"Tell me
what you **know**.

Tell me what
you **don't** *know*.

Then tell me
what you **think**.

Always distinguish
which is *which*."

(General Colin Powell's Four Rules)

OMBUDSMAN FOR BERMUDA

Seventh Report – 2011 Calendar Year

For The Good Of The Public

And Those Who Serve The Public

June 26, 2012

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

Dear Honourable Speaker,

I have the honour to present my seventh Report which covers the year January 1, 2011 to December 31, 2011.

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

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Cover quote: General Colin Powell's "Four Rules" for intelligence staff (Newsweek May 13, 2012)

"Tell me what you know.
Tell me what you don't know.
Then tell me what you think.
Always distinguish which is which."

What you know means you are reasonably sure that your facts are corroborated. At best, you know where they came from, and you can confirm them with multiple sources. At times you will not have this level of assurance, but you're still pretty sure that your analysis is correct. It's OK to go with that if it's all you have, but in every case, tell me why you are sure and your level of assurance.

What you don't know is just as important. There is nothing worse than a leader believing he has accurate information when folks who know he doesn't don't tell him that he doesn't. I found myself in trouble on more than one occasion because people kept silent when they should have spoken up. My infamous speech at the U.N. in 2003 about Iraqi WMD programs was not based on facts, though I thought it was.

Tell me what you think. Though verified facts are the golden nuggets of decision making, unverified information, hunches, and even wild beliefs may sometimes prove to be just as important.

Always distinguish which is which. I want as many inputs as time, staff, and circumstances allow. I weigh them all — corroborated facts, analysis, opinions, hunches, informed instinct — and come up with a course of action. There's no way I can do that unless you have carefully placed each of them — facts, opinions, analysis, hunches, instinct — in their proper boxes.

Ombudsman's Message

The past year was as intense as ever. In addition to an almost all consuming systemic investigation (see below), there seem to be more, and in some cases more complex, individual complaints that raised issues of due process and due diligence. We are seeing a need for more training in the basics of good governance not only for the civil service but also for boards.

At the same time, we are heartened by the fact that most civil servants are eager to deliver good public services and readily implement our recommendations. A stellar example was the Ministry of Education's forthright, full and serious response to our recommendations regarding Special Needs services (see pg. 22). The Archives must also be commended for giant steps in the last quarter of 2011 toward making its holdings more organized and accessible (see pg. 21).

The value of our authority to launch systemic investigations on our "Own Motion" in the public interest was perhaps most understood through our investigation of the Special Development Order ("SDO") process for gathering and analyzing data to inform decision-makers. Although a 2011 Amendment to the Development and Planning Act 1974 moved the decision to grant a SDO from a single Minister to the entire Legislature, this had no effect on the process to gather sufficient information on which the Legislators could base their decision.

There is a process for public input into regular development applications decided by the Development Applications Board. However there is no such process for SDOs. Therefore, controversial applications – such as that by Tucker's Point to lift decades-old conservation protection from environmentally sensitive land – tend to descend into adversarial petition and protests. On all sides of the Tucker's Point SDO application, opinions were fervently asserted – with no actual facts to back them up. The inevitable administrative (and therefore Ombudsman) question is: what should an orderly process look like to ensure that decision-makers have the benefit of the best possible information and public input?

The investigation revealed that there is, in fact, a proven independent process with well-honed methodologies to evaluate development proposals that are likely to cause adverse impact on the environment. This process is called Environmental Impact Assessment ("EIA") and is in use all over the world. The International Court of Justice as well as the Privy Council (whose decisions are binding on Bermuda) endorse EIAs. Some 167 lending institutions, including HSBC (the major creditor of Tucker's Point), require EIAs for certain development loans. We do not need to reinvent the wheel.

Significantly, Bermuda has already agreed to require EIAs – before grant of approval – for developments that are either major or likely to have significant adverse impact on the environment. This is one of the specific commitments in the UK Environment Charter ("Charter") signed by Bermuda in 2001. Bermuda's failure to abide by the commitment to require an EIA prior to the decision to grant the Tucker's Point SDO resulted in clear inadequacies in the final SDO.

