be made. But they are not foolproof. They are, by their nature, general and they therefore fail to account intelligently for every situation. No rule is intended to be self-defending, to be applied even when it will produce perverse results. Rules have to be understood and applied according to their underlying purposes...there are too many times when government agents choose the simple and safe route of mechanically and reflexively following rules, rather than finding ways to solve problems."

One complaint against G.E.H.I. illustrated the difficult decisions that authorities must sometimes make: **Mother G's** son had undergone two failed surgeries at facilities within the hospital network approved by G.E.H.I. One was in Bermuda and the other overseas. Neither surgery repaired the problem and both caused further damage. The mother found a specialist outside of the network and proceeded with the surgery. This surgery worked. Her son would be able to function as normal now.

G.E.H.I. pays for overseas treatment only at specific hospitals within the network. The purpose of this rule is to ensure value for money. To the extent possible, Bermudians should be treated at network treatments whose costs have been approved by G.E.H.I. But even more than cost-savings, the priority consideration must be the quality of care. The Bermuda and overseas network treatments failed. The specialist non-network facility succeeded.

G.E.H.I. declined payment of the bill as the fees were higher at the specialist hospital than at those within the network. The Ombudsman recommended that G.E.H.I. consult

UK Principles of Good Administration: Being Customer Focused

Public bodies should provide services that are easily accessible to their customers. Policies and procedures should be clear and there must be accurate, complete and understandable information about the service.

Public bodies should aim to ensure that customers are clear about their entitlements; about what they can and cannot expect from the public body; and about their own responsibilities.

Public bodies should do what they say they are going to do. If they make a commitment to do something, they should keep to it, or explain why they cannot. They should meet their published service standards, or let customers know if they cannot.

Public bodies should behave helpfully, dealing with people promptly, within reasonable time-scales and within any published time limits. They should tell people if things take longer than the public body has stated, or than people can reasonably expect them to take.

Public bodies should communicate effectively, using clear language that people can understand and that is appropriate to them and their circumstances.

**Public Services Ombudsman
v. H.M. Attorney General for
Gibraltar [17th April 2003]
Supreme Court of Gibraltar
[Claim No.: 2002 T 283]
(applying the
Supreme Court of Canada
BCDC case):**

"I do not think the remedial nature of the Ombudsman Act could fairly be doubted. The objects of the legislation and the degree to which it should receive a large and liberal interpretation can best be understood by examining the scheme of the statute as well as the factors that have motivated the creation of the Ombudsman's office...Only the most serious cases of administrative abuse are likely to find their way into the courts. More importantly, there is simply no remedy at law available in a great many cases...There is a large residue of grievances, which fit into none of the regular legal moulds, but are nonetheless real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country."

with an independent surgeon to determine the quality of the specialist surgeon and the procedures he used.

Their consultant reported that the physician: *"is a world renowned sports medicine surgeon..."*. G.E.H.I. paid Mother G the usual and customary rates for in-network facilities. Mother G received \$17,496.36 in payments.

**GENERAL RECOMMENDATION:
OFFICE OF THE ACCOUNTANT GENERAL – G.E.H.I.**

G.E.H.I. should take care not to speak "in code" to the public and be clear about what information is required.

Ministry of Health

Department of Health ("Health")

Reimbursement of \$500 Deposit

Often departments want to be helpful about matters that are beyond their job description. They sometimes promise to "look into" a complaint but find that they are unable to effect a resolution. Complainants take no further action while they wait and rely upon the Department to resolve the issue. Then the Complainant comes to the Ombudsman upset that the Department did not fulfill its promise. Departments feel put upon because the matter is not something they were required to help with and they feel persecuted for trying to be helpful.

The principle, from a maladministration perspective, is that if you make a promise that the public is likely to rely on, then you have to make best efforts to fulfill the promise. Otherwise, you should quickly communicate why you cannot do so.

Patient H was scheduled to undergo a medical procedure but later decided to cancel after paying a \$500 deposit to her Dr. X. She requested a refund of her deposit but when he did not respond she contacted Health who promised to put it before the Bermuda Medical Council ("Council").

Two weeks later she complained to the Ombudsman's office and we told her that she had to give the authority more time to work on the matter. Nevertheless we contacted the authority in an effort to understand the Council's procedures. Health stated that it was looking into the complaint and that Patient H would receive a response in two months. The Ombudsman was satisfied with this (apparent) informal resolution and did not launch an investigation.

However a year later Patient H complained that Health still had not contacted her. The Ombudsman investigated. Health informed the Ombudsman that they previously informed Patient H that financial matters were not within the jurisdiction of the Council. However it was agreed that in the next meeting they would conclude the review of the matter. Three months later the Ombudsman's office still did not have an update. Health stated that they would get in contact with Dr. X who claimed that he had, in fact, issued a cheque for the refund but Patient H never collected it. After some time the cheque was voided. He refused to reissue another one.

The Ombudsman found maladministration due to unreasonable delay (some 19 months) in resolving this matter and recommended that Health write a "without prejudice" apology to Patient H. Eventually, through further persistence by Health Dr. X refunded Patient H's deposit.

Ministry of National Security

Bermuda Housing Trust Board ("BHT")

Leaky Windows Repaired

Section 3 of the Ombudsman Act 2004 provides that authorities within jurisdiction are:

- (a) government departments
- (b) public authorities
- (c) government boards; and
- (d) any other corporation or body –
 - (i) which is established by Act of the Legislature or in any other manner by a Minister; or
 - (ii) whose revenues derive directly from money provided by the Legislature or a fee or charge of any other description authorized by the Legislature.

UK Principles of Good Administration: Putting Things Right

When mistakes happen, public bodies should acknowledge them, apologise, explain what went wrong and put things right quickly and effectively.

Putting things right may include reviewing any decisions found to be incorrect; and reviewing and amending any policies and procedures found to be ineffective, unworkable or unfair, giving appropriate notice before changing the rules.

The actions of a well-run public body can sometimes bear more heavily on an individual because of their particular circumstances, even though statutory duties, service standards or both have been met. Public bodies should be alert to this and respond flexibly to avoid or, where appropriate, put right any such undue effect.

Public bodies should provide clear and timely information about methods by which people can appeal or complain. They should provide information about appropriate organisational or independent ways of resolving complaints. They should also consider providing information about possible sources of help for the customer, particularly for people who may find the complaints process daunting.

UK Principles of Good Governance: Putting Things Right

Public bodies should operate effective complaints procedures which investigate complaints thoroughly, quickly and impartially; and which can provide an appropriate range of remedies to the complainant and any others similarly affected when a complaint is upheld. As a minimum, an appropriate range of remedies should include an explanation and apology from the public body to the complainant, remedial action by the public body, financial compensation for the complainant or a combination of these. The remedy offered should seek to put the complainant back in the position they would have been in if nothing had gone wrong. Where this is not possible – as will often be the case – the remedy offered should fairly reflect the harm the complainant has suffered.

DID YOU KNOW?

WORK PERMIT: Immigration often issues temporary work permits before issuing long-term permits. The temporary period worked is not included in the calculation of whether you have worked in Bermuda for two years or more.

Although the BHT did not challenge the Ombudsman’s jurisdiction, we needed to be sure that the BHT was within jurisdiction as the Bermuda Housing Corporation’s website describes the BHT as: *“an independent, non-government, non-profit organization.”* This raised the question of whether or not the BHT was a “public authority”.

A 2007 judgment of the Supreme Court of Bermuda determined that since the Minister appoints the BHT Board, it is effectively “Government controlled” within the definition of the Audit Act 1990. Accordingly, the Ombudsman would have jurisdiction.

Tenant I and **Tenant J** lived in condos owned by the BHT. From the time they moved in the Tenants had problems with leaky windows which damaged their floors and walls. The Tenants complained to the BHT for two years and were told that the matter would be looked into but the problem continued unresolved.

The Ombudsman spoke with the Chairman of the BHT and soon after the discussion he arranged to have the windows fixed.

Ministry of Public Information Services

Charities Commission (“Commission”)

What’s Our Name?

Registration under the Charities Act 1978 (“Act”) entitles a registered organization to raise funds (per s.4(2) of the Act). Phenomenal Women’s Inc (“Inc”) felt aggrieved that a few months after they were granted a Certificate of Registration the Commission registered another charity with a substantially similar name – Phenomenal Women’s Association (“Association”). Both organizations were established by civic minded persons who contribute to Bermuda and share similar goals. Although inadvertent, the registrations of names that were too similar constituted maladministration. The maladministration was the direct cause of past and possible ongoing confusion in the public’s understanding about the two organizations. Not only were the banks confused and charged the wrong group bank fees, but also a donor actually gave funds to the unintended charity.

The fairness issue facing the Commissioners in considering re-registration of Association was that the charities were founded and launched activities within months of each other.

Inc registered first and now has a trademark. Association launched activities first. Both have established public identities. The Ombudsman felt that neither should be penalized as they both were allowed to register and continue their activities with similar names in the first instance.

The Ombudsman noted that Inc, Association and even the Commission itself are identical in one important way. They are all comprised of people who are committed to using their time, effort and resources to make a difference in Bermuda. Each group has a role to play according to their vision and focus. The Commissioners are well known persons who have contributed to a multiplicity of organizations, projects and Government boards over the years. In their short tenures, both Inc and Association had succeeded in engaging passionate new volunteers. The Ombudsman stated in the report of her Recommendations: *"Accordingly, I am mindful of the imperative to encourage rather than alienate the voluntary sector. My Recommendations therefore unabashedly aim to find some middle ground that will allow both Inc and Association to co-exist."*

After considerable discussion with both groups they agreed to change their names to avoid future confusion. Inc is now: *"Phenomenal People...Living Loving & Learning"*. Association is now: *"Young Phenomenal Women Association"*.

The Ombudsman recommended (1) an amendment to the Charities Act 1978 to prevent this situation from recurring, (2) the Registrar General list the names of charities in alphabetical order using a uniformed rule for definite articles (3) the Ministry (formerly Culture and Social Rehabilitation) pay for appropriate media advertisement to notify potential donors and the public at large of the purposes, officers – and differences – of the two organizations. The advertisement was published on March 31, 2010.

GENERAL RECOMMENDATION: CHARITIES COMMISSION

The Charities Commission should consult with the Ministry and Registrar-General to

- (a) establish adequate administrative support for the Commission
- (b) determine best practices for form of Register and vetting of applications
- (c) review the Charities Act 1978 and set out general policies (per s.5(4) of the Act) to grant the Commission the power to require name changes where warranted and to update the Act based on other challenges faced by the Commission.

Re Board of Commissioners for the City of Saskatoon et al. and Tickell [1979] states: *"It was the purpose of the Ombudsman Act to bring before the Legislature, Minister or other responsible party, all injustices that the Ombudsman was authorized to investigate. The intention of the legislature could be defeated by placing a restrictive interpretation on those sections of the statute where no restrictions are specifically mentioned."*

The Tasmanian Court in Anti-Discrimination Commissioner v. Acting Ombudsman [2002] TASSC 24 held that the powers of the Ombudsman: *"are, as they ought to be, extremely wide. They are not powers which this Court should read down. They are beneficial provisions designed in the public interest for the important object of improving public administration and increasing its accountability... whilst it may be expected that the Ombudsman will conform to the statute establishing his office, a large power is intended. The words of the Ombudsman Act should be given an ample meaning"* [affirming *Botany Council v. The Ombudsman (1995) 37 NSWLR 357*].

