

“ For the
Cause that Lacks
Assistance
For the Wrong that needs
Resistance
For the **Future** in the
Distance
And the
Good
that we can do ”

– Samuel J. Parker, Sr. –

OMBUDSMAN *for* BERMUDA

EIGHTH REPORT – 2012 CALENDAR YEAR



Cover quote: the motto of *The Times and Advocate*, Bermuda’s first black newspaper, quoted in *Freedom Fighters: From Monk to Mazumbo* by Ira Philip.



June 28, 2013

The Speaker, The House of Assembly
The Hon. K. H. Randolph Horton, JP, MP
Sessions House
21 Parliament Street
Hamilton HM 12

Dear Honourable Speaker,

I have the honour to present my eighth Report which covers the year January 1, 2012 to December 31, 2012.

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

Table of Contents

Ombudsman's Message	2
International Relations	5
Selected Summaries of Closed Complaints	9
The Constitutional Right to Privacy	14
Apology is Often the Best Medicine.....	16
Update: "Today's Choices: Tomorrow's Costs"	18
EIA Around the World	21
From the Charter to Predator Lionfish.....	22
New Special Development Order Protocol – April 2013.....	25
Note re Asbestos	25
Staff.....	26
Ombudsman Examines BHB Review by Howard Associates	27
Note re PATI.....	32
Whistle-Blowing Protection Under the Ombudsman Act.....	33
Statistics	35
Presentations and Orientations.....	40
Caribbean Ombudsman Training Network.....	41
Feedback Received by the Ombudsman's Office	42
Eight Steps for Resolving Your Own Complaint	44
Note re HRC Complaint Process.....	45
Ombudsman Act 2004 "In a Nutshell".....	46
How to Make a Complaint to the Ombudsman.....	48

WE APPRECIATE

Ms. Dianna Taylor, Director, Department of Financial Assistance, for immediate and knowledgeable responses and for taking responsibility for the Department.

WE APPRECIATE

Mrs. Lisa Lister-Reed, Executive Officer, Human Rights Commission, for taking responsibility for the Commission and for commitment to staff learning.

Ombudsman's Message



The Ombudsman operates as the eyes and ears of the Legislature in bringing to light problems in the delivery of public services. The traditional Ombudsman approach is to “name, blame and shame”. Our Ombudsman Act 2004 states that I may make recommendations not only to resolve complaints but also generally about how to improve practices and procedures. Accordingly, our approach tends heavily toward forging resolutions. Over the years, a few members of the public have taken me to task for not doing more naming, blaming and shaming.

The Ombudsman Act does, however, require me to make the point when responses of authorities to my recommendations are inadequate and/or inappropriate. One UK Court judgment¹ clarified: the very reason that authorities are required to explain what they are doing to implement recommendations or give written reasons why not – is precisely because it

is the intention of the Legislature that Ombudsman recommendations ought to be implemented (not mandatory, but there should be adequate and appropriate reasons if not). Therefore, I do name, blame and shame when I have not been given adequate or appropriate reasons for Government failure to implement recommendations.

One curious example this past year is described at pages 14-16 of this Report. Neither the Environment Ministry nor the Department of Land Valuation have submitted adequate or appropriate reasons for rejecting my recommendation that the public be asked – in the first instance – for consent to the taking of internal photographs of their homes from the outside. This is a simple courtesy. If home owners are resistant, then it would be reasonably justifiable under the Constitution to use the Department's existing powers to enter with a police escort. But in the first instance, what is the harm in asking for consent? The police similarly have the Constitutional right to invade privacy of the home without consent. However, the police go through an authorization process in order to do so. Why not a Government Department?

Another glaring example of inadequate or inappropriate resistance to my recommendations is the issue of whether Environmental Impact Assessments (“EIA”) are mandatory rather than discretionary before approval of certain development proposals. The Government has still not submitted any legal rationale or evidence for rejecting my conclusion that an EIA is required in accordance with legal commitments made under the 2001 UK Environment Charter.

The issues raised in my original report – *Today's Choices: Tomorrow's Costs* (“TC:TC”) – are relevant to other Overseas Territories that had signed identical Charters with the UK. Since tabling TC:TC we have received support and information from persons involved with the other Overseas Territories. Most significant is a 2010 judgment of the Eastern Caribbean Supreme Court which is the only case to date that has actually interpreted the legal status of the Charter – and indeed, confirmed my conclusion that the Charter imposes legal obligations. An update on TC:TC was tabled in April 2013 and is extracted at pages 18-21 of this Report.

This update, along with my response to the Government and Annual Report of last year present mountains of evidence about the legal status of the Charter. This evidence includes: both binding common law and international law precedents; explanations from the actual drafters about their intentions; contemporaneous statements of representatives of the UK and Bermuda; subsequent official UK government evidence submitted to the UK House of Commons; and international best practices. This is not mere “opinion”. These are the facts and the law.

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

Therefore, the new “protocol and procedures” for Special Development Orders announced in June 2013 was a bit of a disappointment. While the protocol does fill a gap by removing prior confusion about the role of the Department of Planning in reviewing SDO applications, an EIA is still deemed to be discretionary (see page 25).

A new argument that is now being thrown up is that there must be domestic legislation in order to render the Charter commitments legal in Bermuda. Signature of the Charter was not enough. Actually, there is a much simpler legal route for the Government to begin to require EIAs – if there is a serious will to do so. Section 16 of the Ombudsman Act requires that authorities report what they are doing to implement my recommendations. Accordingly, section 16 constitutes the legal authority to implement my recommendations. In the absence of adequate or appropriate reasons not to do so, a policy to require an EIA can be put in place almost immediately, (regardless of whether or not the government agrees with the judgment of the Eastern Caribbean Court). This is not a theoretical exercise or academic dispute. Without an EIA, there is potential for serious harm to Bermuda’s environment.**

A few people have asked if our office is affected by the election of a new government in December 2012. Absolutely not. As the above example shows, the resistance of the Government to implement my recommendation to require an EIA has not changed with a new political party. Our jurisdiction is oversight over the Civil Service, not Ministers, Cabinet and Junior Ministers. The public is the check on political actors through periodic elections and a robust party system. Our work continues unabated. We are accountable not to Government, but to the Legislature for our operations through annual and special reports. We are accountable for our expenditures through annual independent financial audits.

People have also asked about our protection of whistle-blowers and expressed concerns about the delay in operation of the Public Access to Information Act. My brief observations about both topics appear at pages 33 and 32 respectively.

While much energy and time go into the large systemic investigations we are daily consumed with trying to effect enduring resolutions to individual complaints. We have been able to take a bite out of our backlog by employing informal mediation more frequently. Notwithstanding my comments above, we find that authorities are willing to look for solutions that are helpful and make sense. We do not believe that civil servants wake up each morning with the goal of making life miserable for the public. By and large, they do try to serve and do what is right.

On the international front, as my tenure as Ombudsman ends in 2013, I did not run for re-election to the Board of Directors of the International Ombudsman Institute at our quadrennial conference in November in New Zealand. As always, the Conference was a great opportunity to share with colleagues and to imbibe the exciting developments for this ever-evolving institution. I was delighted to be able to bring together the islands of the Caribbean and Pacific for an informal meeting. We have more in common than meets the eye (see pages 7-8). International networks are key for understanding best practices and contribute to our effectiveness here in Bermuda. I was humbled and thankful to receive an Honorary Life Membership in the IOI.

Nothing is achieved in our office without an amazing team. (I could confidently be out of the office for an extended period and everything would proceed like clockwork.) It is not just the work that my staff has mastered – handling complaints; managing Complainant expectations; researching best practices; analyzing legal issues, people and situations; and, negotiating with authorities. It is their consummate passion and peerless diligence in probing for the facts, seeking what is fair and speaking truth to power that makes my team a truly great honour to serve with.

*** No Environmental Impact Assessment = Potentially Irreparable Harm*

The purpose of an EIA is to identify the risks of a proposed development and to explore ways of mitigating such risks if possible. The caves and hills of the Tucker's Point property are the last most biodiverse and some of the most pristine areas in Bermuda.

The 2012 Tucker's Point SDO ("TP SDO") that was reviewed in TC:TC did not require a proper and comprehensive EIA. However, it did require that a hodge-podge of studies be completed – at the "reserved matters" approvals stage – before final applications could be approved by the Development Applications Board ("DAB"). TC:TC illustrated the deficiencies in the studies and "conditions" set out in the TP SDO (for example, the sewage "condition" was not even as strong as the one set out in their 2001 SDO).

Current applications propose to put an access road perilously close to caves and the Yellowwood trees (see TC:TC for the significance of these). The proximity of caves is not the only concern with the proposed location of the access road. The DAB will also need information about the potential impact on critical habitat soil moisture regimes and groundwater due to construction and ongoing use of the access road.

Even with the deficiencies in the TP SDO, it does at the very least require *"a geotechnical assessment to determine existing caves/voids and cave features involving exploratory borehole surveys for **locations of building sites, access driveways**".* Further, *"any identified critical habitat or existing mature specimen endemic, native or ornamental plants must be recorded; and these sites and plants must be protected and provided with an adequate setback buffer".* (Note: this "condition" gives no guidance about how to determine what is "adequate" – an EIA would have done so.)

My prior reports have quoted the House of Lords UK Court judgment that is binding on Bermuda – EIA can be conducted at the "reserved matters" approvals stage. Even if the DAB does not exercise its discretion to require an EIA before approving the current applications, the studies set out in the TP SDO must be carried out: half a loaf is better than no loaf at all. A failure to do these studies may mean that Bermuda's environment can be irreparably harmed.

Independent Annual Audits

The Ombudsman for Bermuda is accountable to the Legislature and public through (a) annual reports of operations and (b) annual independent audit of the use of the public purse. Our audited financial statements can be found in the annual publication of the Ministry of Finance, Government of Bermuda: *The Financial Statements of the Related Organisations and Funds (the Public Accounts)*.

International Relations

INTERNATIONAL OMBUDSMAN INSTITUTE WORLD CONFERENCE

In November, Ms. Brock attended the IOI Board Meetings and Quadrennial Conference in Wellington, New Zealand. She ended a three year term as Director and Vice-President for the Caribbean and Latin America. (She did not run for election for a second term as her tenure as Ombudsman for Bermuda ends in 2013.)



Incoming and outgoing IOI Board of Directors

The IOI conference is usually held every four years with delegates from all over the world. This is a singular opportunity to learn from and share with colleagues. This excellent conference featured sessions on: the rapidly changing landscape and challenges for Ombudsman work; relationship to the Courts; serving vulnerable



With B. Angrick, former President, IOI; T. Madonsela, Public Protector, South Africa



With M. Hook (and wife), Ombudsman, Gibraltar (guest speaker at 2008 CAROA conference in Bermuda)

populations; holding leaders to account; setting standards in public administration; prisoners' rights; privatization; anti-corruption; technology developments; and, several sessions on aspects of human rights as well as public access to information. Ms. Brock chaired the panel discussion on "Doing More With Less"



in which presenters noted that Ombudsmen oversight is of particular importance during times of austerity when governments often reduce quantity and quality of services.

With J. Daniel, Assistant Ombudsman, Cook Islands



With P. Sangetari, Ombudsman, Papua New Guinea; P. Tamo'ua, Office Manager, Tonga; and, J. Poraiwai, Ombudsman, Solomon Islands



With Dr. N. Arduin, Ombudsman, Sint Maarten; E. Georges, Complaint Commissioner, BVI; N. Williams, Complaint Commissioner, Cayman Is.; Y. Hall, Office Manager, Trinidad & Tobago; L. Stephenson, Ombudsman, Trinidad & Tobago

INTERNATIONAL OMBUDSMAN INSTITUTE (IOI)



International Ombudsman Institute
 Institut International de l'Ombudsman
 Instituto Internacional del Ombudsman

In April 2013 Arlene Brock and Tom Frawley, Ombudsman for Northern Ireland, were awarded Honorary Life Memberships in the International Ombudsman Institute (IOI). (awarded to only 12 others since inception in 1993).

Ms. Brock was elected to the Board of Directors of the IOI at the quadrennial conference in June 1999 and served until November 2012. She was also the Vice-President of the IOI's Caribbean & Latin American Region.

In awarding her the Honorary Life Membership, the IOI cited Ms. Brock's "exceptional commitment" and "outstanding services". Further, the IOI notes "She became an active spokesperson of the IOI's visions in the field of training and it can be said that thanks to Ms. Brock's significant contribution, the IOI was able to forge partnerships with training entities and continues to offer interesting training initiatives to its members".