I found the Government's response to our report: *Today's Choices – Tomorrow's Costs* to be inadequate. In particular, the denial that the Charter is a legally binding agreement flies in the face of: basic principles of international law; actual intentions during drafting of the Charter; statements made by the Government itself in 2001 - 2003; and, subsequent UK actions taken to implement and monitor the Charter's commitments. In May 2012, I tabled a brief Special Report detailing these irrefutable truths.

Now that the substantive SDO reports are finalized, I can inform the Parliament and public that – if not for the protection of Bermuda's 1968 Constitution – this investigation might not have been conducted at all. After announcing the investigation in April 2011, I endured six high level conversations with three different persons over a four week period during which I was asked, advised, cajoled and urged not to conduct it. Finally I was told *"there is no value to this investigation"*. A seventh conversation with three additional persons did not constitute pressure as it was intended merely to clarify that I did not intend to investigate the actual decision to grant the Tucker's Point SDO.

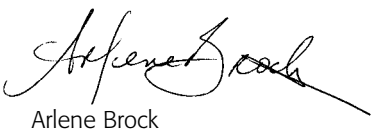
My jurisdiction to launch the investigation was and continues to be challenged despite an independent legal opinion from the UK supporting my jurisdiction. This was the first time in six years that I had experienced such pressure. I prefer to conclude that there was neither malice nor a conscious attempt to undermine my constitutional role. Rather, this pressure appears to be due to a fundamental misunderstanding or ignorance of the stature of independent oversight in a democratic society. Fortunately, the Constitution protects my independence to fulfill my statutory duties. Such pushback is an invitation to an Ombudsman to dig twice as broadly and twice as deeply.

This experience provided assurance about the power of the Constitution to protect our Office when – to badly mix metaphors – the rubber meets the road and we hit a nerve. There is a lesson here: great care should be taken not to cross the line of interference with or direction to the independent oversight Officers of the Constitution – the Auditor General and the Ombudsman. It was troubling that the initial response to my draft report seemed intended to instruct me: *"The better view may be to make recommendations without adverse findings"*. A recent public statement that: *"Any concerns that the Auditor General might have would be best directed to the Financial Secretary or to the Cabinet Secretary"* was similarly out of order.

The Constitution clearly states – with respect to both the Auditor General and the Ombudsman – that in the exercise of our functions, we *"shall not be subject to the direction or control of any other person or authority"*. There is a reason for this constitutional protection in the modern world of accountability. Oversight institutions must have absolute independence and capacity to shine a light where others may want to draw the blinds.

I hope and urge that all people will consider it a duty of the privilege of living in this island to learn about the Bermuda Constitution Order 1968. All politicians, civil servants, members of boards and anyone else associated with governance should be well versed in it. All members of the public and business community should understand the primacy of the Constitution. All students in all schools should be taught about its critical role in setting out the rights and responsibilities of our daily lives.

Especially during this high pressured year, I thank my phenomenal staff for their profound calibre of thinking, probity of conduct, and insistence on work at the highest possible standard.



Arlene Brock
Ombudsman for Bermuda

Questions About the Ombudsman

What is an Ombudsman?

An Ombudsman (the same word is used for singular and plural) is a non-partisan official who takes complaints from the public about administrative decisions and actions in the delivery of public services. What is not legislative or judicial is administrative. The modern Ombudsman institution started some 200 years ago, and there are now over 140 national Ombudsman throughout the world. The Ombudsman is ideally established by a country's Constitution. Almost all national Ombudsman are said to be of 'general jurisdiction' – meaning that they take complaints across the full spectrum of government and quasi-government agencies (except actions by e.g. the Legislature, Cabinet, Courts or for national security and the investigation of crime). One way of conceptualizing this role is that the Ombudsman is the eyes and ears for Parliament with respect to the actions of the civil service.

Under the umbrella of independent oversight, there are a number of variations amongst Ombudsman throughout the world. Approximately 60% of national Ombudsman are said to be hybrid – that is, in addition to strict maladministration, they may also have particular jurisdiction for human rights, corruption or public access to information. Many large countries also have sector Ombudsman (e.g. for prisons, discrimination, housing, etc.). Only five states in the US have state Ombudsman of general jurisdiction. There are a number of complaint-handling bodies with the title 'Ombudsman' but which do not meet the criteria of independence because they are within or ultimately subject to the entities that they oversee. Almost all private sector 'Ombudsman' are in this category. Nevertheless, if heeded, such Ombudsman can influence proactive change within their organizations.