**Heather Moore &
Edgecombe Ltd v. Financial
Ombudsman Service [2008]
EWCA Civ 642**

"An efficient and cost-effective and relatively informal type of alternative dispute resolution should not be stifled by the imposition of legal doctrine... the Ombudsman is free to depart from the common law [but should take it] into account in deciding what was fair and reasonable in the circumstances of the case...if the Ombudsman considers that what is fair and reasonable differs from English law, or the result that there would be in English law, he is free to make an award in accordance with that view, assuming it to be a reasonable view in all the circumstances." [c.f. "see fit" recommendations – s.15(3) of the Ombudsman Act 2004]

DID YOU KNOW?

BERMUDA HOUSING TRUST houses people who meet the eligibility criteria listed in the Financial Assistance Regulations 2004.

**Bermuda is not Another World:
The application of international human rights law**

One Government Department questioned whether the Ombudsman may make recommendations if there is no finding of maladministration. Section 15 of the Bermuda Ombudsman Act 2004 ("Act") lists the kind of remedies that can be recommended when there is maladministration. For example, the Ombudsman may recommend that Government authorities cancel, alter or rectify decisions or courses of conduct, provide reasons for decisions, or review laws and regulations.

However, Section 5 of the Act states that, pursuant to an investigation, the Ombudsman may make recommendations *generally* about ways of improving administrative practices and procedures. This section does not limit recommendations to those situations where there are findings of maladministration. Logically, it would be somewhat counter-productive if the Ombudsman were to (a) investigate (b) find no maladministration (c) nevertheless see ways of improving (d) but not bother to say anything.

In fact, Court decisions throughout the British Commonwealth have established that ombudsman statutes must be given a purposive, liberal and broad interpretation. Ombudsman practice may be restricted only by express provisions and language in the statutes.

There was an interesting case where no maladministration was found as the department had, in fact, followed the law. Nevertheless, the Ombudsman recommended that the law be reviewed. The Human Rights Act 1981 protects specific categories of people against certain forms of discrimination. The Ombudsman has a residual jurisdiction regarding discrimination and may investigate complaints of: *"administrative action that is unfair, oppressive or improperly discriminatory or based on procedures that are unfair, oppressive or improperly discriminatory"*.

Therefore, the Ombudsman was able to investigate a complaint from a non-traditional minister who had applied to be appointed for one day as a Marriage Officer. (She had been given such a temporary license in the past.). However, Bermuda's 1944 Marriage Act states that marriages can be officiated only by a representative of a Christian body. This means that Christians who are not part of a "body" as well as members of other faiths cannot have religious weddings. Actually, the Jewish, Muslim and Baha'i Faiths have overcome this with specific legislation permitting them to have Marriage Officers. Members of all other Faiths are limited to civil weddings.

The Marriage Act of 1944 predates the Universal Declaration of Human Rights [1948], the European Convention on Human Rights [1953] (“Convention”), the Bermuda Constitution [1968], Bermuda’s Human Rights Act [1981] and the UN Declaration on Religious Tolerance [1981]. The Convention is incorporated in the Preamble of Bermuda’s Human Rights Act. Although there is a legal dispute about whether Bermuda must pass domestic legislation for the Convention to apply, the Privy Council has observed that it does.

The fact that it is named in our Human Rights Act is probably a good enough reason for Bermuda to adhere to the spirit of the Convention. Therefore, it is instructive to look at decisions of the European Court of Human Rights regarding limits on marriage to understand the human rights principles that might apply to limits on weddings. Limits on marriage must be reasonable and not go beyond generally recognized public interest considerations such as bigamy, capacity, consanguinity, consent, incest, polygamy and sham marriages. Also, Governments may not stipulate a minimum number of adherents for a religion.

The Ombudsman did not find maladministration because the Registrar General’s denial of a temporary Marriage Officer license complied strictly with the Marriage Act. Clearly, the Legislature of 1944 did not envision or anticipate a Bermuda of 2010 with persons here from all over the world bringing such a diversity of cultures, traditions and beliefs.

The Ombudsman recommended that the Marriage Act be reviewed for compliance with international law. In addition, she was concerned that the Marriage Act may well contravene Bermuda’s own Constitution that protects freedom of conscience. This: *“includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance”*.

The Registry General (“Registry”) agreed to refer this to the Law Reform Commission when it becomes operational.

GENERAL RECOMMENDATION: REGISTRY GENERAL

In accordance with sections 5(1)(b) and 15(4)(f) of the Ombudsman Act 2004, I recommend that the Registry review the Marriage Act 1944 to determine its compliance with s.8 of the Bermuda Constitution, Article 9 of the Convention and decisions on point of the European Court of Human Rights (to which residents of Bermuda have an individual right of petition).

GENERAL RECOMMENDATION: DEPARTMENT OF OPERATIONS & ENGINEERING

The Department should keep records of all inspections and take photographs of the offending areas, as this will assist in proving whether or not to comply with the statutory provisions for notice and removal of offending vegetation pursuant to s.10(2) of the Department of Works & Engineering Act 1984.

In cases where there is not an immediate safety concern, the Department should post signs on the property to notify owners who cannot be located of its intention (and date) to cut the offending vegetation.

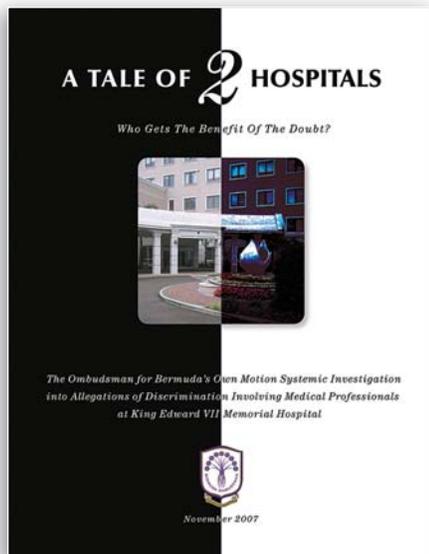
FROM THE CIVIL SERVICE:

Thanks for keeping our feet to the fire – we need that sometimes.

MANY THANKS TO:

R. Rochester, *Department of Transport Control* – for comprehensive and quick responses.

Updates on Previous Reports



Update: Bermuda Hospitals Board (“BHB”) “A Tale of Two Hospitals”

In February 2010 we received the BHB’s final update on the status of its implementation of the 15 Recommendations made in “A Tale of Two Hospitals”, the 2007 Report of the Ombudsman’s systemic investigation into allegations of discrimination. The BHB noted: *“the success of the actions highlighted in the report requires the ongoing commitment of the BHB community. Several of the initiatives have been operationalized and included in many initiatives such as the ‘Culture of Service Excellence’ programme and our satisfaction surveys. Diversity sensitivity will continue to be driven and monitored through the BHB Strategic Plan”.*

The final update on implementation of the recommendations:

Recommendation 1 – Change accreditation body to US Joint Commission for the Accreditation of Healthcare Organizations.

BHB Response – Accreditation Canada would be accreditation body for next four year cycle.

Ombudsman’s Comment – Accreditation Canada upgraded its processes and now offers standards similar to the US.

Recommendation 2 – Review and follow Bye Laws and Regulations.

BHB Response – Final approval of Bye Laws given on January 26, 2010.

Recommendation 3 – Analyze surgical legacy blocks and cancellations .

BHB Response – Implemented.

Recommendation 4 – Engage various resources to consult in arbitrating between different views on clinical care.

BHB Response – Accepted. Although an overseas partner has been engaged for several departments within the BHB there are still pending discussions.

Recommendation 5 – Implementing outstanding recommendations from previous reports regarding the Department of Anaesthesia and the possibility of hiring hospital anaesthetists.

BHB Response – First BHB-employed anaesthetist was hired on January 5, 2009. Negotiations with local anaesthetists were still ongoing.

Recommendation 6 – Review clinical manpower needs and consider who should hold work permits of specialists.

BHB Response – Accepted. Implemented.

Recommendation 7 – Review Board structures in accordance with best practices.

BHB Response – Accepted. Completed.

Recommendation 8 – Clarify qualification equivalencies between different jurisdictions and establish adequate induction programme.

BHB Response – Accepted. Completed.

Recommendation 9 – Introduce ‘apples to apples’ data collection and comparison. Require mandatory reporting by doctors of all elements of their practice such as lawsuits, insurance settlements and billing anomalies.

BHB Response – Accepted. In progress.

Recommendation 10 – Augment its Major Clinical Incident Policy to ensure a clear, accessible and confidential procedure in a separate complaints department.

BHB Response – Not accepted because the Office of Quality and Risk Management is separate from the Chief of Staff’s office however software that will allow for the correlation and tracking of all complaints was purchased.

Ombudsman’s Comment – This action achieves the goal of the recommendation.

Recommendation 11 – Phase in mandatory, methodical and regular reviews of adverse events, including Morbidity and Mortality Rounds.

BHB Response – Accepted. In progress.

Recommendation 12 – Revamp its disciplinary process.

BHB Response – Accepted. In progress.

Recommendation 13 – Require recruitment criteria for leadership positions to include training in conflict management, diversity and administrative due process. Physician leaders should have clear job descriptions and each department should

submit annual reports.

BHB Response – Accepted. In progress.

Recommendation 14 – Designate a person or office with executive level authority to be trained in and conduct ongoing audits on the institutional climate with respect to race, country of origin and other diversity areas.

BHB Response – Accepted. Completed.

Recommendation 15 – Pathologists should confine their written opinion to the matters within their expertise.

BHB Response – Accepted. Implemented.

Update: Lodging Houses

Sometimes things take longer than desired but patience can be rewarded. In our Second Annual Report 2007, we reported that a complaint had been made to our office by an individual regarding the rental terms and appalling physical conditions of a private home in which all rooms were rented to multiple “house-guests”. Our preliminary inquiries revealed that several Government departments had also received similar complaints and had concerns about how to protect such tenants. We brought them all together to devise a strategy to deal with the problem.

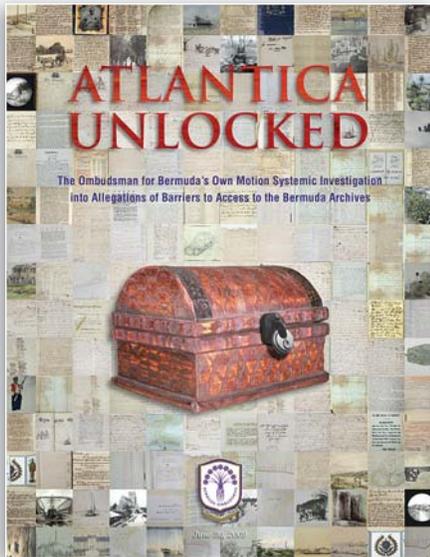
The Department of Environmental Health (“Environmental Health”) had already begun to draft legislation. Along with the Bermuda Fire and Rescue Service they began by inspecting ten sites identified by the cross-Ministry group as high-risk. They all committed to work together to follow-up. As with many cross-Ministry initiatives the wheels may not move as quickly as we would like but the momentum does continue: as at April 2010, Environmental Health had inspected 12 additional rooming houses and a draft Cabinet Memo had been submitted to the Ministry of Health for review and comment.