THE OMBUDSMAN ASSOCIATION (UK)



Bermuda was admitted to join the British & Irish Ombudsman Association (recently renamed the Ombudsman Association) in 2006 after a rigorous accreditation process. In 2012 the OA required each member to be re-accredited based on a self-assessment questionnaire. Bermuda passed with flying colours. In fact: "In order to facilitate the revalidation process of the remaining Ombudsman Members, the Validation Committee has

suggested putting the Bermuda Ombudsman self-assessment form and also that of the Financial Ombudsman Service, on the Association website (in an appropriate part of the 'members' area') as an exemplar so that other schemes can see what is required."

Pacific Ombudsman Alliance ~ Network News

Fostering government integrity and good administration in the Pacific

Issue 29 – December 2012

SPECIAL EDITION – WELLINGTON, NEW ZEALAND

In a busy week in Wellington, POA members participated in the POA members' meeting, POA Working Groups and Sub-Committees, attended the International Ombudsman Institute (IOI) conference, and took part in pre-conference workshops and training.

Wellington was chosen as the venue for the fourth POA members meeting to coincide with the IOI conference, hosted by the President of the IOI and Board member of POA, Chief Ombudsman of New Zealand Dame Beverley Wakem.



ANNUAL MEMBERS MEETING

The fourth annual POA members' meeting was held on Saturday 10th November. Sixteen members representing fourteen organisations from twelve Pacific countries attended the meeting – including both foundation members, and recent appointments who were participating in POA for the first time.

The first order of business was to report on completed activities, such as recent placements in the Republic of the Marshall Islands and the Solomon Islands Leadership Code Commission. The Secretariat also presented a budget statement, including a list of all activities and their costs since the start of 2010. This allowed members to see exactly where the funds had been spent, and the relative cost of each type of activity.

PACIFIC OMBUDSMAN ALLIANCE

Ms. Brock was the only non-regional guest at the formal dinner closing the POA Members Meeting held just prior to the start of the International Ombudsman Institute World Conference in Wellington, New Zealand in November 2012.

Other course topics include interviewing witnesses, writing and publicizing reports, and using new technologies and social media.

FORMAL DINNER

To wrap up the POA proceedings, a celebration dinner was held at the Museum Hotel on Monday 12th November. The outgoing Acting Chair, Bruce Barbour, and the incoming Chair, Colin Neave, both spoke briefly to welcome participants, bring together the threads of several days' discussions and emphasise the importance of personal relationships in the network of international ombudsmen and allied institutions.



Arlene Brock, National Ombudsman of Bermuda, at the POA dinner

We were also delighted to host Arlene Brock, who was appointed as the first National Ombudsman for Bermuda in 2005. Ms Brock has actively promoted links between Ombudsmen in the Caribbean. At the dinner, Ms Brock spoke of the similar problems faced by Caribbean and Pacific Ombudsmen, and the possibility of sharing resources and solutions.



At the dinner (l-r) Ms Phoebe Sangetari, Acting Chief Ombudsman, Papua New Guinea, Ms Sina Hutton, POA Secretariat, Ms Jeannine Daniel, Assistant Ombudsman, Cook Islands

PACIFIC-CARIBBEAN LINKS

Ms Brock set up a meeting of Caribbean and Pacific organisations during a lunch break in the IOI conference. Participants were able to meet each other and briefly share the challenges of being an Ombudsman, or similar, in a small community. Difficulties of resourcing, and the lack of confidentiality, were common themes.

Possible solutions to these problems were also discussed. The group agreed that they would stay in touch through the IOI and POA.

Individual offices also agreed to further communicate in relation to similar specialist roles. For example the Ombudsmen of Papua New Guinea and St Maartens discovered they were both also guardians of their country's constitution and had additional responsibilities in working to resolve constitutional questions.

pacific ombudsman alliance

Selected Summaries of Closed Complaints

Ministry of Home Affairs

The Charities Commission (“the Commission”)

Complaint: Failure to Give Reasons for Decision



Charitable A wished to start a new charity and submitted an application to the Commission. Her application was denied but in its reply the Commission failed to give reasons for its decision. Further to the Charities Act 1978 Charitable A appealed the Commission’s decision to the Minister of Culture and Social Rehabilitation. The Minister denied her appeal but again the Commission which was responsible for communicating the Minister’s decision did not give reasons.

The Commission explained to the Ombudsman that the proposed purpose of Charitable A’s charity was similar to an already existing charity and that another charity was not necessary. The Ombudsman found that while the decision was reasonable the reasons for the decision should have been explained to Charitable A.

The Ombudsman informed Charitable A of the reasons for the Commission’s decision and recommended that the Commission provide written reasons for all future determinations.

Ministry of Legal Affairs

Legal Aid Office (“Legal Aid”)

Complaint: Unclear Advice

Inheritor B is a person with special needs with a high level of understanding. She was told by one of her relatives before he died that she would inherit his house. Six months after the relative passed Inheritor B had not received any inheritance so she approached Legal Aid in an effort to retain legal services to

find out whether the will had been probated. She was advised to attend the free legal clinic at The Centre on Angle Street. The Centre in turn directed her back to Legal Aid who then advised her to go to the Supreme Court Registry.

Inheritor B felt that she had been given the runaround and was very confused by Legal Aid’s instructions. She came to our Office for assistance. Instead of launching an investigation into Legal Aid, the Ombudsman contacted the Supreme Court Registry to find out the process and was told that there would be a small fee to look through the registry book and confirm whether a will has been probated. Normally, if the name of the deceased is not listed then their will has not been probated. The process was explained to Inheritor B but she was still unsure how to proceed.

Although it is not something that our Office typically does, given the circumstances, we decided to help Inheritor B confirm the status of her relative’s will by taking her to the Supreme Court Registry to review the registry book. Her relative’s name was not in the Registry.



Ministry of Tourism Development and Transport

Transport Control Department (“TCD”)

Complaint: Inefficient

For at least 10 years **Trucker C** was required to submit proof of the company’s name change and evidence that all Government taxes were paid as part of the annual licensing application.

In the 11th year when Trucker C went to TCD to license the trucks he was told that in addition to the ownership and tax documents he had to complete an “Application to Operate Trucks,



Tank Wagons, Tractors, Self-Propelled Constructional Machines or Trailers ("Application"). He was also informed that his Application would be sent to the Trucks Advisory Committee ("TAC") for review – this was the first time he would have to do this.

In response to the Ombudsman's preliminary inquiries TCD explained that although the vehicles were previously licensed there were questions about the name on the truck matching the name on the licensing certificate that had to be resolved. This was the reason for requesting the ownership details; the submission of the Application; and, review by the TAC.

The Ombudsman found that it would have been helpful if licensing information was on TCD's website. TCD agreed to raise this issue at its next Senior Management meeting and to remedy it as soon as possible. Note: the website still does not have the information.

Ministry of Home Affairs

Department of Labour & Training ("L&T")

Complaint: Unreasonable Delay

After working for nine and a half years for a construction company **Worker D** was temporarily laid off. Worker D expected to be recalled within three months because this is what previously happened. Therefore when he was not contacted within the three to four month period he complained to L&T.



L&T made inquiries into Worker D's claims and informed him that it appeared that he was not temporarily laid off but that his position was made redundant and that he was eligible to receive redundancy pay. A little over a year after making his initial complaint to L&T Worker D still had not received his redundancy pay. He complained to the Ombudsman.

In response to the Ombudsman's inquiries L&T explained that its investigation was ongoing because they were waiting for additional evidence from Worker D's former employer. It seemed that scheduling conflicts and personal matters kept the former employer from providing the requested information in a timely manner. The Ombudsman found that L&T unreasonably delayed its investigation into Worker D's complaint and suggested that L&T give the former employer a strict deadline within which to provide the documents. L&T did set a deadline and when this deadline passed L&T referred Worker D's matter to the Employment Tribunal. Worker D's complaint was closed once the Ombudsman received confirmation that the hearing was held.

Ministry of Community and Cultural Development

Department of Financial Assistance ("FA")

Complaint: Mistake of Fact

Tenant E was receiving financial assistance. After a couple of incidents with other residents at her government subsidized home, she decided to find accommodation elsewhere. Despite her move to a more expensive place, she continued to receive the same financial allotment for her rent. This created a shortfall which Tenant E was unable to cover.



Tenant E complained to the Office of the Ombudsman that FA had not paid her landlord. We explained to her that as 'an office of last resort', she had to first discuss her concerns with the Director of FA.

Due to the mounting arrears, Tenant E's landlord gave her a week's notice that she would be evicted. Very distressed, Tenant E returned to the Ombudsman for assistance. The Ombudsman communicated with FA and a relative of Tenant E in order to determine if a solution could be found for alternative accommodation and the payment of her arrears.

FA contacted the Bermuda Housing Corporation and was able to secure an affordable room which Tenant E could move into immediately. A relative of Tenant E graciously agreed to pay off the rental arrears in monthly installments. The Office then closed the complaint.

Ministry of Legal Affairs

Legal Aid Office ("Legal Aid")

Complaint: Failure to Give Reasons for Decision

Future Property Owner F was granted legal aid in order to determine whether his mother could convey her property to him. Once it was determined that she could do so, the Legal Aid Committee ("the Committee") correctly terminated Future Property Owner F's legal aid.



Future Property Owner F applied a second time for legal aid in order to effect the conveyance. The Committee determined that he was capable of meeting the legal expenses associated with conveying the property without assistance and informed him that he did not qualify for legal aid because he "now owns property".

Future Property Owner F complained to the Ombudsman who found that the Committee's reason could not be a ground for refusal because Future Property Owner F did not yet own the property. In response to preliminary inquiries Legal Aid confirmed that the wording was incorrect and that Future Property Owner F could appeal the Committee's decision. Future Property Owner F submitted a request for reconsideration and the Committee approved the request. Future Property Owner F's legal aid certificate was reinstated to cover the conveyance of the property with the condition that full recovery of all legal fees would be expected at the conclusion of the conveyance. After the legal aid certificate was reinstated the Ombudsman closed the complaint.

Ministry of Finance

Department of Social Insurance ("DOSI")

Complaint: Inefficient

Future Pensioner G's employer was over six months delinquent in making his pension contributions. When Future Pensioner G was made redundant he spoke with DOSI who told him to "leave it with us; we will take care



of it". Future Pensioner G complained to the Ombudsman that DOSI had not updated him on their inquiries in over a year and his former employer was in liquidation. This caused concern because the Receiver in the liquidation did not view outstanding payments to DOSI as a "priority debt". Future Pensioner G feared that there would be no funds to pay during his retirement if protective measures were not instituted quickly.

DOSI explained to the Ombudsman that when they became aware of delinquent employers and the employer is not on an agreed repayment plan they can conduct a compliance inspection and if necessary commence debt recovery proceedings through the Debt Enforcement Unit of the Attorney General's Chambers. After confirming with DOSI that they would take enforcement action the Ombudsman closed the complaint.

Ministry of Public Works

Department of Works & Engineering ("W&E")

Complaint: Unresponsive

The responsibility for negotiating rental agreements lies with W&E.

Landlord H rented property to a Government Department ("the Department").

Landlord H complained that (1) he had requested a copy of the



signed lease from W&E on several occasions without success (2) W&E did not pay one month's rent and (3) W&E failed to inform Belco that the Department, and not him, was responsible for paying the electricity bill.

Landlord H acknowledged that he had not spoken to a senior person within W&E in order to try and resolve his matter. According to S. 9(1)(b) of the Ombudsman Act 2004, complainants should exhaust existing administrative procedures prior to complaining to the Ombudsman. Accordingly, the Ombudsman directed Landlord H to first try and resolve the matter with W&E. Our Office assisted by finding out exactly who Landlord H needed to speak with and then arranged a meeting between the parties. Following the meeting, Landlord H still felt that his complaints were not resolved and he reverted back to our office.

However, after a preliminary inquiry, the Ombudsman did not find maladministration due to unresponsiveness on the part of W&E because: (1) the Department immediately changed the account name at Belco upon learning that it had not been done; and (2) W&E had submitted the leases to the Tax Commissioner for review and approval and was waiting for them to revert. There was a delay when the Tax Commissioner did not inform W&E that additional copies of the lease were required, however W&E immediately conveyed duplicate information to the Tax Commissioner once alerted to that requirement. This information had been conveyed to Landlord H's agent throughout the process but apparently the agent did not inform Landlord H.

Ministry of Public Works (*"the Ministry"*)

Complaint: Unreasonable Delay and Inefficient



The Ministry owed **Business Owner I** over \$11,000 for services rendered to the Ministry dating back to January 2011. She felt aggrieved because she still had to pay for staff and supplies

whilst the Ministry withheld the funds. Although she tried to resolve the matter with the Ministry directly she was not given an answer and was passed from one person to the next. After eight months with no progress, Business Owner I made a complaint with the Office of the Ombudsman.