What are the Core Characteristics of an Ombudsman?

The most fundamental characteristic of the Ombudsman is independence. Although paid for by the public purse, the Ombudsman is not subject to the direction or control of any other person (such as the Governor or Cabinet). The Ombudsman is accountable to the people through an annual report to Parliament and an independent annual audit. Neutrality, fairness and fearlessness are other key qualities. The Ombudsman's effectiveness derives from the experience of due process, due diligence and fairness by both the public and the civil service. As noted by Tom Frawley, Ombudsman for Northern Ireland: *"the Ombudsman is not an advocate for either the public or the government agency, s/he is a critical friend to both".*

What does "Maladministration" mean?

The Ombudsman is the last resort– after complainants have reasonably tried other available avenues to redress concerns about the Civil Service's decisions, recommendations, actions and failures to act. After investigating complaints, the Ombudsman makes a determination of "maladministration". While there is no hard definition of 'maladministration', the concept includes not only whether actions were lawful, but also whether they were proper. Bermuda's law stipulates that the term includes: improper, inefficient, bad, mistake of or contrary to law, abuse of power, negligent, unreasonable delay, and actions or procedures that are arbitrary, discriminatory or oppressive. Some actions such as unreasonable delay or even bias may not be unlawful, but may constitute maladministration.

Can the Ombudsman Force a Solution?

The Ombudsman makes recommendations only. Recommendations are intended to resolve specific complaints by putting complainants in the place that they would have been in had there been no maladministration. Whether or not maladministration was found, Ombudsman investigations may also illuminate ways to improve procedures generally. The Ombudsman should identify and recommend these also. The Ombudsman institution has been described by the Supreme Court of Canada as the "paradigm of remedial legislation". This means that

recommendations are particularly important where the governing law of an issue or department is silent, vague or internally inconsistent. In these instances, Ombudsman recommendations set out fundamental principles that ought to govern the processes and situations giving rise to complaints. Overall in the past six years, about 98% of our recommendations have been implemented.

What is an "Own Motion" Investigation?

In addition to launching investigations of individual complaints, the Ombudsman may launch an investigation on her "own motion" in the public interest – even if no complaints have been made. An "own motion" investigation usually begins with the premise that there are systemic issues to be addressed beyond the concerns of any one person.

The government's response to the SDO investigation launched April 2011 is that an own motion investigation is "partial and subjective" because there is "no test of a third party complaint that has merit". The notion that the outcome of an own motion investigation is inherently biased because it is initiated without a complaint is wholly inconsistent with the purpose of an "own motion" power – which is precisely that there is no requirement of a complaint. (Interestingly, in better economic times, the Ombudsman for Quebec used to have a staff member tasked with trolling the media and listening to the talk shows in order to see whether there were issues that the Ombudsman should consider investigating.)

"Own motion" investigations are:

- *Systemic* because issues: are not conducive to simple informal resolutions; go beyond immediate incidents and single complainants; require broad fact-finding; and, may affect large numbers of people

- *In the public interest* because issues: are sensitive or high profile; are debated in the Legislature or media; are not easily investigated by other authorities; involve more than one Ministry or organization; and, best practices in other jurisdictions are relevant.

To date in Bermuda, we have conducted three "own motion", systemic investigations:

- As a result of our 2007 investigation into allegations of discrimination amongst doctors at the hospital: the leadership of practice specialties is now chosen by open competition; operations are more fairly scheduled; the hospital has signed a number of agreements with major hospitals abroad for diagnostic and other reference and training; anaesthetists are now on staff; and, there is a role specifically addressing diversity issues (not just for doctors, but throughout the hospital).

- The 2009 investigation into the Archives has resulted in important although understated improvements for researchers. In particular, Bermuda has entered the 21st century by allowing researchers to digitally photograph information. Time has proven that had my recommendations (regarding preparation for impending Public Access to Information legislation) been implemented, there would likely have been a more efficient, productive and dignified result.