Photo: Department of Communications and Information



MANY THANKS TO:
S. Moore-Williams,
Office of Legal Aid – for comprehensive responses.

MANY THANKS TO:
D. Taylor, *Department of Financial Assistance*
– for quick response.



Update: Archives "Atlantica Unlocked"

"Atlantica Unlocked", the report of my systemic investigation into allegations of barriers to access to the Archives was submitted to Parliament in June 2009. I shall refer to that as the "Systemic Report". The first deadline for the Ministry's response was August 28, 2009, extended to December 4, 2009 and finally to March 31, 2010.

The Response was received in February 2010 ("February Response"). Of the original 35 recommendations, only five were implemented almost a year later. Six were in process; action was proposed for 16; no further action was proposed for eight. As I found that approximately one-third of the responses were inadequate or inappropriate, I tabled a "Special Report" in June 2010 of my concerns. In October 2010, subsequent to our year-end, the then Secretary to the Cabinet provided a response to the Special Report

("October Response"). While the full update of what has actually been achieved must be presented in next year's Annual Report, certain proposals and progress should be noted at this time.

Researchers are thrilled that they can now take their own digital photographs. This removes a substantial barrier to access and brings Bermuda in line with well-established international archival practice. The October Response states that there will be a proposal in the 2011 budget to establish an in-house digital lab. Researchers note that a photography area need not be grand or expensive.

I applaud the response of the Archives Advisory Council ("AAC") that veterans will no longer be charged for copying their own service records. Further: *"Council recommended that [all] seniors be exempt from paying for personal use copies of all types of archival material. Cabinet will be invited to make changes to the Government Fees."*

The February Response to the recommendation that the Archives should develop step-by-step user friendly guidelines and / or flowcharts about how to do historical and genealogical research was that: *"reference staff currently gives advice to researchers based on their individual needs"*. I found this to be inadequate. The October Response is that Guidelines as well as descriptions of collections: *"are currently being developed for imminent release on the upcoming website that will provide the public with a basic understanding of the Archives' holdings and how they are relevant to their research"*. This is more "citizen-friendly". In response to another recommendation, the Archives has installed a computer terminal on-site with appropriate caveats for electronic access to research materials. These excellent developments are consistent with good archival practice.

The Systemic Report recommended that the AAC should act as a recourse to receive complaints from the public and advise the Minister on resolution of disputes. The AAC considered this carefully and determined that, while the AAC may consider complaints with a view to formulating general advice for the Minister on policy, it does not have a statutory role to deal with individual complaints. The Archives will investigate a complaints process similar to that used by the UK National Archives.

This response is reasonable. I have cautioned, however, that the creation of an internal complaint procedure should take into account the reason for this recommendation: researchers expressed reluctance to file complaints directly to the Archives because (a) their experience was that little was ever done in response, and (b) they feared the possibility of retaliation for future research.

The Archives continues to insist that: *“the previous under resourcing of the Bermuda Archives accounts for many of the outstanding issues raised in the Ombudsman’s reports”*. That is decidedly not my finding after six months of in-depth investigation and consultation with experts around the world. While all offices of Government probably crave more resources, the problems of efficiency, technical acumen, staff empowerment, management and leadership that were highlighted in my Reports are not, in my considered opinion, due to a lack of resources.

The delivery of the public service is hampered when staff feel disempowered. Therefore, the Systemic Report recommended that the Archives establish guidelines for staff to assist them to respond to public queries about: (a) acquisition policies (b) restrictions on access (c) copyright (d) use fees, and (e) archival research. The February Response was that: *“The Archives has no permanent public service staff at this time. Once fully staffed, the Archives will develop a handbook and orient staff to policy and practices governing the use of the collections.”*

I found this response to be inadequate and noted in the Special Report:

“Given the revolving door of staff as well as current financial constraints, it is unlikely that the Archives will be ‘fully staffed’ in the near future, if ever. It is unrealistic to wait to produce staff guidelines until four highly specialized new posts are hired. Indeed, given limited staff, it is even more critical that the public should have as many guidelines as possible to conduct their own research – this is best practice elsewhere.

For reference staff in particular, basic management instruments to enable them to assist the public do not exist. Without a shelf / location list at the box level, it is difficult for staff to know where things are. This is also a security issue and important for annual audits (see Recommendation 9 / Resources). It is difficult for the Archives to know what should be where without a baseline list.

Perfection should not be made the enemy of the good. Until a handbook is developed, there are at least two documents that can be available to the staff and public – imperfect, but better than nothing: (i) a ‘Reference Desk Guide’ created by a former staff that has been handed down surreptitiously from some staff to others and is considered to be invaluable. It has not been made available to all staff even after the investigation (when the Archives responded that this guide was ‘not on the radar’); and (ii) an ‘Index to the Finding Aids’; appended to the Systemic Report; similarly has not yet been made available at the Archives for the public.”

The October Response stated that the Archives could not locate the Reference Desk Guide. I have therefore forwarded it to the Acting Director for use by current staff. The October Response did set out certain proposed actions: an acquisition policy has been prepared (awaiting review by the AAC and Minister) and access restrictions will be clarified and entered into the cataloguing system. Also,

formal development programs will be provided for staff, the first being a workshop to be arranged by the Director of the Archives with the Registrar General on the new Copyright Act.

While I do not investigate personnel issues (hiring, termination, discipline) a number of staff concerns did come to my attention. Issues relating to management of staff for effective delivery of the public service are within my remit. Accordingly, the Systemic Report recommended that the Director be mentored in administration, public relations and management of people. I found the response that: *“the established post holder is a long serving dedicated and capable public servant, committed to the efficient running of the Department and will be managed and supported as needed”* to be inadequate.

There is absolutely no doubting the dedication and long service of the Director. The fact is that at least one of three interventions by senior officials in years prior to the Systemic Report proposed similar training and mentoring. However the Director was not given the courtesy of being told about this and it was never followed up. The Special Report noted: *“if no further action is taken then at the very least, the Department of Human Resources and / or Office of Internal Audit can assist the Ministry by reviewing processes, deliverables and deadlines for tasks”*.

A number of people have asked, during the investigation and since, whether what they perceive as foot-dragging on the part of senior officials constitutes maladministration and should be the subject of a new investigation by me. It would seem that sufficient light has been shone on these issues since the Systemic Report. Several interviewees during the investigation feared that there was a pattern of the Archives being moved from Ministry to Ministry just when action to redress critical issues seemed imminent. Each new Permanent Secretary must fairly have the opportunity to start anew. However, doing nothing is not the best way to counter these fears.

The highly intensive, 18 month long preparation for the launch of the Public Access To Information (“PATI”) regime requires the expertise to ensure that adequate systems are in place and that all Government departments are properly trained in order to respond to requests for information efficiently. The October 2010 secondment of the Director to the PATI team takes good advantage of her knowledge of records management and archival science. Proper records management will be at the very core of PATI’s success and archival input is key to ensuring that this is done correctly.

Release of Electronic Slave Registers

One of the most significant results from the systemic investigation of the Archives was the release of electronic databases of the Slave Registers of 1821 and 1834. These were originally donated about a decade ago by an US historian, Dr. Virginia Bernhard, who created the searchable electronic format. Researchers claimed that their requests for access were denied on the grounds that these were the proprietary academic work of a researcher.

My Systemic Report recommended that the databases be made available to the public. At that time, I did not release the electronic records that Dr. Bernhard had sent to me in deference to give the opportunity to do so to the Archives. The recommendation was rejected on the grounds that these are “in-house working electronic lists”. They are, in fact, not “in-house” records and were donated for public use. After that response, I could no longer in good conscience hold on to them.

Dr. Bernhard said: *"The Slave Registers are such a treasure. I have no objection to making the databases public – this was my way of saying thank you to Bermuda".* However, she stressed: *"these are academic working lists. They are not perfect – there are some gaps and spelling errors".* Notwithstanding the imperfections, these are remarkable and exciting records because they are searchable – not only for genealogical purposes but also for comparison of slave holdings between the 13 years. If a researcher has done some leg work, the Electronic Slave Registers can yield very poignant information. A member of my staff tested the 1834 Register and found her great-great grandmother!

However, a view has been expressed that I do not have the general authority to release information, whether in the public interest or otherwise, except through a report to the Legislature. There have been relatively few judicial reviews of the Ombudsman throughout the British Commonwealth since the establishment of the institution in the UK in 1967. However all are abundantly clear that Ombudsman statutes should be construed purposively. Limits should not be imposed in the absence of express language in the statutes (see case law in margins).

There is jurisprudence that allows Ombudsman to release confidential information only in very limited circumstances. In such cases, the Ombudsman may impose a duty of confidentiality on the persons to whom she provides this information (see case on inside back cover). However, there is nothing in the Ombudsman Act to prohibit the Ombudsman from releasing non-confidential information. This is consistent with the well-established principle that one of the measures of the Ombudsman's independence is the freedom to communicate directly with the public.

Alberta (Ombudsman) v. Alberta (Human Rights and Citizenship Commission) 2008 ABQB 168

The outcome of a jurisdictional challenge: *"hinges on a purposive interpretation [of the Act]. Nothing in the section [that sets out the limits of jurisdiction] expressly excludes...limits on the Ombudsman's jurisdiction should not be read in or implied in the absence of express language".*

TREASURE IN THE ARCHIVES

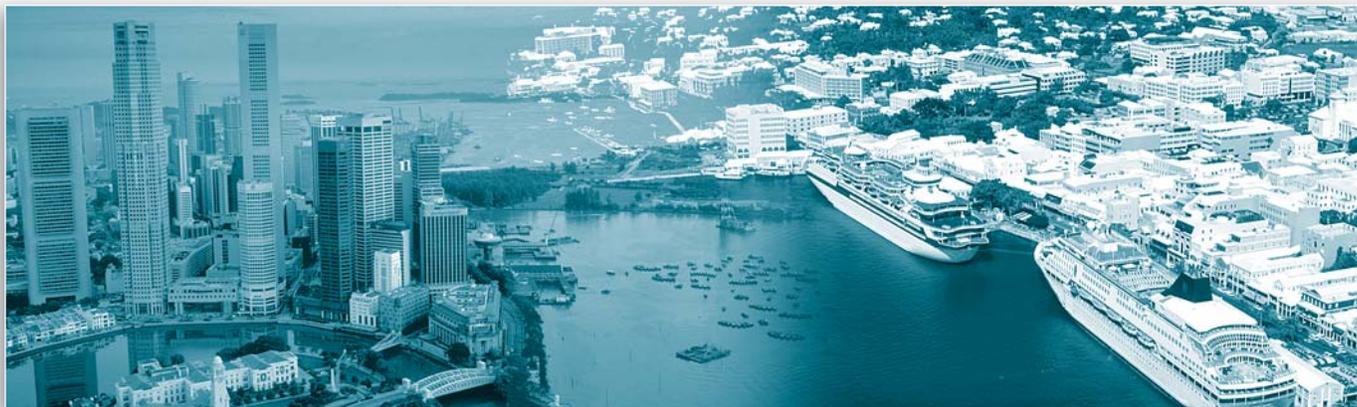
We asked researchers during the Archives investigation to identify any treasures they knew of inside. One person told us about the lovely drawings for the reredos (altar wall with sculptures) in the Anglican Cathedral by sculptor, Byllee Lang. A Canadian, Ms. Lang lived in Bermuda for 20 years and openly disregarded the racial and class divisions of the time. She taught a generation of artists in integrated classes, often waiving fees for promising students.