Within three months of the Ombudsman's inquiries Business Owner I received all outstanding payments. Upon confirmation of this the complaint was closed.

Ministry of Home Affairs

Department of Immigration
(*"the Department"*)

Complaint: No Reasons Given



Husband J, a Bermudian, struggled for two and half years to bring his foreign wife to the island. A couple of months after the wedding Husband J obtained a Bermuda entry visa for his wife but she was still unable to travel to the island as she did not receive a transit visa for the UK in time. Almost a year later the wife was again granted a Bermuda entry visa but this time her transit visa was denied. It was Husband J's understanding that the reason his wife's transit visa was denied was because the Department recommended that it be denied. This confused Husband J because he had received a letter from the Department stating that "*a woman who continues to be lawfully married to a Bermudan husband is deemed to belong to Bermuda under s. 11(5) of the Bermuda Constitution Order 1968*". It was therefore unclear why the Department had instructed the UK Border Agency to refuse his wife's application for a transit visa.

Husband J came to our Office for assistance. The Department explained to the Ombudsman that they were looking into the matter. Since the Ombudsman's office is an 'office of last resort' the Ombudsman did not make further inquiries but allowed the Department the opportunity to try and resolve Husband J's concerns. He called later to say that his wife was in Bermuda.

Ministry of Public Safety

Parole Board (“the Board”)

Complaint: Unfair Decision

Our Office received a letter from a group of foreign inmates complaining that the Board’s policy of not granting parole to foreign inmates was unfair. Unlike their Bermudian counterparts foreign inmates are not eligible for parole after serving one third of their sentence.

The Ombudsman explained to the inmates that this very issue was the subject of the Supreme Court decision: *Martin Cashman v. The Parole Board and The Minister of Labour, Home Affairs and Public Safety* [2010] SC (Bda) 36 Civil. The Court found that the Board would be willing to favourably consider parole in Bermuda if the foreign national was able to find accommodation and to financially support himself. However, such favourable consideration would be subject to the Minister responsible for Immigration giving the necessary immigration approvals. The Department of Immigration typically requires that foreign prisoners with no right to reside in Bermuda are deported upon their release. Therefore, parole within Bermuda for foreign inmates is next to impossible to obtain.



Furthermore, the “concept of parole entails the ‘carrots’ of (a) early release and (b) supervision, backed up by (c) the ‘stick’ of recall for breach of the license conditions”. Therefore only prisoners belonging to countries with which Bermuda has a reciprocal parole agreement may be eligible for parole. Otherwise, based upon the Department of Immigration’s policy that foreign prisoners with no right to reside in Bermuda must leave the island, the parole of foreign inmates would create a situation of early release with likely toothless supervision in their home countries. The Court ruled that this was incompatible with the concept of parole as defined by S.12 of the Prison Act 1979.

Based upon the Court’s judgment, the Ombudsman did not find maladministration in the Board’s decision.

WE APPRECIATE

Mr. Shaun Bailey, Department of Corrections, for responsiveness and enthusiastic organizing of our presentations to the Department.

WE APPRECIATE

Mrs. Rozy Azhar, formerly Department of Immigration, now Assistant Cabinet Secretary, for forthright and comprehensive responses.

WE APPRECIATE

Mr. Graham Robinson, Human Rights Commission, for assisting in conveying complaints to our office from persons in prison.

WE APPRECIATE

Mrs. Herbert-Trott, Department of Human Resources, for taking responsibility for a problem, identifying the cause and determining what needed to be rectified.

The Constitutional Right to Privacy

Upon issuance by the Department of Planning of a *Certificate of Use and Occupancy Permit* the Department of Land Valuation (“Department”) usually conducts a new survey of the site. This is also an opportunity for the Department to update its files generally. Therefore, Technicians take note of any other changes to a property in addition to the development that triggered the inspection. In this instance, the Certificate of Use and Occupancy Permit was issued after Complainant had installed solar panels and a related water heater.

Complainant was quite put out to receive a notice that the Department would be conducting a site inspection: *Why should installation of solar panels lead to an inspection and possible increase in the valuation of his property? Surely the Government should be encouraging energy efficiency. Complainant and wife are retired and extremely frugal – hence, installation of the solar panels.*

The notice from the Department did not state what law allows it to conduct inspections. However it did state: *“the resurvey entails taking external measurements of the property...if you wish to be present during the inspection, please contact [us]”*. Complainant called immediately. He had two prior experiences with the Department and had accused it of unprofessionalism so he definitely wanted to be present. He clearly remembers that he requested the Technician to postpone the inspection until they return from overseas. It was a tense 25 minute telephone conversation in which the husband challenged the need for the inspection. However, the Department did not schedule a future appointment.

The next day Complainant’s wife was home alone. A Technician arrived from the Department. He politely showed his identification and indicated that he would be making external measurements. She did not understand why he was there as her husband had said that the inspection was postponed. So she kept a keen eye on the Technician from the window. Suddenly, she noticed that he was taking photographs of the inside of her home. Neither the Department’s notice nor the Technician himself had said anything about internal photographs.

For a very real half moment, she was consumed with fear. This young man may well be an exemplary employee of the Department – but she did not know him or how long he had worked there. In this day and age of so many break-ins one can never be too careful. Her husband was irate. Both felt strongly that the privacy of their home was violated. With lingering distrust from the past, he went straight to the Department and angrily asserted his concerns.

The Technician’s later evidence was that he did not recall being asked to postpone the inspection in the initial telephone call. The Department had decided that due to internal staffing levels it would be more efficient to conduct the inspection right away. Apparently, the Department’s sketch of this home from years ago had depicted the basement as “outdoor storage space”. While conducting the inspection, the Technician noticed that the basement is indoor living space and decided to take photographs. He had not asked for permission or explained this to the wife.

The Department’s evidence is that the encounter at their reception area was one of their most difficult ever with a member of the public. They also claim that the husband threatened to set his German Shepherd loose if anyone from the Department ever came on to his property again. While he admits that he was annoyed and a bit loud, the husband vehemently denies this. He is adamant that the Department is wholly inefficient. The basement was an indoor finished space since the house was built – so whoever made the original sketch must have got it wrong.

Ombudsman Recommendation

My Report cautioned Complainant: *“while civil servants must treat the public with respect, they also have a right to a basic level of civility from the public”*. Nevertheless, I did make a finding of maladministration due to the Department’s failure to seek permission to take the interior photographs. I recommended an apology to the Complainant. The Department did apologize – after direction and/or assistance of the Attorney General’s Chambers.

Even before my investigation was complete, the Department amended its “On-Site Advice Note” (internal guideline for inspections) to reflect this issue:

Taking photographs is part of the resurvey, but note that for residential cases, interior photographs are not permissible unless access had been granted. Thus document interior finish, use etc. from the exterior whilst on site, and arrange an internal inspection, if necessary... For all cases, the taking of internal photographs is of a sensitive nature, so clearly explain the reason for the photographs once access has been granted.

I found this amendment to be appropriate, indeed, commendable. However, the Department subsequently changed its mind. That implies that the Department believes that it can, should and will enter peoples’ premises and take internal photographs without consent.

Therefore, I further recommended that the Department reinstate its On-Site Advice Note to require that technicians seek consent to take internal photographs in the first instance.

Bermuda Constitution

The Department asserts a Constitutional right not to request consent. It is true that Article 7(b) of the Bermuda Constitution allows government officers to inspect premises without consent for the purpose of any tax. Valuations determined by the Department are for the purpose of assisting the Tax Commissioner to calculate taxes and issue bills.

However, the Constitution also requires that such entry must be *“reasonably justifiable in a democratic society”*. It is my opinion and recommendation that it is not reasonably justifiable for the Department to enter onto people’s premises in the first instance without first seeking consent. If people refuse, then the Department still has recourse to enter – with a police escort under s.8 of the Land Valuation and Tax Act 1967.

The Bermuda Police Service (“BPS”) has a similar right under Article 7(a) of the Constitution to enter on premises without consent in order to protect public safety, order and morality. Yet, even the BPS has strict parameters and must in most instances obtain initial authorizations in order to exercise this right under the Police and Criminal Evidence Act 2009 and certain other legislation:

The BPS may enter premises without consent – only on the reasonable belief that a person or relevant evidence is on the premises – for the purpose of: executing arrest warrants; recapturing persons unlawfully at large; saving life or limb; or preventing serious damage to property. There is an even higher standard of information required to obtain a warrant issued by a Magistrate. Specifically: the warrant must be in connection with an indictable offence; and, the evidence sought must be considered to be of substantial value.

Citizen-Friendly Procedure

In 2009 the Supreme Court of Bermuda suggested a new standard of good administrative behavior for Government departments. The Supreme Court noted that even when their governing laws do not require such, Government departments should establish procedures that are *“simple and citizen-friendly to adopt”*.

Surely asking for consent from homeowners in the first instance and explaining the need to take interior photographs would be both simple and citizen-friendly. I suspect that the majority of us who live in Bermuda would be aghast to learn that a Department of the Government – whose mission is “At Your Service, Bermuda” – believes that it may take interior photographs of our homes without first asking for permission.

I have urged the Ministry to require that the citizen-friendly On-Site Advice Note be reinstated.

Apology is Often the Best Medicine

Apology is an important and consistent remedy in global Ombudsman best practice. Ombudsman recommendations seek to put complainants in the position that they would have been in had there been no maladministration. In many instances, it is impossible to return complainants to such positions and an apology is the only reasonable remedy. Frequently, complainants are looking for nothing more than for government departments to acknowledge the harm and to put in place processes to avoid similar incidents in future.

The following “Principles of Good Administration” and “Principles for Remedy” articulated by the UK Parliamentary Commissioner have been applied by Ombudsman worldwide: (<http://www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples>)

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...In many cases, an apology and explanation may be a sufficient and appropriate response. Public bodies should not underestimate the value of this approach. A prompt acknowledgement and apology, where appropriate, will often prevent the complaint escalating. Apologizing is not an invitation to litigate or a sign of organizational weakness. It can benefit the public body as well as the complainant, by showing its willingness to put things right.

On occasion, government authorities may balk at implementing an Ombudsman recommendation to apologize to complainants. Often, there is a fear that apology amounts to an admission of guilt and may even expose the government to legal liability. British Columbia and Australia have passed apology legislation to codify that there is no legal liability for apologizing. The UK Parliamentary Commission, amongst many other jurisdictions, has taken the view that public bodies should apologize, not because there is a statutory requirement or even an Ombudsman recommendation – but because it is the right thing to do.

I have taken a middle ground and designate apologies as “Without Prejudice”. By definition therefore, there is no legal liability. My Recommendation language usually states:

A “**Without Prejudice Apology**” is more substantive than mere “regret”. The apology should articulate:

- an acknowledgement that the Complainant was harmed
- a comprehensive explanation for the Authority’s actions
- what is being done to prevent a recurrence in the future.

In a great many cases, all that is needed to resolve a complaint is an apology. This is not an admission of guilt or legal liability. When we have made a mistake, an apology can sometimes be not only a fundamental way, but often the only way, of accounting to the public who pay our salaries to serve them. And at the end of the day, that is what the civil service purports to do – “At Your Service, Bermuda”.

“ Faced with the choice
between **changing**
one’s own
mind
and
proving there is
no need to do so,
almost
everyone **gets busy**”
with the **proof.**

– John Kenneth Galbraith –

Update: “Today’s Choices: Tomorrow’s Costs”

In 2011, I undertook on the public’s behalf a comprehensive investigation of the scope and quality of information analyzed and recommendations made by civil servants for the Tucker’s Point Special Development Order (“SDO”). My Special Report, *Today’s Choices: Tomorrow’s Costs* (“TC:TC”) was tabled in February 2012. I will update the public at a later time on the implementation of the recommendations. In this Annual Report, I update readers only on:

- A. the failure to implement one of the recommendations with the apparent consequence that an important historical site has been destroyed
- B. new information that confirms that the 2001 *UK Environment Charter* (“the Charter”) created legal obligations on behalf of the government
- C. a list of countries in the world that require some form of Environmental Impact Assessment (“EIA”) for proposed developments.
- D. a note on the irony of Bermuda benefiting from the UK fulfilling its obligations under the Charter while at the same time denying that we have obligations.

A. Recommendation re Tucker’s Town historical gravesite

In accordance with section 16 of the Ombudsman Act 2004, the government responded to each of the recommendations – what has been done or planned to implement or reasons why not if there was no intention to implement. The government agreed to implement my recommendation to list the graves within the Tucker’s Town golf course under the “listed building” designation of section 30 of the Development and Planning Act. The site was designated as an historical protection area in the Zoning Map for the 2008 Development Plan. However, I saw the need for an “extra layer of protection”. Listed Building protection would mean that the curbstones could not be touched without planning approval.