- The result of the 2011-12 Special Development Order investigation is still to be determined. Certainly, this investigation shed factual light on a number of misconceptions that were rampant in the public domain of opinion and emotion. If Bermuda acts consistently with our prior commitments and international best practice, Environmental Impact Analysis will be required for all future major developments, especially those likely to have significant adverse effect on the environment.

What Does the Future Hold?

The Ombudsman institution worldwide is ever and rapidly evolving. Throughout the world, regardless of the system of government, there is a well-established concept of three branches of government - the Legislature, Judiciary and Executive. In the last couple of years a new idea has been emerging in the Ombudsman movement – this may well gain currency in the broader legal community in the next decade or two.

The Ombudsman, Auditor General and other oversight institutions such as the Human Rights Commission and Police Complaints Authority (if fully independent from governments) already exist as institutions and many are even entrenched in national Constitutions. In some important ways, they are said to effectively constitute a fourth branch of government – the Accountability branch.

What have Commonwealth Courts said about the Ombudsman?

Re Purpose of the Ombudsman

The purpose of an ombudsman is provision of a "watch-dog" designed to look into the entire workings of administrative laws….he can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process. If not, no harm can be done in looking at that which is good? (Re Alberta Ombudsman Act [1970] 10 DLR (3rd) 47)

The traditional controls over the implementation and administration of governmental policies and programs – namely, the legislature, the executive and the courts – are neither completely suited nor entirely capable of providing the supervision a burgeoning bureaucracy demands. The inadequacy of legislative response to complaints arising from the day-to-day operation of government is not seriously disputed. …The demands on members of legislative bodies are that they are naturally unable to give careful attention to the workings of the entire bureaucracy. Moreover, they often lack the investigative resources necessary to follow up properly any matter they do elect to pursue…

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

There is a large residue of grievances, which fit into none of the regular legal moulds, but are nonetheless real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country. (BCDC v. BC (Ombudsman) [1984] 2 SCR. 447)

Re Interpretation of Ombudsman Statutes

I do not think the remedial nature of the Ombudsman Act could fairly be doubted. The objects of the legislation and the degree to which it should receive a large and liberal interpretation can best be understood by examining the scheme of the statute as well as the factors that have motivated the creation of the Ombudsman's office. (Public Services Ombudsman v. H.M. Attorney General for Gibraltar [17th April 2003] Supreme Court of Gibraltar [Claim # 2002 T 283])

Limits on the Ombudsman's jurisdiction should not be read in or implied in the absence of express language. (Alberta (Ombudsman) v. Alberta (Human Rights and Citizenship Commission) 2008 ABQB 168)

Re Response of Authorities

The Parliamentary intention was that reports by Ombudsman should be loyally accepted by the local authorities concerned…This is clear from…section 31(1) [of the Local Government Act 1974]*, which requires the local authority to notify the Ombudsman of the action which it has taken and proposes to take in light of his report.* (R v Local Commissioner for Administration ex parte Eastleigh Borough Council [1988] 1 QB 855)

The [Minister] *acting rationally, is entitled to reject a finding of maladministration and prefer his own view. But…it is not enough that the* [Minister] *has reached his own view on rational grounds; it is necessary that his decision to reject the Ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies* [the Ombudsman's legislation]*…it is not enough for a Minister who decides to reject the Ombudsman's finding of maladministration simply to assert that he had a choice: he must have a reason for rejecting a finding which the Ombudsman has made after an investigation.* (Regina (Bradley and Others) v Secretary of State for Work and Pensions and Others. [Judgment of the High Court Feb. 21, 2007; Court of Appeal Feb. 7, 2008])

Bermuda's Supreme Court has adopted the judicial view that the Ombudsman Act must be construed broadly, with a view toward upholding rather than undermining the purpose of the institution.

Unless the Ombudsman's statutory jurisdiction under the Ombudsman Act 2004 to investigate complaints of maladministration and recommend that offending public authorities reconsider inappropriate administrative decisions is to be materially impaired, the Act must be construed as empowering the Human Rights Commission to reconsider complaints which it has previously dismissed, especially where it appears that the original decision was invalid. This principle, which has never before been considered as a matter of Bermudian law, is of general application and is likely to apply to administrative decisions made by public authorities generally…

The application of the logic of the impugned decision to other statutory contexts could potentially curtail the Bermuda Ombudsman's remedial jurisdiction altogether…

It is difficult to apprehend how the policy objectives of the Human Rights Act could be advanced by contending for a construction of its provisions which both (a) restricted the scope of relief the HRC could provide in respect of a meritorious complaint and (b) rendered nugatory the important constitutionally-derived role of the Bermuda Ombudsman. (Smith v. Minister of Culture & Social Rehabilitation [2011] SC (Bda) 8 Civ.)