In 1958 she was commissioned to design the reredos and installed the first of 14 statues – the Christ – in July 1962. She died in 1966 with five statues unfinished. The researcher expressed concern that her work was not fully acknowledged. We mentioned this to the Rt. Reverend Bishop Patrick White who has informed us that the Vestry has approved the creation of a plaque to acknowledge both Byllee Lang and the sculptor who completed the statues. It will be placed on the wall in the sanctuary.

FROM THE PUBLIC:

*Thank you, thank you. Well done. I am so happy.
You have made my year.*

Bermuda or Elsewhere?



One of the most interesting aspects of this work is that complaints to Ombudsman around the world are remarkably similar. It seems that ‘maladministration is maladministration is maladministration’ no matter where we live. Here are a few cases that could be from Bermuda or elsewhere – you guess (answers on p. 41).

1 Complainant met with Planning officials to find out the process for installing solar panels. In their meeting he was given a copy of the Act but no specific guidelines or procedures. He submitted an application but then Planning told him that he needed architectural elevation drawings and an ordinance survey location plan. Complainant complained to the Ombudsman about the quality of the information given to him in the first meeting and the way that the subsequent complaint was handled. The Ombudsman found maladministration on the ground that there were inadequate guidelines for the installation of solar panels and that the department’s responses to Complainant were unreasonably delayed.

2 Complainant agreed that a neighbouring developer could build a 6ft boundary fence instead of the regulatory 4ft high fence. Planning Officers put on the drawing the developer’s agreement that the fence would be built with PVC materials. This was considered to be the most practical material since the fence, which is at the end of a cul-de-sac, extends to the ocean-front. Complainant had stipulated PVC as a condition of her agreement to the fence being over four feet. The developer did not honour the agreement and erected a wooden fence. The Ombudsman recommended that Planning should require the developer to remove the wooden fence and erect the agreed PVC fence. This recommendation was declined by Planning on the ground that the fence complied with the Planning Act in that wood was more in keeping with a “rustic appearance”. The Ombudsman found this response to be inappropriate because Complainant would have not agreed to a 6ft wooden fence that would quickly deteriorate.

3 A couple, long-time tenants of the Housing Corporation, was aware of wait times associated with getting repairs done. While they were on the list for repairs they purchased a desperately needed new lock for their front door. The problem was that the front door was so rotten the lock was ineffective. The Ombudsman’s office contacted Housing officials and they dispatched a contractor to view the problem. Housing supported the claim for a new door and it was quickly replaced.

4 Complainant was concerned about an encroachment onto his property by the owner of the adjacent property. His neighbour had built a retaining wall on the western side of Complainant’s house using Complainant’s wall as the base. He reported the matter to

Planning. When Complainant made enquiries as to the status of his matter he was informed that an investigating officer had not yet been assigned. Subsequently, the wall of his home began to crack due to water seepage from the neighbour's property. After several attempts to access information from Planning had proven futile, Complainant sought the intervention of the Ombudsman who recommended enforcement actions.

5 The Government sold off previously rented apartments to residents of a public housing condo complex. An owner's corporation took over management. After the sales, a design fault in the sewage drainage system came to light with considerable damage to some of the apartments. The Government's response was that it was not liable as it no longer owned the units which were sold "as is". The Ombudsman obtained a legal opinion that supported the Government's contention. However, the Ombudsman noted that good administration goes beyond legalities and that since this was a pre-existing problem, the Government should at least take responsibility for quarterly inspections of the pipes. The pragmatic solution was agreed and ensured that structural problems could be identified and addressed by owners before damage is caused. All of the new owners were the beneficiary of this single complaint.

6 Complainant had given years of honest, diligent services to a department, usually emergency repairs. Often, when he was on site he would be asked to do additional work that was not originally requisitioned. He kept accurate records. The department, however, did not keep consistent or complete records – especially for additional work requested or follow up work. Complainant took full responsibility for submitting certain weekly time sheets several months late. The department refused to pay him \$54,000 on the grounds that the services could not be verified. After consultation with the Ombudsman, the department worked with Complainant to reconcile records and work done. He was paid. The Ombudsman also recommended improvements in the department's system for recording requisitions and services.

7 Complainant was awarded a four year scholarship from the Government. She had finished her course requirements for the degree early and decided to pursue an Honour's thesis in the last semester of her fourth year. The Government decided not to pay for the last semester on the ground that the scholarship was intended only for the degree course of study. Complainant was aggrieved because she felt that the scholarship should cover the full four years including university fees for the Honour's thesis which was not a different degree program. The Ministry accepted the Ombudsman's explanation that the Honour's thesis merely enhanced the degree and agreed to fund the last semester.

8 Complainant was aggrieved because she had been waiting two years for repairs and refurbishment works to be carried out in her Government rented apartment. Her first complaint to the Ombudsman resulted in the department stating that the problems would be fixed. However years later she returned to the Ombudsman to state that the repairs were still outstanding. She complained that she wanted to move due to the neglect and disrepair that the apartment was in. It took more than a year after this request for the department to relocate her.

9 Complainant retired and received a pension for about ten years. The department informed him that he would no longer receive the pension until he produced additional information. He submitted appeal documents to the department and the department advised

that the matter would be sent to the Appeal Tribunal. However, years later the appeal still had not been scheduled. He complained about unreasonable delay and also that his phone calls were not answered. The Ombudsman found maladministration and recommended that the appeal be submitted without delay to the Appeal Tribunal (which upheld his case – he received \$40,000).

10 When a Judgment Debt is obtained against someone, his / her property can be legally seized or “levied” in order to be sold to satisfy the debt. Complainant complained to the Ombudsman after the Bailiff’s office placed an advertisement in the local newspaper for his mother’s property to be auctioned. This caused her considerable embarrassment. The Ombudsman found that a different property, which Complainant owned solely, should have been levied and advertised. The Bailiff’s office argued that an advertisement, by itself, was a sufficient legal levy. The Ombudsman concluded that the proper legal process was not followed.

11 Complainant obtained a Court Judgment against a debtor. She requested that the debt order be served on the bank at a specific date in order to freeze the debtor’s account on the 1st of the month when funds are most likely to be available. The Court argued that it could not control the date an account is frozen. The Ombudsman found that the Court does control the date that debt orders are served and could have done so at the time requested by Complainant. If this was not possible, then the Court should have notified Complainant and advised her to serve a third party debt order on the bank herself.

12 An MP contacted the Ombudsman’s Office on behalf of a constituent who felt the Family Support Office (“FSO”) was not taking adequate enforcement measures against her ex-husband, who was late in making child support payments and owed nearly \$3,000. The FSO had told her that its policy allows a full month after the due date before a payment is considered to be “late”. She believed her ex-husband was taking advantage of this practice. The Ombudsman contacted the FSO and after a review of the file, officials agreed that additional enforcement action was warranted.

13 Complainant argued that an employment-related offence had not been referred to the Court on time because the department failed to consider and process her complaint before the time ran out to bring charges. The Ombudsman recommended that special attention must be paid to employment-related offences because of the short time within which they become statute-barred.

14 The Ombudsman found procedural errors and delay in the Commission’s handling of a complaint of sexual harassment. The complaint was therefore time-barred from consideration for prosecution in Court. As there was no remedy that could restore Complainant’s legal rights or otherwise put her in a position that she would have been in had there been no maladministration, the Ombudsman recommended an apology and a \$2,000 “ex-gratia payment” for her frustration.

15 The complaint was that the department had cut down a tree on private property without the owner’s consent but at the request of a neighbour (who believed that the tree was unstable after a branch had fallen). The law allows the department to inspect properties without contacting owners (a courtesy rather than a requirement) and to cut down potentially hazardous trees if owners do not comply with orders to do so. The Ombudsman found inadequate communication with the property owner.

International Links and Colleagues

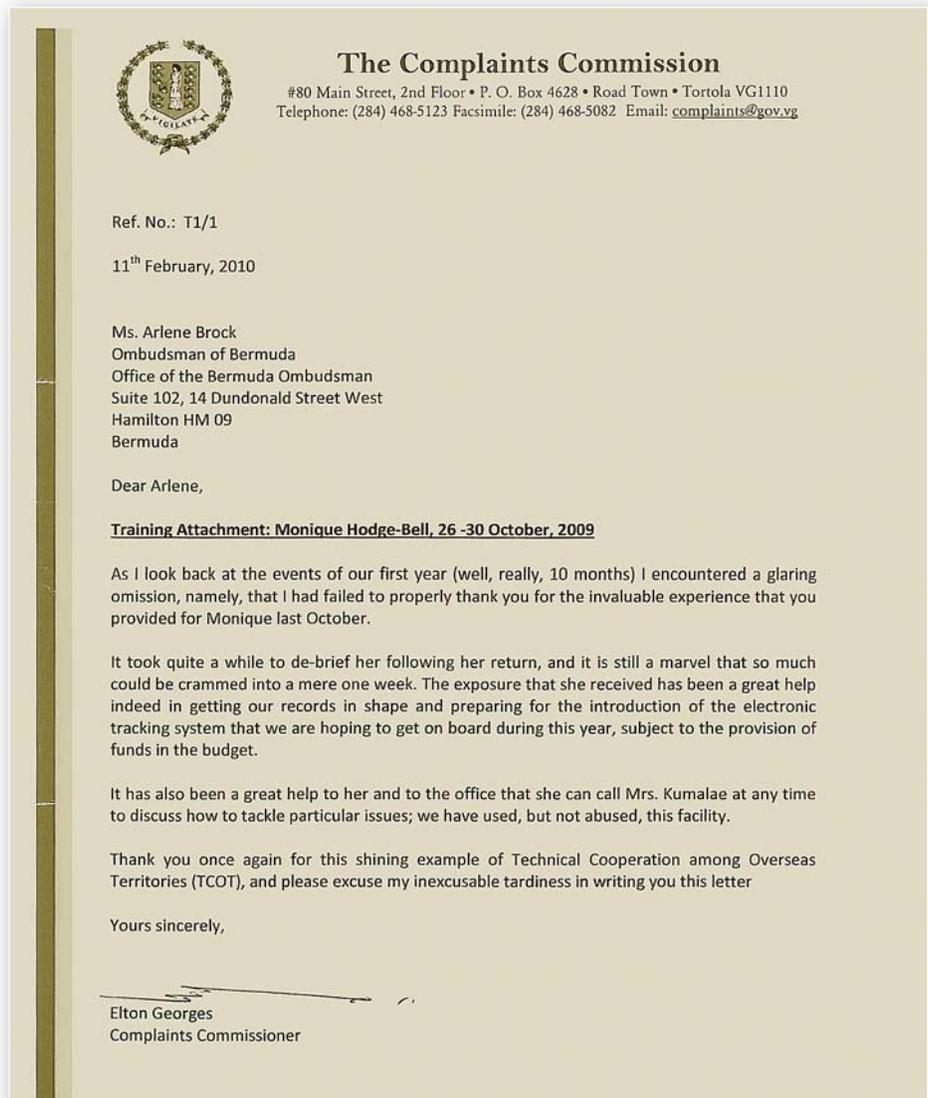
International Links

The international Ombudsman network provides critical avenues for us to learn from each other. Bermuda has been the beneficiary of much sage advice and clarity about best practices over the past five years through our memberships in and relationships from the International Ombudsman Institute, Caribbean Ombudsman Association (“CAROA”), British and Irish Ombudsman Association, US Ombudsman Association and the Forum for Canadian Ombudsman. It was in a presentation to the UK Public Sector Group (comprised of the Parliamentary Commissioner for the UK, Local Government Ombudsman for England and the Ombudsman for Scotland, Wales, Northern Ireland, Gibraltar, Malta, Cayman and Bermuda) that I learned about the research on migrant complainants (see p. 6).