A scientific Ground Penetrating Radar Survey was conducted in 2011 to determine possible unknown graves. However the stones of the known graves were not removed for this purpose. Inexplicably, in October 2012, the curbstones were totally razed to the ground. This was done apparently without a request made to or knowledge of the Department of Planning.

We received a complaint that (a) the graves had been desecrated and (b) the Department of Planning was considering an application to erect a monument without adequate consultation with the wider public. On 18 March 2013 I announced an investigation into: the complaint; the delay in implementing my recommendation; and, related questions. I hope to complete my report on this matter before the Legislature rises for the summer recess.

B. Legal Status of the UK Environment Charter

TC:TC found that the Civil Service had erred at law by not recognizing that Bermuda’s signature on the Charter is a legal commitment.

In a press release dated 2 May 2012, the then Minister stated: “We have taken advice from both the Attorney General’s office and the FCO via Government House, and conclude that the *UK Environment Charter* does not constitute law. It is unenforceable. Rather, the UK itself considers the Charter to be ‘aspirational!’”

In June 2012, I responded with a brief *Special Report* that clarified and provided additional evidence that the Charter is a legal agreement. This included:

- Two decisions of the International Court of Justice, regarding
 - o what constitutes a legal agreement between two governments
 - o the fact that Environmental Impact Assessment is becoming a principle of “general international law” – i.e. applies to all countries, whether or not independent or members of the United Nations
- the rationale for the Charter set out in the 1999 White Paper;
- contemporaneous statements of both the UK and Bermudian Governments confirming their intentions that the Charter commitments are to be implemented; and
- subsequent evidence to the Environmental Audit Committee of the UK House of Commons by the Foreign and Commonwealth Office affirming the commitments of the Charter.

Since then, I have received additional information, including the only judicial decision to date about the legal effect of the Charter. The truth counts. Accordingly, I presented this additional information in a Special Update Report titled: *Diligent Development – Getting it Right (Update on the Legal Status of the Charter)*.

My independent investigation confirmed that the current SDO process is inadequate: an EIA, coupled with a proper process for public consultation, was required to lift the conservation protection and to approve the SDO. One purpose of an EIA is to identify risks, ways to mitigate risks, and alternatives to development proposals (such as site or design). Another purpose of an EIA is to ensure transparent public consultation, disclosure and input.

The mandatory language and structure of the Charter is clear: it creates legally binding commitments. Since tabling TC:TC, I have spoken with one of the drafters who confirmed that the words were chosen carefully to designate the future obligations we were undertaking at the time. The Charter commitments are explicit and detailed.

The rationale for the Charter was set out in the 1999 White Paper – *Partnership for Progress and Prosperity*. The UK has signed certain multilateral treaty and other international obligations (such as the 1992 Convention on Biological Diversity) to protect the sustainability of the environment. This includes the environments of the Overseas Territories (“OT”).

The UK cannot unilaterally extend its environmental responsibilities to Bermuda as responsibility for the environment was devolved to the local government by our Constitution of 1968. Therefore, the primary mechanism by which the UK fulfils its own international responsibilities with respect to OTs is by way of the Environmental Charters. The 1999 White Paper signalled that – as priority actions – the UK must (and the OTs were encouraged to) undertake certain responsibilities. Section 8.15 of that White Paper stated:

These responsibilities already exist, but the UK and its Overseas Territories have not always addressed these issues sufficiently consistently or systematically. Examples include damage to coral reefs and the effects of introduced species on native species and habitats. We intend bringing together the responsibilities, common objectives and cooperative approaches of the UK Government, Overseas Territory governments, the private sector, NGOs and local communities by drafting and agreeing an Environment Charter with the Overseas Territories. The Charter

will clarify the roles and responsibilities of these stakeholders, set out in a shared vision which also takes account of the wide variety of circumstances and local resources in each territory. The exact form of the Charter and variations between territories will be determined in consultation with them.

In 2007, the Foreign & Commonwealth Office (“FCO”) reaffirmed the commitments of the Charter in evidence before the Environmental Audit Committee of the UK House of Commons. The FCO asserted that the Charter is the basis to work with Overseas Territories’ governments on implementation. The responsibility for doing so is a cross-UK government responsibility of the FCO, Department for Environment, Food & Rural Affairs (“DEFRA”) and Department for International Development (“DFID”). (However, as my attached note – *The Irony of It All* – shows, funding for OT environmental projects is now administered solely by DEFRA.)

As recently as January 2012, in a policy document, *The Environment in the United Kingdom’s Overseas Territories: UK Government and Civil Society Support*, DEFRA defined the Charter as a: *formal individual agreement, listing commitments to develop and implement sound environmental management practices in the OTs*. No one has presented evidence to me that any of the UK agencies with acknowledged responsibility – FCO, DFID or DEFRA – have asserted that the Charter Commitments are merely “aspirational”.

The common law doctrine of Legitimate Expectations means that a government is legally obliged to perform the actions that it has promised to do. Legitimate Expectations arise when the government makes it known that it will follow a specific course of action. Government can depart from the expected course of action only where it has given proper notice and has given those affected an opportunity to be heard.

- A recent case from the Eastern Caribbean Supreme Court is directly on point with the issues facing Bermuda: *Webster et al v. Attorney General (Anguilla) and Dolphin Discovery*. In that case, the Court reviewed the adequacy of EIAs and public consultation based on commitments under the *UK Environment Charter* for the construction of a Dolphinarium and shopping complex. The Court found that the Charter (singly or taken together with the government’s environmental strategy and action plan) established a policy and therefore created a Legitimate Expectation that the public would be consulted.²
- The Privy Council has affirmed that – just by virtue of making public statements – the doctrine of Legitimate Expectation imposed a legal obligation on the Government of the Bahamas to do what it had promised: *The public had a legitimate expectation of consultation arising out of official statements recognizing the need to take account of the residents’ concerns and wishes*.³

Similarly, the Government of Bermuda can be legally held by the courts to perform actions that it promised to do. Once a *Legitimate Expectation* has been established – which the Charter establishes – the onus shifts to the government to identify an overriding public interest to justify going back on its commitment.

The government has not provided a compelling reason to renege on its promise to require EIAs for a development proposal that required the lifting of decades-old protection from the last, most biologically diverse, pristine corner of Bermuda.

² *Webster et al v. Attorney General (Anguilla) and Dolphin Discovery* (Civ) A.D. 2010 (ECSC) at para. 45

³ *Save Guana Cay Reef Association v. R* [2009] UKPC 44

The current SDO process fails to meet these purposes. The new “Principles for consideration of a Special Development Order” announced May 2013 transfers the technical aspects of the application process from the Ministry to the Department of Planning. However, despite a clear legal obligation and the integrity of Bermuda’s word at stake, the new process still does not require EIAs.

No environmental expert consulted has been able to suggest what possible protocol Bermuda could create that would be better than an EIA. Most countries of the world, with the exception of a few countries such as Syria and Iran, require EIAs for major developments. Does Bermuda really want to be in the company of these countries? For what purpose do we insist on striking out on our own, defying the judgments of the highest courts, and ignoring global best practices?

It is time for Bermuda to be realistic, join the 21st Century, and keep our promises. EIAs must be done prior to approval of major developments and all development proposals that may cause significant adverse impact on our fragile environment. The choice is ours. The choice is now.

EIA Around the World

C. Status of EIA legislation in developing countries as of February 2013

Provisions related to Environmental Impact Assessment began appearing in developing countries’ legislation during the 1970s, shortly after the United States enacted the first national EIA law – the *National Environmental Protection Act* of 1969.

Throughout the 1980s, more countries decided to establish EIA as an element of environmental policy and a legal requirement for proposed development activities. EIA is perhaps the most widely adopted environmental requirement by individual countries, international organizations (e.g. World Bank) and individual companies (e.g. lenders such as HSBC have adopted the *Equator Principles* requiring EIA before approving certain loans).

According to information collected by the United Nations Environment Programme, EIA provisions (laws, decrees, regulations, policies) now exist in the framework environmental legislation of 55 developing countries (see list below). In addition, at least 22 developing countries currently have specific laws, decrees or regulations which contain criteria or procedures applicable to EIA. Other decrees and administrative instruments provide sectoral EIA guidelines related to mining, energy, transport and biotechnology.

European Union (Environmental Directives)

Austria	Estonia	Hungary	Malta	Slovenia
Belgium	Finland	Ireland	Netherlands	Spain
Bulgaria	France	Italy	Poland	Sweden
Cyprus	Germany	Latvia	Portugal	United Kingdom
Czech Republic	Gibraltar	Lithuania	Romania	
Denmark	Greece	Luxembourg	Slovakia	

North America

- Canada
- Mexico
- United States of America

The Caribbean

Antigua & Barbuda
Bahamas
Barbados
Belize
British Virgin Islands
Cayman Islands
Cuba
Curacao
Dominican Republic
Grenada
Jamaica
Montserrat
St. Kitts & Nevis
Trinidad & Tobago

Other Countries

Afghanistan	Czech Republic	Maldives	Slovak Republic
Albania	Ecuador	Mauritius	Slovenia
Algeria	Egypt	Mongolia	South Africa
Bolivia	Gabon	Nigeria	Tajikistan
Botswana	Gambia	Nicaragua	Thailand
Brazil	Guatemala	Panama	Togo
Bulgaria	India	Pakistan	Tunisia
Burkina Faso	Indonesia	Palau	Turkey
Cape Verde	Honduras	Paraguay	Ukraine
Chile	Hungary	Peru	Uruguay
Colombia	Kazakhstan	Philippines	Venezuela
Comoros	Kyrgyzstan	Russian Federation	Vietnam
Congo	Latvia	Senegal	Zambia
Costa Rica	Malaysia	Seychelles	Zimbabwe

From the Charter to Predator Lionfish

D. Analysis of Obligations Under the UK Environment Charter

In the ongoing denial by the Government of Bermuda about whether the UK Environment Charters constitute legal obligations – and therefore whether Bermuda is obliged to require Environment Impact Assessments before approving major developments – I have amply shown that the common law (in particular, decisions of the Privy Council and the Eastern Caribbean Supreme Court) defines the Charters as a policy document that the public has a legal *Legitimate Expectation* would be implemented.

UK Official Statements of Charter Obligations

In addition to common law I have previously demonstrated that under international law the Charters do constitute legal agreements. In order for an agreement between governments to be legally binding, the International Court of Justice states that the agreement must: (a) be between two governments; (b) be intended to be implemented; and (b) list specific commitments.

From time to time, the Foreign & Commonwealth Office is required to account for its administration of the Overseas Territories to committees of the UK House of Commons (with written responses to questions and sometimes oral evidence). The recitation below proves that the UK Government has not asserted in any official submissions that the Charters are “aspirational”.

(a) Did the UK sign the Charters with separate OT governments? – YES

- The FCO’s written testimony to the **Foreign Affairs Committee** in 2007 regarding the relationship of the UK to the OTs stipulated: *The Overseas Territories are constitutionally not part of the United Kingdom. All of them have separate Constitutions made by an Order in Council.*

(b) Are the Charters intended to be implemented? – YES

- The Charters were signed in 2001 on behalf of the UK by Baroness Amos, then OT Minister. In announcing the Charters, she stated: [that they set out guiding principles and contained] *some real long-term commitments*.
- Bermuda hosted the Third Conservation Conference for the OTs in 2003. At the official opening, the then Permanent Secretary declared: *we all signed on to the Environmental Charter and that means we've signed on to a variety of Commitments*.
- The FCO affirmed the obligations, responsibilities and steps taken to implement the Charters in written evidence to questions put by the **Environmental Audit Committee** in 2007. The FCO's response to the question: *Has the FCO met its responsibilities towards the environment in UK Overseas Territories?* was:
 - o "Responsibility for the protection of the environment in the UK Overseas Territories is owned jointly by the Governments of the Overseas Territories and the UK Government as a whole. As the 1999 White Paper *Partnership for Progress and Prosperity* made clear, Britain is pledged to defend the Overseas Territories, to encourage their sustainable development and to look after their interests internationally. The responsibility for the environment of the Overseas Territories rests with the people and the governments of the Territories. The UK Government can, and does, support those governments to deliver sustainable development. The FCO has a role, as do the Department for Environment, Food & Rural Affairs, the Department for International Development, the Ministry of Defence and a number of Non-Governmental Organizations. All of these give support through either direct financial or technical assistance.
 - o The Overseas Territories (except British Antarctic Territory and the Cyprus SBAs) signed Environment Charters with Her Majesty's Government ("HMG") in 2001. Gibraltar has a different type of Charter. The Charters have a list of commitments that both HMG and the OT Governments are working towards.