See excerpt from the magazine of the Association of Ombudsman for Britain and Ireland on pgs. 30 & 31

Selected Summaries of Closed Complaints

FROM A CIVIL SERVANT:

I am sure you will handle this matter skillfully.

FROM THE PUBLIC:

Thanks for bein' there.

FROM THE PUBLIC:

All of you in your office have excellent work ethic and excellent follow up skills.

FROM THE PUBLIC:

Please thank the powers that be for their level of professionalism and follow up policies with clients. This common courtesy is missing within our establishments and it is refreshing to know a sense of decency still exist among the few...so thank you!

Ministry of Economy, Trade & Industry

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

Worker A had worked for over eighteen months before he was permitted to take his first vacation ("1st Vacation"), having been told by his employer ("Employer") he was not entitled to vacation leave. He was not paid the vacation pay to which he was entitled.

Worker A complained to Labour and Training but requested that his name not be divulged. Accordingly, Labour and Training made general (no name) inquiries of Worker A's Employer. The Employer had been mistaken in believing that her staff were not subject to the Employment Act 2000 ("Act"). Labour and Training advised Employer to make all outstanding payments.

The next year Worker A took a second vacation ("2nd Vacation") and again was not paid for this period.

Worker A approached our office complaining of Labour and Training's unreasonable delay in its investigation, adding that he was now owed for his 2nd Vacation.

Labour and Training did not record Worker A's complaint as a formal complaint because he had not wanted his name mentioned. Therefore, Labour and Training regarded this as a general inquiry only and merely informed Worker A of his rights. Labour and Training did not think that it was necessary to give him a formal closure letter.

Given the considerable confusion as to whether and when Labour and Training was informed that they could use his name in their inquiries we could not find maladministration on the grounds of unreasonable delay.

In any event, this matter eventually went to the Employment Tribunal which ruled that Worker A be paid for both vacations.

Worker B's employer ("Employer") held a meeting of senior and executive personnel to present a new organizational chart and reporting structure and to inform them of certain redundancies. At this time Worker B was assigned additional management responsibilities as a result of a managerial post being made redundant.

Just 10 days later Worker B was terminated effective immediately due to his position being made redundant.

Worker B filed a written complaint with Labour and Training alleging the Employer unfairly dismissed him, having failed to offer him a lateral position.

Labour and Training facilitated a meeting between Worker B and the Employer in which the parties focused on the terms of Worker B's severance package. Worker B's complaint that the dismissal was unfair (and, in fact, in retaliation for Worker B challenging the Employer on another matter) was not raised by either Labour and Training or Worker B. Worker B believed that Labour and Training would discuss the issue of whether or not the dismissal was unfair with his Employer after Worker B left the discussion.

By a closure letter, later that month, Labour and Training informed Worker B that no provisions of the Act were violated. No reasons were given for this conclusion.

Worker B complained to our office, and after an investigation we made the following findings. Labour and Training:

- failed to ask core questions in order to determine if the dismissal was in breach of the Act
- was unresponsive to Worker B's reminders that the primary issue was the redundancy and the amount of the severance pay was secondary
- accepted all of the Employer's explanations without question
- did not request relevant documents
- assumed that a termination during times of difficult financial conditions cannot be unfair.

Accordingly, I found maladministration due to Labour and Training's failure to conduct the fullest possible investigation. I also found maladministration due to Labour and Training's failure to provide reasons to the complainant for the conclusion that no provisions of the Act had been violated.

I made several recommendations to Labour and Training which aimed to put Worker B in the same position he would have been in had no maladministration taken place. I also made three general recommendations to assist Labour and Training in carrying out thorough investigations in the future:

- research best practices for investigation standards for employment complaint handling
- establish standards and procedures for investigation and conciliation
- conduct ongoing training.

FROM THE PUBLIC:

We know you were doing the right thing.