During our first year of operations, the international network proved to be so invaluable in resolving a matter before me that it bears repeating: the widow of a Bermudian missionary murdered in the Sudan had tried unsuccessfully for almost a year to obtain his death certificate through diplomatic channels. We asked our Ugandan counterpart, the Inspector General of Government, for advice on who to approach in the Sudan. Within four months, Uganda obtained the original death certificate directly from the hospital in the Sudan through informal channels. We are convinced there was divine intervention!

Bermuda also contributes, for example, to consultation documents about: the creation of an Ombudsman in the Isle of Man and the sharing of personal information in healthcare complaints with relevant bodies (UK Ombudsman). I have also been asked to comment on draft complaint reports by Ombudsman elsewhere.

I have presented at several Ombudsman conferences abroad and for two years served on the Council of the Caribbean Ombudsman Association. I am now one of the 18 directors of the International Ombudsman Institute. Each of six geographical regions is represented by three directors (one of whom is elected as Regional Vice-President).



From *The Virgin Islands StandPoint*

Wednesday, November 4, 2009

StandPoint

Asst. Complaints Commissioner on attachment

Assistant Complaints Commissioner Monique Hodge-Bell is in Bermuda on a week-long training attachment to the Office of the Ombudsman/Complaints Commission there.

Hodge-Bell will be learning firsthand about the systems, such as the electronic complaints management system, that are necessary to keep a complaints office functioning effectively.

She will also have the opportunity to observe and participate in various activities with the staff of the Bermuda office including case reviews and complaint intake meetings. Her focus will be on practical measures that can be introduced to enhance the functioning of the Virgin Islands Complaints

Commissioner's Office which is still developing its operational modes.

Complaints Commissioner Mr. Elton Georges told the Department of Information and Public Relations he is looking forward to the outcome of the training. "The Bermuda Office is highly regarded in the region and it will help Mrs. Bell greatly to see how it works."

The Bermuda Ombudsman's Office is under the direction of the Ombudsman, Attorney Arlene Brock; it has been in operation for four years and is recognised as one of the most successful in the UK Overseas Territories. In 2008 it hosted the biennial general meeting of the Caribbean Ombudsman's Association, CAROA.

The three directors for the Caribbean and Latin American region (Mexico, Trinidad & Tobago and Bermuda; I am also the Regional Vice-President) will serve until 2012.

We were honoured to host training of the Ombudsman for the Turks and Caicos Islands (2006), the Deputy Ombudsman for the newly established British Virgin Islands office (2009), and the Ombudsman for the newly established Grenada office (2010). I again thank the following for graciously meeting with our guests: the Human Rights Commission, Police Complaints Authority, Rent Commission and the Departments of Consumer Affairs, Immigration and Labour and Training.

Last year I spoke at the conference of the Brazilian Ombudsman Association Pro-Citizenship Institute and co-presented Ontario Ombudsman's advanced investigation course – *Sharpening Your Teeth* – in the British Virgin Islands, specifically regarding oversight in small jurisdictions. Discussion notes included:

Issue	Positives	Negatives	Implications for Oversight
Parliamentary Systems	Well developed institutions and roles	Entrenched bureaucracy and individuals	<i>Manage resistance to change:</i> Investigators must educate re best practices in addition to investigating
Easy Access to Leadership	Competencies are well known (e.g. 'doers' vs 'talkers')	Differences and disputes are personalized	<i>Refocus on issues:</i> Investigators must deal with new complaints systemically; with clean slates; separate people from issues; attune to power imbalances
Community Relations	Multi-layered; transparent	Nepotism; concerns about confidentiality	<i>Fair process:</i> Investigators must continuously demonstrate integrity, due process; clearly explain reasons for decisions; use objective standards
Community Dynamics	On-going interactions; conflict adverse; tendency to compromise	Biases from history and relationships; high tolerance for negative behaviours ("he's inefficient at work but wonderful in church")	<i>Demonstrate neutrality:</i> Investigators must continuously step back and reality-check own biases; base (i) decisions on objective principles and (ii) analysis consistent with mission; balance empathy for complainants with fairness for all; model and educate principles of good governance

International Colleagues

Ombudsmen around the world have faced tragedies in the past year. We mourn the passing of Janusz Kochanowski, the Ombudsman for Poland, in the horrible plane crash that also took the lives of the President of Poland and numerous senior officials.

In the Caribbean region, the lives of the staff at the office of the Ombudsman (Protection du Citoyen) for Haiti were thankfully spared in the earthquake of 2010. The office was damaged and the country remains in crisis. The Ombudsman, Madame Elie, demonstrated that the office is not merely an institution, but is foremost a champion for the people. She halted normal operations in order to serve and heal the neighbouring community. She requested funding to help the families prepare for the expected rains. With the modest donation from our office, she was able to provide 60 baskets each filled with: 1 raincoat, 5 bags of rice, 4 bath soaps, 1 bath towel, 6 tins of tuna and sardines, 5lbs of sugar, 1 tin of Nestum, 1 toothbrush, 2 tubes of toothpaste and 1 gal of cleaning product.

Not only can we be inspired by the efforts of the Ombudsman and her staff, but her integrity is above reproach and a model to all. She meticulously accounted for each penny donated. The Ombudsman accomplished what so many large organizations that collected money did not: she delivered help. Only a disgraceful 10% of the funds collected and pledged around the world has reached Haiti, a year later.

I note the courage and inspiration of the Ombudsman for Papua New Guinea who wrote a damning report exposing corrupt political complicity in a regional legal scandal. When the Ombudsman went to deliver his report, senior officials of the Legislature were not available to receive it. However, the Ombudsman Act stated that reports may be submitted to the "Office of the Speaker". Therefore, the Ombudsman was able to deliver his report through the Deputy Clerk. Within a few months, there was an assassination attempt on the Ombudsman's life. Thankfully, he has recovered and continues his work fearlessly.

Finally, we wish all the very best to Bill Angrick who retires as International Ombudsman Institute ("IOI") President (he continues to mentor colleagues globally), and retires as Iowa Ombudsman after 32 years. All the best also to Mats Melin who leaves the Ombudsman role and IOI Board to become the Chief Justice of the Administrative Court of Sweden.



Staff



*Staff (from left):
LaKai Dill,
Research Consultant
Georgia Symonds,
Administrative Associate
Arlene Brock, Ombudsman
Tikitta Suhartono,
Administrative Officer
Quinell Kumalae,
Investigations Officer*



*Chrystal Cassidy,
Administrative Assistant*

The wonderful Bermuda Sun article (of August 11, 2010) that likened us to the 'Ladies 1st Detective Agency' highlighted the special attributes of our team. As Bermudians, we believe that our work contributes to the foundation of a more fair, caring and service-oriented island for current and future generations. Yet, our own diversity (racial, religious, not yet gender) ensures that we are open, compassionate and neutral toward all who seek our help.

Each of my staff is highly competent, thoughtful, hard-working and flexible. Heavy daily doses of perspective and humour are also invaluable in our work together.

Our electronic Complaint Management System (CMS) retrieves information at the push of a button, but we practically need a full time person just to keep it up to date. When our Administrative Assistant asked to downsize to part-time associate work, we began to recruit a full time Administrative Assistant who would be responsible for the CMS.

We expected maybe 30 applicants and were stunned as the numbers climbed past 80, eventually to 146 applicants. This was too much to handle in-house and we outsourced the recruitment process to a very professional group who, in the first instance, whittled the applications down to a more manageable 22 and then coached us in selecting from this smaller group. The second stage

entailed interviews by our Administrative Officer and Administrative Assistant who have day to day familiarity with the work that the new person would have to do. They developed the short list of six who were skills tested and interviewed separately by our Investigations Officer, then me. Finally, our full team met to discuss our assessments and together we reached a unanimous decision.

We welcome Chrystal Cassidy and congratulate her for surviving a grueling process.

She has easily acclimated to our remarkable team: Quinell Kumalae, our Investigations Officer, streamlined the complaint intake process and conducts investigations with an abundance of professionalism, legal acumen and a humane insistence on fairness; our Administrative Officer, Tikitta Suhartono, keeps the office (accounts, personnel, inventory, vendors) running efficiently with focused husbandry and flawless preparation for our annual independent audits; Georgia Symonds, now part-time Administrative Associate, ensures that complainants and government officials alike are treated with compassion and clarity. She is also a certified travel consultant and assists in coordinating events for our overseas guests. We very much miss our temporary Research Consultant, LaKai Dill, who assisted us for 18 months with a myriad of tasks with enormous insight and diligence. The accolades that I so often hear about my staff are certainly well deserved.

Presentations

Management consultants advise that the more people are affected by or must implement decisions, the more they should be involved in decision-making or be fully informed. In the first year we started with 'Ombudsman Orientation' presentations to Senior Officers in each Ministry. Over the years we have made a number of presentations to the public and the media in addition to the Civil Service and Government boards. Earlier presentations canvassed the history and evolution of the Ombudsman movement, basic principles and operation of the Ombudsman Act 2004. Many of our presentations now also explore the applicability of the UK Principles of Good Administration to specific complaints.

Presentations in 2009-10: the Senate; Bermuda Bar Association; Sandys Rotary Club; Hamilton Rotary Club; Corporation of Hamilton; Human Rights Commission; and a half-day presentation to a Department of Human Resources Negotiations Workshop.

In celebration of our Fifth Anniversary Year, we held "Wednesday Lunchtime Chats" in our office in June 2010 for the public, some of whom emailed questions in advance:

Q: *Whistleblower legislation, what do you think?*

A: Very important! Whistleblowers are uniquely placed to expose, sooner rather than later, serious problems within an organization. They are an essential component for the fair delivery of services within the public sector. Such responsible behaviour should be considered part of doing a good job because it (a) can assist in stopping the hemorrhaging of poor service and (b) can effect improvement. The Ombudsman Act 2004 provides for what I call "pre-whistle-blowing protection". Under s.14(4) and (5), anyone who discloses information to me cannot be refused employment, threatened with dismissal or demotion, treated prejudicially in regard to employment or otherwise intimidated or coerced for doing so. If I have reasonable grounds to believe that any of this has happened, I can refer the matter to the Human Rights Commission (and will watch that process with care!).

Q: *How independent is the Ombudsman, really?*

A: One of the essential characteristics of the Ombudsman is independence. The independence of the Auditor General, Ombudsman and Public Service Commission are protected by the Bermuda Constitution 1968. Section 93B(2) of the Constitution provides: *"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"*.

There are at least four measures of independence:

Structural = established by the Constitution, therefore not easily diminished by political will. The independence and permanence of the office create stability and credibility.