(c) Do the Charters list specific commitments? – YES

- The two commitments of Bermuda relevant to Environmental Impact Assessment could not be more specific – the Government of Bermuda will:
 - o **#4.** Ensure that environmental impact assessments are undertaken before approving major projects and while developing our growth management strategy.
 - o **#5.** Commit to open and consultative decision-making on developments which may affect the environment; ensure that environment impact assessments include consultation with stakeholders.
- Equally, the UK's commitments are abundantly clear, for example: the Government of the UK is committed to:
 - o **#8.** Use the existing Environmental Fund for the Overseas Territories, and promote access to other sources of public funding, for projects of lasting benefit to Bermuda's environment.

Evolution of the FCO's Environmental Fund to DEFRA's Darwin Plus

As the 1999 White Paper explained, the Environmental Fund was needed because the OTs are not independent states and therefore cannot access most international funds.

- The FCO's evidence to the 2007 **Environmental Audit Committee** also noted: *As a result of the Charters, the Overseas Territories Environment Programme, a joint FCO and DFID funded programme, was initiated to support the OTs with the implementation of the Charters and environmental management more generally.*

- Also in 2007, the **Joint Nature Conservation Committee** (“JNCC”) that advises the UK Government on mechanisms needed to provide evidence to support decision-making at the regional and international level reviewed the Overseas Territories Environment Programme (“OTEP”). The FCO submitted evidence of the OTEP’s role as: *a means of supporting the implementation of the Territories’ Environmental Charters and achieving the UK’s strategic international priorities.*
- The JNCC recommended additional assessment of whether the UK Government, and the OT governments have met their respective obligations under the Environment Charters and Multilateral Environmental Agreements. The JNCC expressed concern that the FCO, DFID and DEFRA were not working together more closely. In particular, DEFRA did not fill specialist environmental gaps in the OTs. Accordingly, the JNCC also recommended that DEFRA be given joint responsibility towards the OTs.
- DEFRA’s evidence to the 2007-8 **Environmental Audit Committee’s** investigation *Halting Biodiversity Loss* was that: *Support from FCO and DFID continues through the Overseas Territories Environment Programme. OTEP supports the implementation of the Environment Charters, and environmental management more generally, in the UK Overseas Territories, but has focused on biodiversity conservation given the Territories’ significance for biodiversity.”* (For the record, I note that requiring an EIA for Bermuda’s most biodiverse corner – at Tucker’s Point – before approval of development would have complied with this UK focus.)
- In a January 2012 policy document *The Environment in the United Kingdom’s Overseas Territories: UK Government and Civil Society Support*, DEFRA defined the Charter as: *a **formal individual agreement, listing commitments** to develop and implement sound environmental management practices in the OTs.*
- In November 2012 the Environmental Fund referenced in the Charters and previously administered by the FCO was renamed *The Overseas Territories Environment and Climate Fund* (to be known as *Darwin Plus*) and turned over to DEFRA to administer.

The Irony Of It All

At the same time that the Bermuda Government insists that we are not bound to fulfill our Charter commitment to require EIAs before approval of major development proposals – we are benefiting from the UK’s fulfillment of **its** Charter commitments.

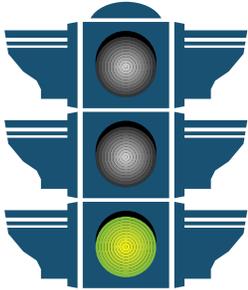
On 30 May 2013, the Minister of Environment and Planning announced the receipt of a *Darwin Plus* grant of \$265,000 from DEFRA aimed at tackling the invasion of Lionfish that seriously threatens local fish populations, our coral reefs and other marine habitats. The Minister stated:

The Darwin Plus fund is an important part of the UK Government’s network of support for conserving biodiversity and natural ecosystems in the overseas territories. As island ecosystems, the UK OTs are particularly vulnerable to invasive alien species, and the UK has pledged both financial and logistical assistance to help tackle this issue in particular.

This pledge **is** the UK’s implementation of its *Commitment #8* in the Charter!

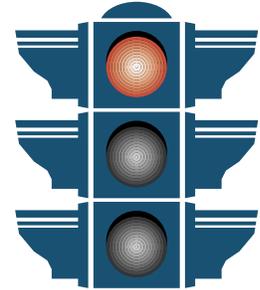
At both common law and international law, the Charter constitutes a legal obligation that is easily implemented by a policy or Department of Planning Guidance Note mandating EIA (not as a matter of discretion or when someone might think it “necessary”). Additional domestic legislation is not needed for Bermuda to honour our commitment.

New Special Development Order Protocol – April 2013



The New SDO Protocol is a half step in the right direction. It clarifies what kinds of developments can be handled by the Department of Planning and Development Applications

Board versus which are deemed to require SDOs. It also clarifies the role of technical review by the Department of Planning for SDOs.



However, it still deems Environmental Impact Assessment to be discretionary, ignoring our legal Charter obligation to require EIA

for all major development proposals as well as those proposals likely to have adverse impact on the environment.

Note re Asbestos...

Asbestos at Government Quarry

Sometimes during an investigation, an unrelated issue arises that warrants attention. This happened during our investigation of the Special Development Order for Tucker's Point. Some members of the public had questioned why Tucker's Point could not negotiate a swap of their pristine hills with the brownfield site of the neighbouring Government Quarry.

Our due diligence visit to the Quarry revealed a variety of important industrial activity including glass recycling, asphalt production and repair shops for Government vehicles. The amount of funds and time required to remediate this site for condo or tourism development (and to find alternative sites for the industrial works) would likely make the Quarry an expensive candidate for a swap.

During our visit, we observed a number of corroded containers storing asbestos.

We contacted the Ministry of Public Works which responded right away. Further to a 2010 engineering and environmental report, the Government planned to test the appropriate process and materials to encapsulate the asbestos materials and then move the containers to a permanent storage location. As of June 2013, the Government has tested the foamed concrete materials and is due to begin a trial run of filling and testing one of the more seriously damaged containers before the next phase of encapsulating and moving all of them.

In the meantime, the Government has contracted local experts to carry out regular air quality sampling adjacent to the containers containing asbestos. To date every test has confirmed that there is no risk to human health.

Staff



THE HARD WORKING TEAM AT THE OFFICE OF THE OMBUDSMAN

Seated: Georgia Symonds (Admin. / Personal Assistant for Ms. Brock); Arlene Brock (Ombudsman)
Standing: Kara Simmons (Complaint Intake Officer and Analyst); Catherine Hay (Investigations Officer);
Quinell Kumalae (Chief Investigations Officer); Lamumba Tucker (Administrative Officer).



Ms. Brock was graciously hosted by **Ombudsman for Samoa**, Maiava Iulai Toma, and his staff.

Ombudsman Examines BHB Review by Howard Associates



On 17 April 2013, after a long and arduous review process that began November 5, 2012, I tabled our “Review of the Review” of the Bermuda Hospitals Board. A brief excerpt including the Executive Summary and conclusion are extracted in this Annual Report. Our full report as well as the original Howard Associates report that was the subject of our report can be found on our website – www.ombudsman.bm.

EXECUTIVE SUMMARY

It was commendable of the Bermuda Hospitals Board (“BHB”) to requisition a CCG Review late last year (see BHB Terms of Reference *Appendix I*). Another sensible step was to ask me to review that review on behalf of the public. The BHB knew that there would be some skepticism about a CCG Review that they paid for – “*he who pays the piper plays the tune*”, especially if the piper hopes for further opportunities to play. Accordingly, the BHB understood fully that my oversight of the consultant’s process and report would be frank, not subject to the BHB’s preapproval or timelines, and that all of my statutory powers would remain intact. I would not be a rubber stamp (see Ombudsman Terms of Engagement *Appendix III*).

I participated in the interview of the short-listed consultants and agreed that HA had presented themselves best – as humble, serious and inclined to ask questions rather than razzle-dazzle with “consultant-speak”. Their proposed methodology was particularly impressive. They would embed themselves into the BHB (in the same way that journalists embed themselves with troops at war). This is an ideal way of obtaining both formal and informal information about the real dynamics and operations of an organization. The “Embed” method tends to uncover untold amounts of extremely useful information.

From such an auspicious beginning through an excellent methodology, I am sorry to have to report to the Legislature and the public that I am exceedingly disappointed with the HA report. The report simply does not reflect the wealth of information and insight that ought to have been obtained from embedding.

After thorough review and opportunity for HA to explain their report (indeed, I asked 134 specific questions of which only half were adequately responded to), my conclusion is that the report is full of statements, conclusions and recommendations without evidence, examples, best practices or rationales.

There are three HA reports that must be noted:

I. March 18 Report

By an email dated March 2, HA agreed to a deadline of March 18 to submit to me a final report for my review (subject only to potential minor subsequent revisions). HA did submit a report on March 18 but did not copy this to the BHB.

II. March 22 Report

Instead, HA submitted a report to the BHB dated March 22. However, HA did not copy that report to me. I found out! The two reports were different and the differences warranted critique (see pages 21 and 22 of my following report).

III. April 12 Report

Largely as a result of my critique, HA produced a Rectification Report – in accordance with its contractual agreement with the BHB. I was not told until 1st April (quite informally) that the BHB had required a Rectification Report. Had I known from the outset that there was an intention to use our considerable resources, thinking, insight, time and efforts to improve upon what the HA review would produce, I probably would not have agreed to this in the first instance.

Logically, I cannot critique the Rectification Report. It would be improper for me to applaud the improvements that I had suggested. Essentially, I cannot review my own work. My report is based on HA’s March 18 and 22 reports.

HA'S FOCUS ON THE NEXT 'GIG'

In our very first meeting on November 5, 2013, I strongly counselled HA to beware of the impulse to focus on the "next gig" or the urge to market their future services. Such a focus would fully compromise their process and report. Indeed – this would verge on the unethical.

Therefore, their first draft of February 18, 2013 with four obvious marketing hints for future contracts raised serious red flags. I stated in my memo of February 20, 2013:

"Most troubling is the comment on p.35 / 4th paragraph: "With the information that we have collected... we could assist the excellent teams at BHB". By itself, this comment will be the death knell of this report. I was crystal clear in our first meeting that Bermuda is used to consultants who are always looking for "the next gig". In fact, I indicated that I was once in the consultant world and understand this business impulse – however that would not be acceptable in this case. So, it frankly astounds me that you have made this statement or even have the thought in mind."

The final March 18, 2013 report that was submitted to me by HA for the purposes of my review did not include such blatant marketing efforts. However, I have learned that HA did not copy the March 18, 2013 report to the BHB. Instead, HA gave a different report to the BHB on March 22, 2013. Tellingly, HA did not copy this report to me.

There are minor substantive differences between the two reports with respect to HA's analysis of the BHB. The five non-marketing additional sentences or paragraphs sprinkled throughout the report neither change my evaluation of it nor make significant improvements overall.

However, given the prior cautions that I had made to HA, it is now clear why they did not copy the March 22, 2013 report to me. There are at least seven marketing statements missing from the March 18, 2013 report – both subtle and blatant:

p.19 – re HA's recommendation for a coordinated services plan to be completed within three months: *"We believe this is critical to the success for Bermuda's healthcare system and we do not believe that Bermuda has the manpower available who have the time and skillset to accomplish this important task within a reasonable time frame."*

p.38 – re planning for new facility and need for more external consultation: *"We do not believe that the island has the current people with the time and the talent to deal with this problem in the rushed time frame required."*

p.38 – re recommendation for a top priority within the next three months to revise modalities for quality care: *"we believe this can be accomplished much faster and with much higher outcome if the BHB works with outside experts who understand quality and health care."*

p.48 – re recommendation to redesign the funding model for hospital health care: *"We do not believe that the time and specialized skills are available within the island to accomplish this critical task of developing a new funding model for Bermuda and yet this is one of the island's top and urgent priorities."*

p.55 – re Medical Tourism: *“We recommend exploring this opportunity in more detail and we do not believe that the talent and time is available on island to do this properly.”*

p.57: *“The hospital needs to undergo an external operational review to maximize efficiency and effectiveness of its resources once its plan has been determined.”*

A particularly undisguised ploy in the March 22, 2013 report to create a further contract for HA proves my earlier scepticism (see page 16) that HA intended to cast aspersions on the work of the Auditor General. The March 18, 2013 version that I received stated:

“These audits have made numerous valuable recommendations, and none have found as of yet any areas of fraud so far.