Functional = reports only to Parliament and is not subject to political intimidation.

Operational = full authority over own office, staff and operations and freedom to deal with the public.

Personal = Ombudsman must approach all issues and people without fear or favour.

Q: *In communities around the world, the citizens are plagued by leaders in business and politics whose behaviour is – or borders on – corrupt. What role can or should Ombudsmen play in stemming and correcting such behaviour? And if not the Ombudsman, then who?*

A: As the UK Parliamentary Commissioner, Ann Abraham, has said: *"we are not a panacea for everything that is wrong out there"*. Typically, the Ombudsman investigates administrative maladministration in the delivery of public services such as: mistake of law or fact; unreasonable delay; unfair or oppressive actions; arbitrary or unreasonable procedures; abuse of power; negligence. In theory, corrupt behaviour can be prosecuted in the Courts or, in the courts of public opinion – through the vote. There are only a few Ombudsmen who can investigate corruption: e.g. from Papua New Guinea; South Africa; South Korea; Sweden (of Government Officials and Administrative Court Judges) and Uganda.

Q: *Would you make any recommendations that are against the law? If someone is trying to do something the law precludes, do you recommend against the law?*

A: We do not make recommendations that an Authority do something that is against their governing or any other law. The Ombudsman was defined by the Supreme Court of Canada as the: *“paradigm of remedial legislation”*. Laws cannot anticipate every eventuality. Therefore, Ombudsman recommendations are particularly helpful when the law is silent, vague or internally inconsistent. Although in keeping with the law, Ombudsman recommendations may go beyond the law to take into account and recommend actions that are *fair and reasonable* in the particular circumstances. In 2009, the Supreme Court of Bermuda supported the role of the Ombudsman in making recommendations for: *“simple and citizen-friendly procedures”* even if the governing law of an authority does not require such procedures.

Q: *With the phrase “Sharpening Your Teeth” for the September workshop, the question comes to mind: How sharp are the office’s teeth in Bermuda? To what extent could a resolution on behalf of a member of the public be enforced by the ombudsman?*

A: The Ombudsman can make recommendations only. There is no enforcement power in the Courts (which the Public Defender in Jamaica now has). If recommendations can be enforced, then they must be able to be appealed at law. This restricts recommendations to remedies and rights that are established by legal statutes or precedent. Typically, Ombudsmen can make more relevant, nimble (albeit unenforceable) recommendations that go beyond legal constraints in order to promote fairness, reasonableness and what is *“simple and citizen-friendly”*. These recommendations should be so sensible and fair that they have the ‘power of persuasion’. If we are of the opinion that an Authority’s response to recommendations is inadequate or inappropriate, then we may publicize this opinion in a Special Report to Parliament. To date, about 97% of our recommendations have been accepted and implemented.

Q: *Could your model in the public sector be a good one for “private” industry?*

A: The key to a public service ombudsman is that we are fully independent from the agencies that we investigate. Therefore we are not subject to any influence or intimidation. There are many complaints-handling mechanisms in the private sector that are called ‘ombudsman’. On one hand, they may be viewed as apologists for their companies because they are not fully independent and may sometimes not deliver hard recommendations. On the other hand, when they do have the ear of management, they often act as persuasive ‘canaries in the mine’ and can help to craft remedies and system improvements that ultimately make their companies become more efficient (not just looking good). Financial Services Ombudsman (“FSO”) are well regarded because they operate independently of individual companies and are paid for by the entire financial industry. By handling complaints early on, the FSO is often able to head off far costlier lawsuits and can leverage learning from individual complaints to promote efficiencies in the entire industry. Our 2009 Annual Report recommended an FSO for Bermuda if the planned mechanisms to investigate non-criminal, non-regulatory financial complaints are not effective.

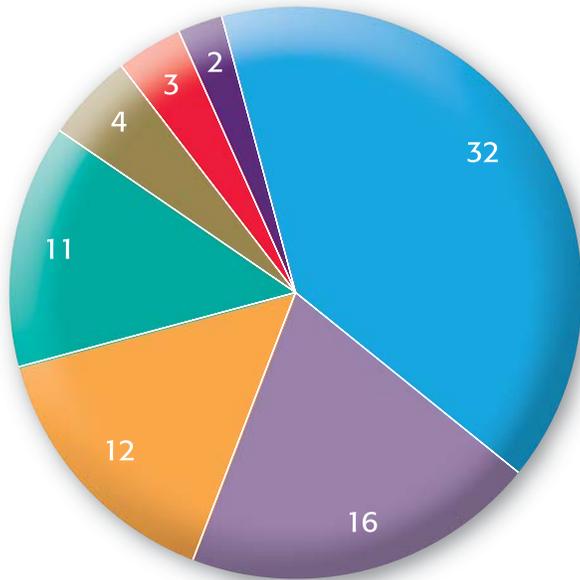
Q: *If you see a trend across several branches of government would you comment?*

A: Yes. We often include special interest topics in our Annual Reports for matters which went beyond simple investigation and recommendations. For example, our 2007 Annual Report highlighted problems with the funding of kidney transplants and the problem of unregulated lodging houses that needed a multi-department resolution. The Government responded by raising the ceiling on contributions for transplants. With respect to lodging houses, we held two meetings to encourage coordinated action by: the Department of Environmental Health, Department of Consumer Affairs, Bermuda Fire & Rescue Service, Bermuda Housing Corporation and the Department of Immigration.

Statistics

COMPLAINTS REFERRED

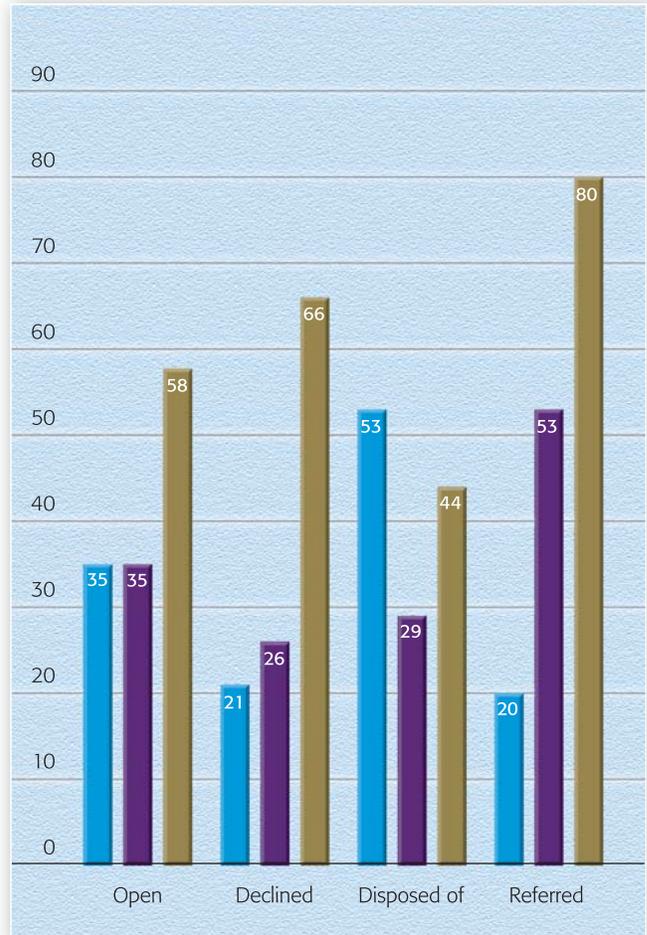
Number (80 total) / Where Referred



- Department of Labour & Training
- Other
- Consumer Affairs
- Police Complaints Authority
- Immigration
- Magistrates' Court
- Rent Commission

STATUS OF COMPLAINTS

Number / Status at July 31, 2008, 2009 and 2010



- 2008 – Total Number of Complaints **129**
- 2009 – Total Number of Complaints **143**
- 2010 – Total Number of Complaints **248**

Complaints Not Referred	2005-2009	2009-2010	Total
Complaints Brought Forward at July 31	54*	–	54
New Complaints Not Referred	–	168	168
Complaints Closed / Declined During the Year	< 35 >	< 110 >	< 145 >
Complaints Open at July 31	19	58	77

Note: Open Complaints

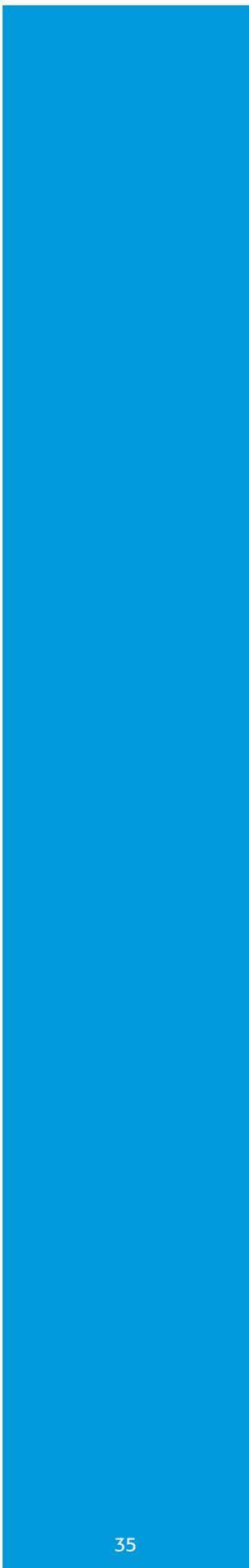
“Open” indicates that complaints were still being investigated or a resolution was being considered at the cut-off date of our July 31 year-end.

* Reports prior to 2009 included statistics only for the reporting year.

Figures in red represent complaints open at the end of 2009 which were closed in 2010.

MINISTRY (at 31 / 07 / 10)				
TYPES OF COMPLAINTS		INEFFICIENT	IMPROPER	UNREASONABLE DELAY
Cabinet	3			
Department of Human Resources	2			
Public Service Commission	1			
Economy, Trade & Industry	28			
Bermuda College	(1)			
Bermuda Post Office	3			
Department of Labour & Training	18			8 / 2
National Training Board	1			
Work Permits	6			2 / 1
Education	11			
Department of Education	11	3		
Environment, Planning & Infrastructure	24			
Department of Environmental Protection	4			
Department of Planning	17	2		4 / 1
Department of Telecommunications	1			
Rent Commission	2			
Finance	11			
Accountant General Office	1			
Accountant General Office – GEHI	4			2
Bermuda Monetary Authority	2			
Department of Social Insurance	1			
Pension Commission	3			1
Health	14			
Bermuda Health Council	(1)			
Bermuda Hospitals Board	5			1 / 1
Bermuda Psychologists Registration Council	2			
Department of Environmental Health	1			
Department of Health	5			2
Health Insurance Department	1			1
Justice	9			
Attorney General's Chambers	1			
Bailiff's Office	2		1	1
Department of Corrections	1			
Department of Court Services	1	1		
Department of Public Prosecutions	1			
Magistrates' Court – Legal Aid	3	1		
National Security	25			
Bermuda Fire & Rescue Service	1			
Bermuda Housing Corporation	4			
Bermuda Housing Trust	2			
Department of Immigration	11			2
HM Customs	4			1
Parole Board	1	1		
Police Complaints Authority	2	1		
Public Information Services	7			
Archives	7	6		1
Charities Commission	(1)	1		
Registry General	(1)			
Public Works	8			
Board of Trustees – Golf Courses	4			
Department of Parks	1			
Operations & Engineering	3			
Transport	4			
Department of Civil Aviation	1			
Marine & Ports	(1)			
Public Transportation Board	1			
Transport Control Department	2			1
Youth, Families, Sport & Community Develop.	13			
Department of Child & Family Services	3			1
Department of Community & Cultural Affairs	2			
Department of Financial Assistance	2			1
Human Rights Commission	5			1
Psycho-Education Committee	1			
Other	11			
TOTALS	168 / 35	15 / 1	1	29 / 6

ABUSE OF POWER	CONTRARY TO LAW	UNFAIR/ OPPRESSIVE	MISTAKE OF LAW OR FACT	ARBITRARY	NEGLIGENT/ UNRESPONSIVE	OTHER
		1				1
		1				
		2	1		1	
	1		2		4 / 1	4
		1	1		1	1
			1		5	2
			1		4	
	1	1	1		6 / 2	3
			1		1 / 1	1
				1	1	
		1			1	1
					1	1
					1	2
		1	1		3 / 5	
					2	
1					1	1
					1	
1					1	
		2				
1		1 / 1	1		2	
					2	
		4 / 2	1	1	2	1
		2				1
					1	
				1		
		1			3	
		1				
		1		1	1 / 2	
						1
		1				
		1	1			
		1			1	1
					1 / 1	1
1	1	3		1		
		1				
1					4 / 1	6 / 1
5 / 1	3	25 / 6	11	3 / 2	52 / 14	27 / 2



MINISTRY (at 31 / 07 / 10)	# of new Complaints	OPEN	DECLINED		
DISPOSITION OF COMPLAINTS NOT REFERRED			Not in Jurisdiction	Existing Process	Time Bar/ Withdrawn
Cabinet	3				
Department of Human Resources	2		2		
Public Service Commission	1		1		
Economy, Trade & Industry	28				
Bermuda College	(1)				
Bermuda Post Office	3	1			
Department of Labour & Training	18	6	2	1	4 / 1
National Training Board	1	1			
Work Permits	6	2	1		1
Education	11				
Department of Education	11	4	4		1
Environment, Planning & Infrastructure	24				
Department of Environmental Protection	4				
Department of Planning	17	8			4
Department of Telecommunications	1	1			
Rent Commission	2				1
Finance	11				
Accountant General Office	1	1			
Accountant General Office – GEHI	4	1			1
Bermuda Monetary Authority	2	2	1		
Department of Social Insurance	1				
Pension Commission	3				1
Health	14				
Bermuda Health Council	(1)				1
Bermuda Hospitals Board	5	3			2 / 1
Bermuda Psychologists Registration Council	2	2			
Department of Environmental Health	1				
Department of Health	5		1		2
Health Insurance Department	1				
Justice	9				
Attorney General's Chambers	1	1			
Bailiff's Office	2	1	1		
Department of Corrections	1				1
Department of Court Services	1				
Department of Public Prosecutions	1		1		
Magistrates' Court – Legal Aid	3	1		1	1
National Security	25				
Bermuda Fire & Rescue Service	1		1		
Bermuda Housing Corporation	4	2			2 / 1
Bermuda Housing Trust	2				
Department of Immigration	11	2	1	2	1
HM Customs	4	1		2	1
Parole Board	1				
Police Complaints Authority	2	1		1	
Public Information Services	7				
Archives	7	5			1
Charities Commission	(1)				
Registry General	(1)				
Public Works	8				
Board of Trustees – Golf Courses	4	3			
Department of Parks	1		1		
Operations & Engineering	3		1		
Transport	4				
Department of Civil Aviation	1		1		
Marine & Ports	(1)				
Public Transportation Board	1		1		
Transport Control Department	2	1			1
Youth, Families, Sport & Community Develop.	13				
Department of Child & Family Services	3	2			
Department of Community & Cultural Affairs	2	1		1	
Department of Financial Assistance	2	1		1	
Human Rights Commission	5	2	1		3
Psycho-Education Committee	1	1			
Other	11	1	10 / 1		
TOTALS	168 / 35	58	29 / 3	9	28 / 4

Figures in red represent complaints open at the end of 2009 which were closed in 2010.

Evolution of the Modern Ombudsman

The modern constitutional Ombudsman dates back to the 1809 Constitution of Sweden. The idea was likely inspired almost 100 years earlier by the Turkish Court. After losing wars against Russia, King Karl XII of Sweden fled to Turkey in 1712 where he was a guest or prisoner of the Turkish Court for several years. He was able to observe a category of official known as the *Qadis* or *Justices of the Sultan* who were independent from the Court and acted as arbiters between the peasants and officials. In order to monitor military and political intrigue rampant during his absence, King Karl wrote a letter to Sweden to establish the "Highest Procurator" (later, "Chancellor of Justice" / "Ombudsman") who could prosecute persons in breach of the King's rules.

A century later, in 1809, after King Gustav IV was dethroned, the Swedish Parliament adopted a constitution that introduced the separation of powers. The Ombudsman became an independent official, appointed by Parliament who could prosecute violations by civil servants and the judiciary arising from complaints of citizens or on his own initiative.

The Ombudsman institution expanded to Finland in 1919 and Denmark in 1955 (but without authority over the judiciary or the power to prosecute). The spread of the Ombudsman movement beyond Scandinavia is credited to the first Danish Ombudsman who is said to have had "missionary zeal" in championing the idea to English-speaking audiences. As a consequence, New Zealand established the institution in 1963, Tanzania in 1966 and England in 1967.

Today, there are approximately 140 national Ombudsmen. Professor Reif of the University of Alberta classifies about 40% as following the "classical Scandinavian model". The remaining 60% are "hybrids" that combine oversight of public administration with human rights, corruption or freedom of information mandates. Some countries (such as Canada and Spain) have regional or provincial Ombudsmen rather than or in addition to a national Ombudsman. There are only five states in the U.S. with independent Ombudsmen of "general jurisdiction" (i.e. takes complaints about all government departments).

Other forms of the Ombudsman concept include the 'supra' Ombudsman of the European Community. This idea is being act-

ively considered by the Caribbean Ombudsman who recognize that with the imminent regional Single Market Economy, there may be complaints that span their borders and involve inter-island agencies. There are also sector or specialized Ombudsmen (e.g. for pensions, children, prisons) as well as many private sector complaints mechanisms with varying degrees of independence from the entities they oversee. The UK Financial Services Ombudsman is a notable example of a private sector Ombudsman that operates independently of and yet is financed by industry.

While we owe to Sweden the idea of a constitutional mandate, there can be no doubt that the concept and yearning for justice is a universal theme. Those of us concerned with human rights understand that rights are universal – just by virtue of being born human we have certain inalienable rights. I believe that in the same way that rights are universal so is the urge for justice. Just by living in community, human beings always seem to find ways to ensure justice. We can find in almost every tradition and culture on earth the concept of the Wise Arbiter who gives voice to the ordinary person vis-à-vis the powerful. Examples of such traditions include: the Qin Dynasty in China as far back as 221 B.C., the *Diwan-al-Mazalim* from 7th Century Islam, the Listeners from mid-16th Century Brazil and the *Amapakati*, literally, the Middle Ones, of the Zulu people of South Africa (reported in the early 1800s by colonial agents as a centuries old tradition). Perhaps this explains why the modern constitutional Ombudsman has caught fire all over the world in the past 50 years.

Dr. Victor Ayeni, a renowned expert in the oversight of public administration (Keynote Speaker at the official opening of our office in January 2006) states that the value of the Ombudsman is such that it has become a human right in itself. That is, countries that do not have Ombudsman institutions are denying inhabitants the right to administrative justice.

Comparative research by a legal team at the University of Sheffield in the UK explored a seminal idea largely from developments in Australia in their just published research: "*The Ombudsman Enterprise and Administrative Justice*". Dr. Richard Kirkham who spoke at the CAROA conference in Bermuda contends: "*Constitutional lawyers have always talked of three*

distinct and fundamental branches of the constitution – the executive, the legislature and the judiciary. We should add a fourth branch – the integrity or accountability branch. Such a theoretical development is no more than a practical recognition of how constitutions have evolved”.

In Bermuda, the “Integrity Branch of Government” is comprised of three Constitutional authorities – Auditor General, Ombudsman and Public Service Commission. The permanence of being Officers of the Constitution enhances credibility in our oversight functions. There are also five statutory accountability authorities – Human Rights Commission, Parliamentary Registrar, Police Complaints Authority, Department of Internal Audit and impending Information Commissioner.

South Africa has a complex oversight regime with a plethora of constitutional institutions. The venerable Nelson Mandela’s response is instructive for all who govern:

“It was to me never reason for irritation but rather a source of comfort when these bodies were asked to adjudicate on actions of my government and Office and judged against it. One of the first judgments of our Constitutional Court, for example, found that I, as President, administratively acted in a manner they would not condone. From that judgment my government and I drew reassurance that the ordinary citizens of our country would be protected against abuse, no matter from which quarters it would emanate. Similarly, the Public Protector (Ombudsman) had on more than one occasion been required to adjudicate in such matters.”

**R. v. Local Commissioner for Administration ex parte
Eastleigh Borough Council [1988] 1 QB 855**

“There is a suggestion that the council should issue a statement disputing the right of the Ombudsman to make his findings and that this would provide the council with an adequate remedy. Such an action would wholly undermine the system of Ombudsman reports and would, in effect, provide for an appeal to the media against his findings. The Parliamentary intention was that reports by Ombudsman should be loyally accepted by the local authorities concerned... This is clear from... section 31(1) [of the Local Government Act 1974], which requires the local authority to notify the Ombudsman of the action which it has taken and proposes to take in light of his report... Whilst I am very far from encouraging councils to seek judicial review of an Ombudsman’s report, which, bearing in mind the nature of his official and duties and the qualifications of those who hold that office, is inherently unlikely to succeed, in the absence of a successful application for judicial review and the giving of relief by the Court, local authorities should not dispute an Ombudsman’s report and should carry out their statutory duties in relation to it.”

The practical effect of Eastleigh was that Ombudsman findings were understood to be binding. This was affirmed in the lower Court’s judgment of

**Regina (Bradley and Others) v. Secretary of State for Work and
Pensions and Others [Judgment of the High Court Feb. 21, 2007;
Court of Appeal Feb. 7, 2008]**

The High Court affirmed Eastleigh that: *“unless objectively shown to be flawed, irrational, peripheral or there is genuine fresh evidence to be considered,”*

Ombudsman findings (not Recommendations) are binding.

However, the Court of Appeal in Bradley set out a different test: Ombudsman findings are not binding, but cannot be rejected without good reason: *“the [minister] acting rationally, is entitled to reject a finding of maladministration and prefer his own view. But... it is not enough that the [minister] has reached his own view on rational grounds; it is necessary that his decision to reject the Ombudsman’s findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies [the Ombudsman’s legislation].”* Authorities should have provided all relevant evidence to the Ombudsman during the investigations. Irrational reasons for rejecting the Ombudsman’s findings include defensiveness and denial.

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.

DID YOU KNOW?

IMMIGRATION: References for applicants for Permanent Residency Certificates must corroborate the time period that applicants lived in Bermuda. Otherwise, applicants must provide professional references.