Despite this, the Auditor General’s office has requested a more detailed internal audit of operations at BHB as well as for HPL. HPL is a complex entity that we will address later in the report. We support this audit being done, and feel it should be part of normal practice to conduct a more extensive review every ten years. It adds an additional bar of trust for the public to know that accounts are reviewed and scrutinized by several parties and that a very thorough review is undertaken every ten years.”

(Notwithstanding that the annual audits thoroughly scrutinize the BHB; I did not criticize these statements.) However, the March 22, 2013 version given to BHB casts a very different light on those seemingly innocuous statements. This version adds the following:

p.46 – *“We caution, however, we believe this type of extensive audit unless narrowed significantly, will take up to one year to accomplish and will cost over one million dollars. A smarter and much faster strategy might be after receiving word of the inevitable narrowing of the scope of the Auditor General’s review would be to add another month to our review at our end – resulting in the same overall objective and much cheaper and faster. ”*

This is the proverbial nail in the coffin. What I had suspected were snide attempts to denigrate the work of the Auditor General appear to have been in service of a further – potentially lucrative – contract for HA (none of whom working on this job are even accredited public sector auditors).

In an email of March 11, 2013, HA commended me: *“Both Phil and I think you are doing superb oversight”*. Sadly, this means that I have had to point out the many flaws in their report. Poor structure, unfounded recommendations and lack of analytical rigour amount to a wasteful and expensive lesson for us. Their deliberate and repetitive devaluing of Bermudian skills and insight – all for the blinding glint of gold – takes cynicism to another level and is wholly unacceptable.

Bermuda needs the BHB to succeed. We need to develop solutions that both tap our vast insight into our own problems and still harvest the best from the rest of the world. Most important, we need all of the people in this critical endeavour to be focused on **our** common good.

A Cautionary Tale

There is a West African folktale (retold by L. Alexander) of a fortune-teller who makes the circuit of villages assuring people what they most want to hear:

Question: Will I marry and be happy ever after?

Answer: you shall wed your true love if you find her and she agrees. And you shall be happy as any in the world if you can avoid being miserable.

Question: Will I live long?

Answer: Indeed so. You need only stay healthy and keep breathing.

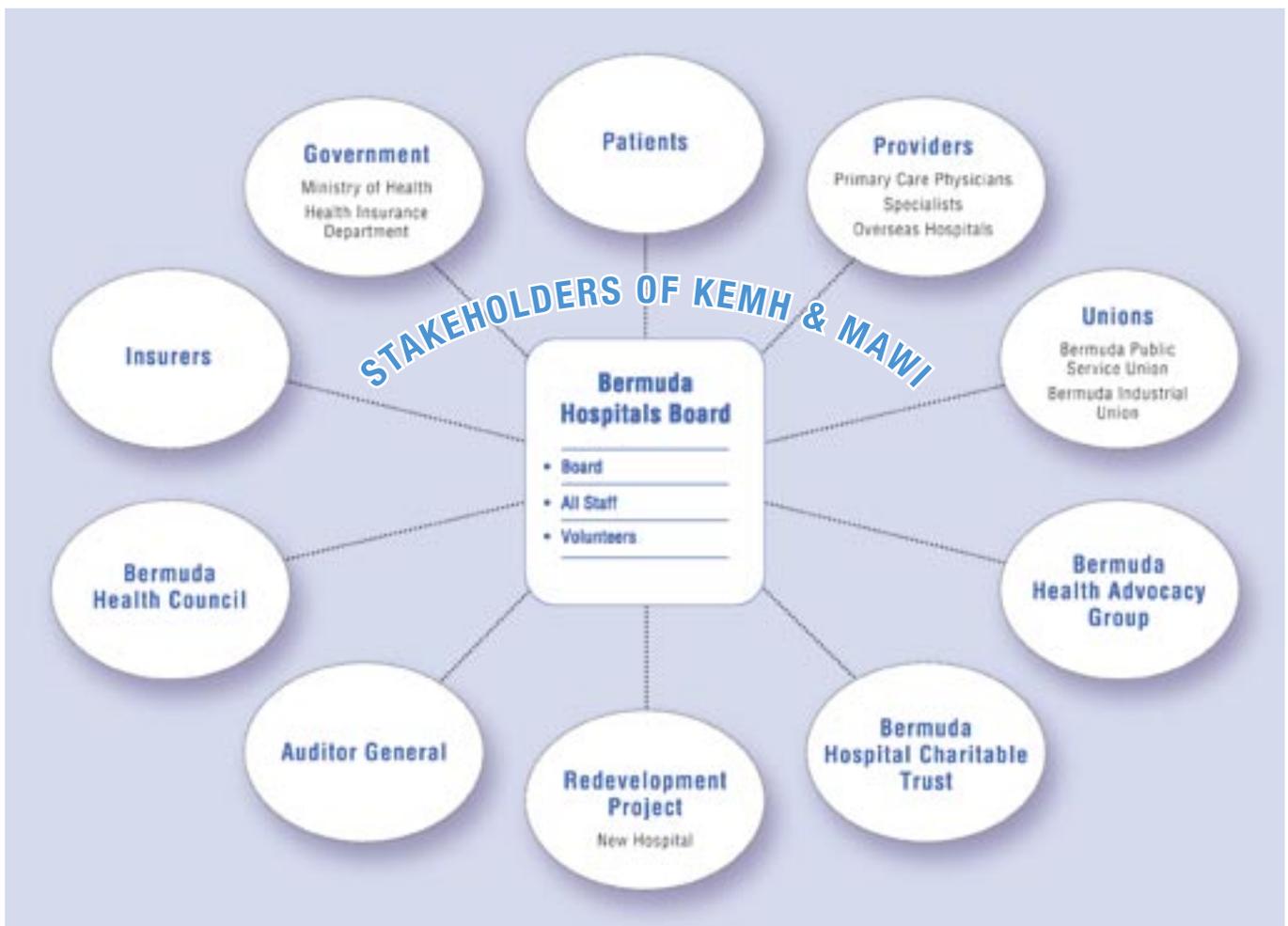
Question: Will I be rich?

Answer: Rich you will surely be...on one condition: that you earn large sums of money.

A skeptic might view consultants as the modern day equivalent of the fortune-teller:

Question: Will we make enormous savings in our operations (e.g for long-term medical care)?

Answer: Absolutely – as long as you shift costs elsewhere.



“ We cannot *direct*
the **wind**,
but we can
adjust
the **sails**.”

– Bertha Calloway –

Note re PATI

Public Access to Information (“PATI”)

Approximately 60% of Ombudsman institutions in the world are “hybrid”. That is, they combine strict complaint-driven maladministration investigations with other remits. Most are hybrid maladministration and human rights Ombudsman. A few are hybrid maladministration and freedom of information Ombudsman. I have never advocated for our office to assume the Information Commissioner role pursuant to the PATI Act. (The next Ombudsman may have a different, equally valid view.) However, I do keep an eye on how access to information works elsewhere in case I am asked to comment in Bermuda.

At the 2000 International Ombudsman Institute quadrennial conference, there were exactly zero plenary or workshop sessions on access to information. Three conferences later, in 2012, there were one plenary and four workshop sessions, titled:

- The Importance of records, accountability and ‘putting things right’ in an area of austerity (plenary)
- Developments in Freedom of Information (“FOI”) and Ombudsmanship – Norway & USA
- Complementary or conflicting? Benefits and disadvantages to being both an Ombudsman and an FOI Commissioner
- Introducing & Embedding FOI
- Ombudsmen, access to Information and anti-Corruption Agencies in delivering good governance and safeguarding taxpayers’ resources.

This is a good illustration of the ever-evolving nature of the Ombudsman institution. The various presenters coalesced around common benefits and challenges:

Benefits

- Transparency necessary for reputation of countries
- Overall increase in public confidence in government
- Enhances participatory democracy because people have adequate information to give input to government and their representatives
- Unearth petty corruption
- Changes culture of secrecy
- No citizenship requirement to make a request
- Leads to better record keeping (in UK – direct link to records management)
- Low fees
- Reduction in wasted money (although difficult to measure cost savings)
- More care taken to protect personal information

“Establishing the truth shouldn’t be a game of hide and seek”

*L. Connelly,
Deputy Ombudsman,
New Zealand*

Challenges and Lessons Learned

- Phased implementation has to be thought through carefully (120 days in India – very fast but necessary to respond to peoples’ petitions and marches demanding legislation about how funds are spent; 5 years in UK – gave message to civil servants that this is not really a priority)
- Adequate funding for preparation for roll-out
- Must have a code of practice for professional records management
- Success depends on Ministry’s ability to produce records requested in a timely manner

- Periodic review should be done of both demand and supply sides of equation
- Statistics of requests and times taken to produce records should be kept
- Ministers and political advisors should be trained early in roll-out
- Staff redundancy necessary in small jurisdictions due to mobility of staff and trained people – this can produce gaps in effective records keeping
- Time provisions should be capable of being extended to avoid deadlines from expiring due to lengthy internal review procedures before Information Commissioner can assess why requests were not granted
- Access to information seen as a “magic bullet” – often lack of information is not the real problem underlying maladministration or corruption
- Records of public / private partnerships should not be exempted
- Determine how to use and leverage technology for efficient access
- Use disciplinary process (e.g. hold up promotions) if departments do not keep complete, accessible and usable records
- Move responsibility from legal to information specialists
- Have regular audits to identify systemic problems in information management

Public access to information law has passed in Bermuda but is not yet operational. Some people have expressed impatience with the delay in implementing. Others are concerned that the records management may not yet be adequate to ensure quick responses to requests. Perhaps a phased approach – of course not as long as in the UK – would be a way to move things forward.

Whistle-Blowing Protection Under the Ombudsman Act

From time to time, Civil Servants have come to us with information that they think we ought to be aware of. We do not necessarily launch investigations as a result, but such information can be very useful in providing context or pointing us in directions that prove to be very important for our investigations. If we do need the information right away, we usually figure out other ways of obtaining it in order to protect our whistle-blowers.

In any event, the Ombudsman Act 2004 protects whistle-blowers:

- Section 14(4) provides that no person shall discriminate against another person in the arena of employment for complaining, giving evidence or otherwise assisting the Ombudsman.
- Section 14(5) provides that where I have reasonable grounds to believe that someone is being discriminated against, then I may refer the matter to the Human Rights Commission.
- Under section 8 of the Human Rights Act, such discrimination includes: refusal to continue to employ a person; threats of dismissal or demotion; intimidation; coercion; or penalty of any kind.

Further, it is not a breach of any statutory or other obligation of secrecy or non-disclosure to provide information to the Ombudsman. For example, the Official Secrets Act does not apply.

Threading the Needle of Whistle-Blower Protection

- Whistle-blowers who **complain or make disclosures** to the Human Rights Commission or **otherwise participate in a proceeding** under the Human Rights Act 1981 are protected by s.8 of that Act from retaliation in employment – hiring, firing, discipline, intimidation, threats, financial penalty, and so on.
- **Whether or not an investigation has commenced**, whistle-blowers who give information to the Ombudsman are similarly protected under s.8 of the Human Rights Act 1981. This protection is enforced through a referral by us to the Human Rights Commission.
- The Good Governance Act 2011 protects whistle-blowers from **unfair dismissal**, enforced by Inspectors under the Employment Act 2000.
- The Good Governance Act 2012 (“GGA 2012”) protects whistle-blowers from retaliation with respect to (a) termination or non-payment of **contracts** and (b) breach of criminal or statutory obligations related to the **suspected offender’s business**.

We received a complaint from an individual who believes that she is being black-balled from **being hired** for management positions in government. It appears she is considered a trouble-maker due to prior whistle-blowing and questioning of ethics. She says that her history as a whistle-blower was alluded to during the course of three of her job applications.

When working temporarily in a government office, she learned of and gave serious information to the police. This initiated an investigation, conviction, and reimbursement to the government under the Proceeds of Crime Act. The whistle-blower received a Letter of Appreciation from the Commissioner of Police. Yet, she cannot find a position commensurate with her qualifications.

If her claims of retaliation are true, there appears to be no redress:

- from the Human Rights Commission (as her whistle-blowing was not a complaint to or during their proceedings)
- through the Ombudsman (as she did not whistle-blow to us; and, we cannot investigate personnel practices such as hiring)
- under the Employment Act (as she was not unfairly dismissed).

It is unclear if she can find redress under the GGA 2012. It can be argued that “contracts” in the GGA 2012 include contracts of employment. However, protection would be in relation to termination or non-payment only, not hiring. The argument that “business” is not limited to an enterprise and can generically mean anything the suspected offender is concerned with is somewhat more tenuous.

So, how is this whistle-blower to be protected from retaliation?

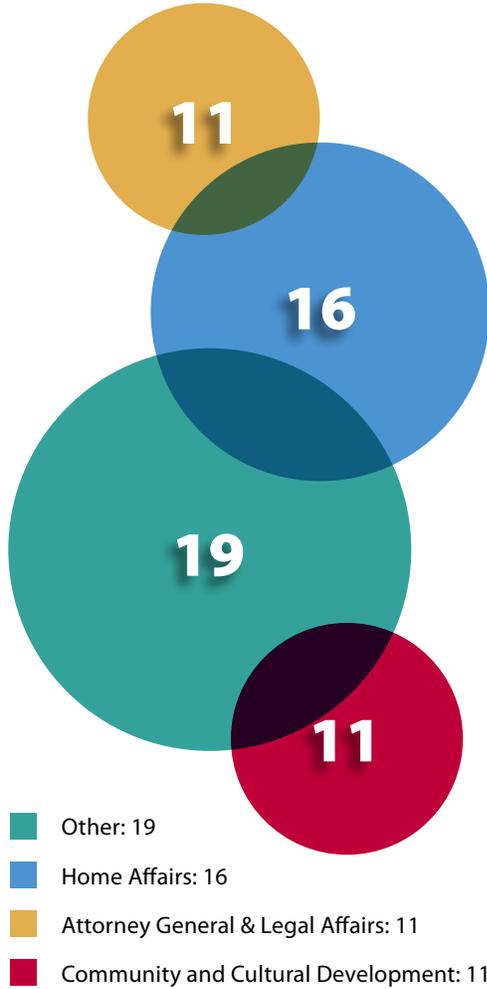
If her claims are true, the message to the entire civil service would be chilling: speak up and you will never work again in public service.

That cannot be what our Legislature intends. Accordingly, I am recommending that (a) GGA 2012 be tested in her case and (b) the broad language of s.8 of the Human Rights Act 1981 be considered in drafting the next phase of the Good Governance legislation.

Statistics

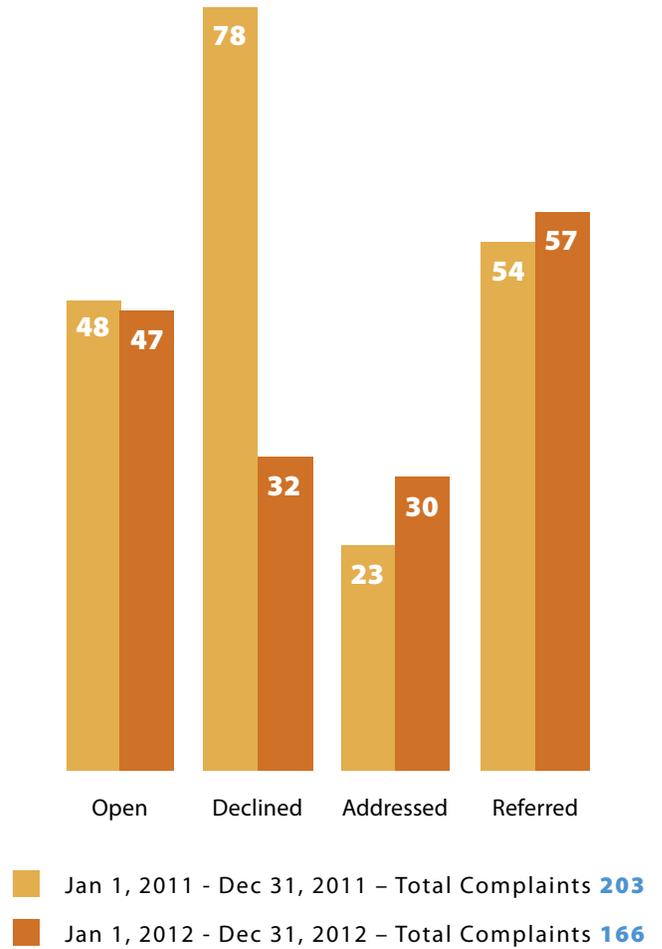
COMPLAINTS REFERRED

Number (57 total) / Where Referred



STATUS OF COMPLAINTS

Number / Status January 1 to December 31, 2011 and January 1 to December 31, 2012



Complaints Not Referred	Aug 1, 2005 Dec 31, 2011	Jan 1, 2012 Dec 31, 2012	Total
Complaints Brought Forward at Dec 31	93	47	140
New Complaints Not Referred	149	109	258
Complaints Closed / Declined during 2012	51	63	113
Complaints Open at December 31	42	47	89

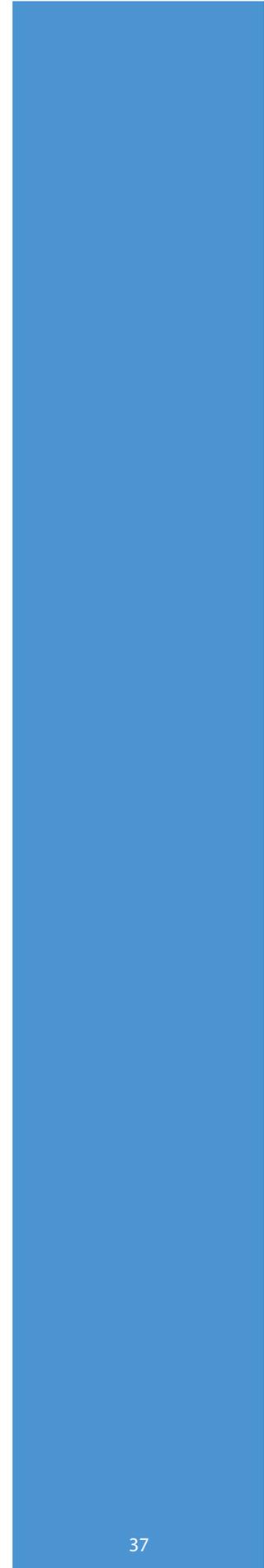
Open Complaints

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

Figures in red represent complaints open at the end of 2011 which were closed in 2012.

MINISTRY (January 1, 2012 - December 31, 2012)				
TYPES OF COMPLAINTS (NOT REFERRED)		INEFFICIENT	IMPROPER	UNREASONABLE DELAY
Attorney General & Legal Affairs	4 (2)			
Bailiff's Office	(1)			
Consumer Affairs	1			
Court Services	1			1
Magistrates' Court - Legal Aid	1 (1)	(1)		
Magistrates' Court	1			
Cabinet	2			
Human Resources	2	1		1
Community & Cultural Development	13 (3)			
Bermuda Housing Corporation	2			
Department of Child & Family Services	1	1		
Department of Community & Cultural Affairs				
Department of Financial Assistance	6 (2)	1 (1)		(1)
Human Rights Commission	2		1	
Rent Commission	(1)	(1)		
Education	3 (6)			
Archives	(5)			
Department of Education	3 (1)	(1)		1
Environment, Planning & Infrastructure Strategy	13 (2)			
Department of Environmental Protection	1 (1)	(1)		
Department of Planning	10 (1)			2
Land Valuation	1			
Parks	1			
Finance	8 (4)			
Accountant General - GEHI	1 (1)			1 (1)
Department of Social Insurance	2 (2)	1 (1)	1	
H.M. Customs	5		1	1
Office of the Tax Commissioner	(1)			
Health & Seniors	12 (6)			
Bermuda Dental Board	1			1
Bermuda Health Council	3			
Bermuda Hospitals Board	4 (3)	1	1 (1)	
Health Insurance Department	1			1
National Office for Seniors and Physically Challenged	3			
Summerhaven	(3)			
Home Affairs	23 (11)			
Charities Commission	1			
Department of Immigration	10 (1)	2	2	
Department of Labour & Training	9 (8)	1	2	4 (6)
National Training Board	(1)	(1)		
Registry General	2 (1)			
Public Safety	17 (10)			
Corrections	10 (7)		(2)	(1)
Parole Board	1 (1)			
Police	(1)			
Treatment of Offenders Board	6 (1)	4 (1)		
Public Works	3 (3)	1 (1)		
Land Registry	(1)			
Wedco	1			
Works & Engineering	1			1
Tourism Development & Transport	3 (6)			
African Diaspora	1			
Airport Operation	(2)			
Department of Tourism	1	1		
Board of Trustees – Golf Courses	(3)			
Transport Control Department	1 (1)	1	(1)	
Other	8	2		
Totals	109 (53)	12 (7)	11 (6)	14 (9)

ABUSE OF POWER	CONTRARY TO LAW	UNFAIR/ OPPRESSIVE	MISTAKE OF LAW OR FACT	ARBITRARY	NEGLIGENT/ UNRESPONSIVE	OTHER
		(1) 1	1		1	
		2 2				
		5 2				
		(5) 1			1	
1		1 2 1	1		5 (1)	
		(1) 2 (1)		1		
1		1 (1) 3 (3)		1	3 (1)	
		1 2 (1)			1 4 2 (2)	
1		1 (1) 7 (4) 1 (1) 2	1 (1)		1 (1)	
			(1)		(1) 1	
		1 (2)			(3)	
2		1	1	1	1	
5	-	40 (21)	4 (2)	3	20 (9)	-



MINISTRY (Jan. 1 - Dec. 31, 2012) # of new Complaints		OPEN	DECLINED		
DISPOSITION OF COMPLAINTS (NOT REFERRED)			Not in Jurisdiction	Existing Process	Time Bar/ Withdrawn
Attorney General & Legal Affairs	4 (2)				
Bailiff's Office	(1)		(1)		
Consumer Affairs	1	1			
Court Services	1		1		
Magistrates' Court - Legal Aid	1 (1)				
Magistrates' Court	1				
Cabinet	2				
Human Resources	2		1		
Community & Cultural Development	11 (3)	2	2		
Bermuda Housing Corporation	2	1		1	
Department of Child & Family Services	1				1
Department of Financial Assistance	6 (2)	1		2	2
Human Rights Commission	2	1			1
Rent Commission	(1)			(1)	
Education	3 (5)				
Archives	(5)				
Department of Education	3 (1)	1	2		
Environment, Planning & Infrastructure Strategy	13 (2)				
Department of Environmental Protection	1 (1)		(1)		1
Department of Planning	10 (1)	8	1	1 (1)	
Land Valuation	1	1			
Parks	1				
Finance	8 (4)				
Accountant General - GEHI	1 (1)				
Department of Social Insurance	2 (2)			1	
H.M. Customs	5	1		3	
Office of the Tax Commissioner	(1)				
Health & Seniors	15 (6)				
Bermuda Dental Board	1	1			
Bermuda Hospitals Board	7 (3)	4	(1)	1 (1)	1
Bermuda Health Council	1	1			
Health Insurance Department	3				
National Office for Seniors and Physically Challenged	3	1			2
Summerhaven	(3)				
Home Affairs	23 (11)	1			
Charities Commission	1	1			
Department of Immigration	10 (1)	5		1	1
Department of Labour & Training	9 (8)	6	1 (1)		1 (1)
National Training Board	(1)				
Registry General	2 (1)	1			(1)
Public Safety	17 (9)				
Corrections	10 (6)	7		2 (1)	
Parole Board	1				
Police	(1)		(1)		
Treatment of Offenders Board	6 (1)		1	4	
Public Works	3 (3)				1 (1)
Land Registry	(1)		(1)		
Wedco	1				1
Works & Engineering	2				
Tourism Development & Transport	3 (6)				
African Diaspora	1				1
Airport Operation	(2)				
Department of Tourism	1	1			
Board of Trustees -- Golf Courses	(3)				
Transport Control Department	1 (1)	1			
Other	6		6		
Totals	109 (53) *	47	15 (6)	16 (5)	14 (3)

Figures in red represent complaints open at the end of 2011 which were closed in 2012.

* One complaint open at the end of 2012 was later referred.

CLOSED AFTER PRELIMINARY INQUIRY OR INVESTIGATION				
Mediation/ Informal Resolution	Maladministration		No Maladministration	
	Specific Complaint Recommendation	General Practices Recommendation	Value Added	No Action
			(1) 1	
1				
		(1)	1 (1)	
		(5)		(1)
1 (2) (1)			1	(1) 1
	1			(1)
(3)				
2 (2) 1 (1) (1)		(1) (1) (1)	1 1 (1)	(1)
		(3)	1 1	(2)
				1 (1)
			1	
(2) (3)				
			(1)	
5 (15)	1	(12)	9 (4)	2 (7)

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

Presentations and Orientations

Complaint Handling Workshop for Departments

The Ombudsman is a last resort for Complainants. When they contact us, we always ask if they had first tried to resolve their issues with the departments or other government entities. The public usually complain to us not only about their substantive issues (planning, immigration, etc.) but also about how they were treated by the departments when they tried to sort out their issues. Many internal complaint handlers within departments and other government entities do not have training on how to handle complaints.