Children of Permanent Resident Certificate holders have the right to live in Bermuda but grandchildren do not.

Even if you and your spouse live in the same house, Immigration can investigate if you are in a sham marriage.

It is not a right to live in Bermuda even if you are married to a Bermudian. You may be required to depart due to criminal conviction or other serious reasons.

If you travel into Bermuda by air and plan to leave by boat, you must provide a travel itinerary (for tourists) or a letter from the boat's captain specifying itinerary (for crew).

MANY THANKS TO:

E. Foley, Rent Commission – for facilitating mailing of flyers to individual households announcing legislative changes to the rent control ceiling.

DID YOU KNOW?

OPERATIONS & ENGINEERING: When a landowner who has been notified that they must trim roadside hedges fails to comply, the Department may cut back the hedges up to 6.5ft from the road.

The Department may cut back a landowner's roadside vegetation even without notice on an emergency basis.

Answers: "Bermuda or Elsewhere?" • 1 Scotland • 2 Bermuda • 3 Newfoundland • 4 Trinidad • 5 Hong Kong • 6 Bermuda • 7 Mauritius • 8 Gibraltar • 9 Bermuda • 10 Bermuda • 11 UK • 12 Ontario • 13 Finland • 14 Bermuda • 15 Toronto

Investigation Process

Tahmourpour v. Canada (Solicitor General) [2005] FCA 113

“Any judicial review of the Commission’s procedure must recognize that the agency is master of its own process and must be afforded considerable latitude in the way that it conducts its investigations. An investigation into a human rights complaint cannot be held to the standard of perfection; it is not required to turn every stone. The Commissioner’s resources are limited and its case load is heavy. It must therefore balance the interests of complainants in the fullest possible investigation and the demands of administrative efficacy...However, in failing to investigate and analyse the statistical data, and to interview others...the investigator failed to investigate obviously crucial evidence...[and thus] the investigation lacked the thoroughness required by the duty of fairness.”

MANY THANKS TO:
**J. Aubrey, Department of
Communication & Information**
– for professionalism
and assistance.

By the time complainants come to the Ombudsman they usually have at least two layers of concerns. First is the underlying substantive matter that they had wanted the Government department or authority to address. The second layer is the manner in which that authority tackled the matter and / or treated complainants.

Many of the early Ombudsman regimes allow for investigation of process only. Section 2 of Bermuda’s Ombudsman Act 2004 (“Act”) provides for the investigation of both substance and process. For example, we can investigate whether administrative actions are based wholly or partly on a mistake of law or fact or irrelevant grounds. Further, we can investigate whether administrative action was unfair, inefficient, oppressive or improperly discriminatory or based on procedures that are unfair, oppressive or improperly discriminatory.

Complaints may be made orally, electronically or in writing. The Ombudsman is a last resort. Accordingly, we first ask if a complainant has given the authority an opportunity to address and rectify the matter. In the past year, we have seen a large increase in complaints and some of this is due to people coming to us a bit too early. Usually, we refer them either back to the authority they are complaining about or to a more appropriate authority.

We prefer complainants to come in for intake interviews and ask that they bring all relevant documents with them. Complainants are usually very much anchored in the conviction that they are right and the authority is wrong. Often, we know enough about the authority’s processes that we are able to give them an initial idea on whether the matter that they are complaining about was properly dealt with. Complainants are sometimes surprised when we reality-test them in intake meetings. We often quote Tom Frawley, the Ombudsman for Northern Ireland: *“the Ombudsman is neither an advocate for the complainant nor the authority – he is a critical friend to both”*.

The next step is to determine whether the complaint is within our jurisdiction and is made in time. The complaint is within jurisdiction if it is about a Government department, board or other public authority and is not an administrative action (such as employment matters) that is prohibited by the Schedule to the Act (see Ombudsman Act in a Nutshell, p. 40). We may decline to investigate if the complaint is more than a year after the event complained about (which can include the authority’s last communication about the issue that complainant may perceive as dismissive or negligent). We may also decline to investigate if a complaint is frivolous or if there is an existing process to remedy the matter and it was reasonable for complainant to use that process.

The Act requires that we acknowledge the complaint and identify the action complained

about. We then make preliminary inquiries (usually written but may be oral) in order to determine whether or not to conduct an investigation. The Act also allows us to address complaints through mediation instead of investigation. Quite often, preliminary inquiries combined with informal mediation will resolve an issue.

We may embark on a formal mediation for those complaints where there is an ongoing relationship between the complainant and the authority – as relationship and communication issues often contribute to substantive problems. We also conduct formal mediations when the problem is acknowledged but the parties cannot agree on resolution or when investigation would only inflame entrenched (often emotional) positions.

In all mediations, as well as in analyzing evidence gathered in investigations, we usually draw on the ‘Interest-Based Methodology’ developed by the Harvard Negotiation Program (“HNP”) of the Harvard Law School. The analysis of interests (rather than positions), insistence on creative options and objective standards never fails to reveal critical information about the various perceptions and also helps to craft operational remedies that address both complainant and authority concerns. In a previous career, I taught this methodology and facilitated mediations and negotiations with Conflict Management Inc., the corporate arm of HNP.

Complaints that are not referred, declined or mediated are addressed through investigations. The systemic approach to investigation developed by Ombudsman Ontario is very helpful in methodical planning, pinpointing sources of evidence, anticipating roadblocks and using resources efficiently and effectively. Whether complaints are complex or not, systemic or individual, this approach clarifies the prioritization of witnesses and documents to be requested. On occasion, we conduct site visits as a picture really does tell a thousand words.

The process of questioning witnesses is usually iterative as the devil is truly in the details. The back and forth may sometimes annoy authorities but we have to be scrupulously fair to both complainants and authorities by testing and re-testing the details. Investigations are not always straightforward and linear. We try to update complainants periodically, especially when there is new information. We frequently research best practices overseas and other objective standards.

There are three cases from Canada regarding investigation standards for human rights complaints that I believe are equally applicable to ombudsman, labour and other investigations (see Slattery p. 6; Tahmourpour and Hughes in margins). Essentially, fairness dictates

Hughes v. Canada (Attorney General) [2010] FCJ No. 1193; 2010 FC 963

An investigator cannot rely solely on a respondent’s position and must address the critical aspects of the complaint, the perspective of other similarly situated persons, systemic evidence and, any rebuttal issues and evidence. Quoting *Canadian Broadcasting Corp. v. Paul*, [1999] 2 F.C. 3 at parag. 62, overturned in part on other grounds (2001), 198 D.L.R. (4th) 633 (F.C.A.):

“In essence, the investigator must collect the information which will provide an adequate and fair basis for a particular case, and which will in turn allow the Commission to balance all the interests at stake and decide on the next step. No relevant fact should be left out. Omissions, particularly when the information is damaging to the complainant’s position, only result in casting serious doubts on the neutrality of the investigator. I realize that this is a difficult task, but it is only in achieving this high standard of fairness that the investigator will help the Commission retain its credibility.”

DID YOU KNOW?

PLANNING: According to their website, Planning must provide a building permit within 8 - 10 weeks of the building permit application being filed.

MANY THANKS TO:

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

DID YOU KNOW?

KEMH: When scheduled for surgery, three separate expenses will be billed to your account (1) KEMH facilities fee (2) surgeon fee (3) anaesthetist fee.

MANY THANKS TO:

G. Ness, *Department of Planning* – for consistent, fair, resolution-oriented responses.

FROM THE PUBLIC:

Thank you for your assistance in getting the problem resolved. It is nice to see the system works!

that we try to uncover all available evidence and clarify all relevant issues within realistic limits of investigative resources.

In addition to review of relevant laws, interest-based analysis and the UK Principles of Good Administration, we use other analytical tools such as the 'Root Cause' analysis of human factors and system weakness. At some point, we usually also reality-test our guts, put ourselves in the shoes of both complainant and authority and ask – does this set of allegations and evidence smell right? We are almost always able to arrive at a considered conclusion about whether or not there was maladministration.

Individual complaint remedies are intended to put complainants in the position they would have been in had there been no maladministration. I may recommend that a matter be referred to an appropriate authority for further consideration, an omission or delay be rectified, a decision, recommendation or procedure be altered or a law or regulation be reviewed. Especially in those instances where complainants felt badly treated, I may recommend that the authority provide complainant with reasons for their actions and / or a "without prejudice" apology. Australia and British Columbia have led the way with the standards for apologies with actual legislation. Our recommendations clarify that a "without prejudice" apology should be more substantive than mere "regret" and should articulate: an admission that complainant was harmed; an explanation for the authority's actions; and, what is being done to prevent a recurrence in the future. Complainants often say that they complained so that this "doesn't happen again." Whether or not we make a finding of maladministration, we try to identify in the investigation or mediation process any ways that we can recommend for improving administration practices and procedures. Such systemic advice is the enduring value of the Ombudsman.

A final note: we do not have a slew of policies and procedures. This could actually hamper our flexibility and nimbleness. No two days are alike. Regretfully, we sometimes have to put a research-intensive investigation aside in order to focus on an emergency or other complaint with immediate impact. But there is one overarching policy that all staff understand and try to apply: **we always say 'yes' before we say 'no'**. When a complaint is made too early or is beyond our jurisdiction, we try to find out exactly to whom we can refer complainants. Even if it is clear that we must say 'no' we still make a point of listening and may suggest ways of moving forward. When we find that there is no maladministration, we try to provide as cogent and full explanations as possible. We are not always adept or successful, but we do try to ensure that the public experience our office as a place where they are fairly heard and helped – in some way.

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 cases can be resolved in a few weeks, but more complex cases can take much longer.

How much does it cost?

Services are free and available to anyone.

Kay v. Health Service Commissioner [2008] EWHC 2063

The statutory restriction that confidential information supplied to the Ombudsman “shall not be disclosed” applies to people receiving information from the Ombudsman as well as to the Ombudsman herself. *“It would be an absurd position if the ombudsman was restricted as to the situations in which she could disclose the material, only for the material to be used by others for reasons outside the ambit of the ombudsman’s investigation and report.”* The Ombudsman may require the complainant or any third party to whom she releases such confidential information to provide her with a legally binding undertaking not to release it further.

NOTES

• "Own Motion Investigation"

COMPLAINT PROCESS – FREE AND AVAILABLE TO ANYONE
 Ombudsman may investigate in the public interest even if no complaint

Complaints may be

- Oral, electronic, written
- by persons aggrieved (or family if persons cannot act for themselves)
- Within 1 year of event

- Is complaint about a Government Board, Department, or Public Authority?
- Is matter exempt (Cabinet, court proceeding, crime or employment Issue)?

- Ombudsman can investigate even if matter cannot be further appealed or is final

- Inquiries resolve complaint; or
- Investigation or mediation; or
- Ombudsman declines

- Ombudsman may visit sites, require documents, question under oath, summon any witness
- due process to respond
- update case periodically
- Obstruction=Contempt of Court

- Ombudsman makes
 - specific recommendations re complaint *and/or*
 - general recommendations on how to improve practices and procedures

- Notify Ombudsman of steps taken or proposed to implement or reasons for not doing so
- Ombudsman accepts if adequate or appropriate

- For other complaints, Ombudsman may summarize (without names) in Annual Report