During 2012, Ms. Brock developed a half to one-day Complaint Handling workshop to assist internal complaint handlers. The workshop combines basic standards for due process and due diligence with the UK Principles of Good Complaint Handling (Getting It Right • Customer Focus • Accountability • Fairness • Remedies) as well as the interest-based methodologies of the Harvard Negotiation Program and Conflict Management Inc. (of Ms. Brock's former mediation career). This workshop is a step-by-step exploration of how to implement the principles, standards and methodologies when engaged in complaint intake, analysis and resolution. This workshop employs iterative exercises, tools and case studies that are tailored to each department's daily operations (often based on complaints previously filed about that department with the Ombudsman).

The workshop was piloted in 2012 with the senior staff of the Department of Education. The Departments of Labour and Training, H.M. Customs and the Human Rights Commission are scheduled to take the workshop in 2013.

Other Presentations

A. Brock: Bermuda Bar Association • Let's Talk Program ZFB (G. Moreno) • Human Rights Commission Summer Students • Cabinet Office Interns • Presentation on systemic investigations and good governance standards to participants in the Dept. of Human Resources' Advanced Negotiation Course

Q. Kumalae: Department of Human Resources • H.M. Customs (2 locations: Hamilton and Airport)

A. Brock, Q. Kumalae, C. Hay: Senior and Civilian Staff, Dept. of Corrections (3 locations: Westgate, Prison Farm, Co-Ed Facility)

Conferences and Training

All Staff: Franklyn Covey: 5 Steps to Success, Bermuda

K. Simmons: Records and Complaint Management systems, Atlanta, Georgia

A. Brock, Q. Kumalae, C. Hay: 2-day Hague Conference in Private International Law (hosted by Bermuda Parliamentary Registrar); one lunch for participants was sponsored by the Ombudsman for Bermuda

A. Brock: International Ombudsman Institute Quadrennial Conference, New Zealand

C. Hay: Complaint Intake Course, Forum for Canadian Ombudsman.

We thank the offices of the Ontario Ombudsman and the Ombudsman for Toronto for hosting Ms. Hay for one day each to observe and learn from their offices.

Caribbean Ombudsman Training Network

Head of Office from Ombudsman for Sint Maarten spends a week in the Bermuda Office

In February Bermuda hosted **Ms. Patricia Phillips**, the Head of Office for the new Ombudsman office in Sint Maarten, who spent a week gaining insight into our work. Ms. Phillips' training trip has been funded by the USONA funds (the development funding agency for the Kingdom of the Netherlands).

Ms. Phillips noted: *"The contact with the Ombudsman Office of Bermuda was made at the CAROA conference in Curaçao in 2010. The Ombudsman of Sint Maarten, Dr Nilda Arduin, established a close relationship with Ms. Brock which resulted in this exchange visit of*

the Head of the Ombudsman Office of Sint Maarten. My visit was short but fruitful and informative and I wish to thank Ms. Brock and her staff for allowing me to visit and learn from their experience."

Our office has developed a curriculum that gives each member of our small staff the opportunity to develop skills as trainers. Although tailored to the needs of each guest, the week generally covers statutory interpretation, complaint management, investigation and mediation skills, analysis, statistics, reports and ethics. In Ms. Phillips' case, we also spent time on conference planning as Sint Maarten was planning to host the 2013 Caribbean Ombudsman conference that Bermuda hosted in 2008.

This is the fourth time in just six years that a new Ombudsman or deputy from the Caribbean has come to Bermuda to learn from and share with us. In 2006, the **Ombudsman for Turks and Caicos** spent two weeks

here; in 2009 the **Deputy Ombudsman for British Virgin Islands** and in 2010 the **Ombudsman for Grenada** each spent a week. The visits of the two UK Overseas Territories were sponsored by the Foreign & Commonwealth Office and Grenada's visit was sponsored by the Commonwealth Secretariat.



Mr. Argar Alexander, Ombudsman for Grenada (June 22-25, 2010) visited our office for training in June 2010, and said *"I wish to formally extend very special gratitude to Ombudsman Brock and staff of the Bermuda Ombudsman Office for the profes-*

sional and hospitable way in which they hosted and assisted me during the study visit. I was very impressed with their modus operandi."

The **Deputy Ombudsman of the British Virgin Islands** similarly expressed appreciation for her training in Bermuda: *"It is still a marvel that so much could be crammed into a mere one week. Thank you for this shining example of Technical Cooperation among Overseas Territories."*

Mrs. Sadie-Jean Williams, retired Complaints Commissioner for the Turks & Caicos stated, *"The expertise of Ms. Brock and her staff was a tremendous help for my tenure in my office. I gained a great deal from them."*

Ms. Brock has also presented a session at the 2007 US Ombudsman Association Annual Conference on *Launching a New Ombudsman Office*.

Thank you again for your diligence in replying to my original concerns.



Hats off to you for being the people's eyes and ears in Bermuda.

After you became involved, everything worked quickly and smoothly. Thank-you very much!

Some samples of feedback received by the Ombudsman's Office

Thanks for being the Ombudsman because that helps to get people moving.

I noticed in yesterday's Royal Gazette that the government had finally resolved the situation at the Bermuda Archives. I understand that the Archives has hired a couple of promising young Bermudian archivists and that the service is much improved. At this juncture, I wanted you, and your staff, to know how grateful I was for your action on this long drawn-out affair; you came out on the side of decency for the beleaguered staff at the Archives and for the users of the Archives. Your report was masterful and thorough. It is amazing how long it took for effective action on your advice. Thank you.

Thanks for doing the right thing for our people.

How many people are in your office? You all did a great job!

Re Tucker's Point SDO: It is EXCELLENT!! What compelled you to dig so deeply? You have everything there – it's hard to argue with anything. I had thought that it would have been obvious that the SDO should not have been granted – but you make it completely clear. Other than defensiveness, what has been the reaction? I sure hope people read it – people don't bother to read anymore to get the facts. Well, you sure presented it. I hope that the politicians will not try to ignore your report.

I am very appreciative of your time, even though my complaint is not something you can deal with. I've learned more about your office and what you do. I have also learned about how employment disputes are handled.

An excellent report. I have sent an email to my staff to put your reports on their reading list.

Your candid, matter of fact statistical data with a solution is the five star approach Bermuda needs to adopt, in order to make things work for everyone.

Our family had given up on everybody – your letter made a difference. You gave them faith again when you concluded that more than an apology was warranted.

“Rising to the **challenge** is what makes possible the revelation that **humanity** at its essence is both an ongoing readiness to recognize wrongs and try to make things **better**, and the desire to help those in need of **assistance** without expecting reward or public recognition. It is a **difficult** task, but no other endeavour better conveys the **certainty** that this is what life is about; this is why we are **here**.”

– Derrick Bell: *Ethical Ambition* –

Eight Steps for Resolving Your Own Complaint

“What steps have you taken to resolve the problem?” That is often one of the first questions we ask people who contact us with a complaint.

Under law, one of the scenarios in which the Ombudsman is not required to investigate is when “the law or existing administrative procedure provides a remedy adequate in the circumstances for the complainant and, if the complainant has not availed himself of the remedy, there is no reasonable justification for the failure to do so”. [Ombudsman Act section 9.1(b)] In other words, a complainant must exhaust the other remedies or channels of complaint which they could be reasonably expected to use prior to filing a complaint with the Ombudsman. And it is not just the law, it is also simple common sense. Disputes and grievances can be resolved with simple, honest communication. Certainly not all the time, but enough that it is almost always worth trying before filing a complaint with our office.

Here are some basic, important guidelines to follow when you are trying to resolve any “consumer” problem, whether it involves a government department or not.

- *Be pleasant, persistent, and patient.* The wheels of government usually move, but not always quickly. We have found the citizens who are best able to get problems resolved have three core traits in common: they treat everyone with respect and courtesy; they don't give up easily; and they realize that most problems are not resolved overnight.
- *Exercise your appeal rights.* Does the problem involve a decision or action that has a formal appeal process? If you are not sure, ask the department. The right to appeal usually has a deadline. Respond well before the deadline and consider sending your appeal by certified mail. If you cannot write before the deadline, call to see if you can get an extension or if you can appeal by telephone.
- *Choose the right communication mode.* If you are not filing a formal appeal, decide whether you want to contact the department in person, over the phone, or through a letter or e-mail. Go with the mode you are most comfortable with, unless the problem is urgent, in which case you will probably want to rule out a letter or e-mail.
- *Strategize.* Before making contact, consider who your likely audience will be. Will it be someone who can actually fix the problem to your satisfaction? If not, your initial goal might be along the lines of patiently explaining your concern, listening to the response, and then politely asking to speak with a supervisor—perhaps even more than once!
- *Plan your questions.* Write down your questions before calling or visiting the department. Be sure to specifically ask which law, rule, or policy authorized the department's actions. Then ask for a copy of the law, rule, or policy (so you can read it for yourself, to see whether you agree).
- *Be prepared.* Be sure to have any relevant information available before contacting the department. If you are wanting face-to-face contact, we recommend you call first. A short phone call could save headaches and wasted time, such as finding that the person you need to talk to is sick that day.
- *Keep records.* Take good notes of all conversations. This should include the person's name and title, the time and date, and what they told you. Keep all records received from the department, even envelopes. Also keep copies of any letters, faxes, or e-mails you send to the department.
- *Read what is sent to you.* Carefully read everything from the department, front and back including the fine print!

If all that fails, contact us. Our office has authority to investigate complaints about government departments, public authorities, Government boards, and any other corporation or body that is established by Act of the Legislature or whose revenues derive directly from money provided by the Legislature. Major exceptions include any administrative action taken by the Cabinet or any exercise of power by the Governor to pardon persons convicted of criminal offences. We do not have authority to investigate any civil or criminal proceedings or any administrative action taken in respect to appointments, removals, pay, discipline, superannuation or other personnel matters.

Adapted, with thanks, from State of Iowa Citizens' Aide / Ombudsman, "2012 Annual Report", p.4

Note re HRC Complaint Process...

We applaud a 2012 amendment to the Human Rights Act 1981 that strengthens and streamlines the following complaint process for the Human Rights Commission (with thanks to the Executive Officer):

- 1. Complaint Received** – A complaint is received from the individual lodging the complaint and Officers work to obtain as much relevant information as possible. The Executive Officer considers the complaint and, if it is determined to be a prima facie case, the Respondent(s) are invited to respond to the complaint.
- 2. Conciliation** – At the first instance, Officers will attempt to conciliate the dispute as appropriate.
- 3. Investigation** – If conciliation is unsuccessful, the complaint will be referred for investigation.
- 4. Determination of Merit** – Following an investigation, the Executive Officer considers the evidence adduced and then makes a decision as to whether or not the complaint appears to have merit. If it is determined that the complaint does not appear to have merit, Complainants are offered the opportunity to be heard and a final decision is made.
- 5. Offer of Mediation** – If the complaint appears to have merit, mediation is offered to the parties. If the matter is not resolved through mediation, the matter is referred to the Chairperson.
- 6. Adjudication** – The Chairperson, at first instance, offers mediation again. If mediation is not successful, the Chair empanels a Human Rights Tribunal to hold a public hearing. The Tribunal is empowered to determine whether unlawful discrimination has occurred and make orders that may be registered with the Supreme Court.
- 7. Appeals** – Parties can appeal decisions of a Human Rights Tribunal to the Supreme Court.

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.

WE APPRECIATE

Ms. Karen Daniels, Director, Department of Social Insurance, for immediate, comprehensive response.

WE APPRECIATE

Ms. Donna Francis, Department of Planning, for timely assistance.

WE APPRECIATE

Mr. Gordon Ness, Department of Planning, for thinking outside of the box and commitment to finding solutions.

WE APPRECIATE

Ms. Diane Elliott, Department of Land Valuation, for thorough, well-prepared presentation on Department's process.

WE APPRECIATE

Mr. Troy Symonds, Department of Labour, Training & Employment Services, for consistent customer-focused attitude.

WE APPRECIATE

Ms. Karla Ingemann and **Mr. Andrew Baylay**, Archives Department, for thorough and passionate assistance.

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@cmbudsman.bm
info@ombudsman.bm
www.ombudsman.bm

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

What can I complain about?

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

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

Who can make a complaint?

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

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

How long does it take?

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

How much does it cost?

Services are free and available to anyone.



OMBUDSMAN FOR BERMUDA

Suite 102 • 14 Dundonald Street West • Hamilton HM 09 • Bermuda
TEL 441-296-6541 • FAX 441-296-7734 • www.ombudsman.bm • complaint@ombudsman.bm