FROM THE PUBLIC:

Thank-you, thank-you – I would never had gotten this letter if you hadn't called.

FROM THE PUBLIC:

It's such a relief! Thank goodness your office is there – helps to get people moving!

FROM THE PUBLIC:

I would like to thank you and Mrs. Kumalae for assisting me in getting this done. I am sure it was the call from your office that got it moving.

UK Principles of Good Administration: Being Open and Accountable

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

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

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

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

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

I am happy to note that Labour and Training implemented the recommendations in this case and conducted a thorough investigation. After this second investigation Labour and Training determined that Worker B was not unfairly dismissed but could now provide vetted reasons.

Guest Worker C complained to us about Labour and Training. He had approached Labour and Training claiming that his former employer ("Employer") terminated his employment unlawfully and failed to pay his pension and social insurance contributions to Government.

In a meeting at our office Guest Worker C complained that Labour and Training had been unresponsive to his requests for updates. During the course of this meeting Guest Worker C also stated that the matter was now urgent as the Department of Immigration ("Immigration") had instructed him to leave within a month of his meeting with us.

Guest Worker C requested that our office investigate Immigration's failure to allow him to stay in Bermuda until he had recovered the money owed to him. We advised him that he was not required to be on the Island to collect any funds; therefore we would not make preliminary inquiries into this complaint. We further instructed Guest Worker C that he must abide by Immigration's instructions and leave by the date Immigration stipulated, or else he would face deportation proceedings.

Guest Worker C repeatedly requested that we speak to Immigration to extend his time in Bermuda. Our response was that this was not something we could do, and that his complaint to our office could not be used as a tactic to delay his departure. We repeated that he must follow Immigration's instructions. Guest Worker C continued to allege mistreatment on the part of Immigration and requested our intervention. He also repeatedly contacted the office of the Governor.

We established that Guest Worker C had not told the truth regarding Immigration's handling of his case. We finally informed Guest Worker C that we would not respond to his further persistent requests against Immigration.

We found no maladministration on the part of Labour and Training, which had arranged for Employer to pay Guest Worker C's outstanding benefit payments. Labour and Training had also verbally advised Guest Worker C of their findings that he had not been unlawfully terminated.

Department of Immigration – Work Permit Section
("Immigration")

Worker D's employer ("Employer") made his management position redundant. Worker D complained to Immigration that another management position at the same organisation was retained. The two positions, though having different responsibilities, were equivalent in the Employer's organizational chart and comparable in terms of skills. Worker D complained that if his termination was a valid redundancy the Employer should have made an effort to place him in another equal position. But there was no offer of continued employment and a work permit holder occupied the retained management position.

After several months in which he did not hear from Immigration, Worker D complained to our office. We found maladministration in Immigration's failure to properly log and process his complaint.

With respect to the redundancy however, Immigration would not recommend that the work permit for the manager position in dispute be revoked as no Bermudian held the exact same position of this particular manager. The generic word, Manager, is not sufficient to equate the positions held by the Bermudian and work permit employee. As long as the knowledge base of the two manager positions is different, Immigration would not revoke a work permit of a position with the same title. Worker D's complaint was nevertheless placed in the Employer's file for future reference when Immigration is considering applications to renew work permits (See "Did You Know?", pg. 28, on redundancies).

Worker E's employer ("Employer") advertised for the position of Manager. Soon after, Employer announced that a work permit holder was hired in the position of Vice-President / Manager. However, Employer obtained a temporary three month work permit — for the position of Manager only.

Worker E first complained to Immigration alleging that the advertisement for the Vice-President / Manager position was a sham advertisement. He asserted Employer had already hired the work permit holder that they wanted to fill this position. Therefore there was no intention to take any local applications seriously. Further, Worker E alleged, and our investigation confirmed, that the two positions are often different with respect to responsibilities.

After a delay of three months, Immigration told Worker E that his complaint had been investigated and that "the proper recruitment procedures were followed" by the Employer. No reasons were given by Immigration for this conclusion.

UK Principles of Good Administration: Being Customer Focused

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

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

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

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

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

CONGRATULATIONS ARE IN ORDER!

Beverly Wakem, President of the International Ombudsman Institute, was named Dame Companion of the New Zealand Order of Merit (for Queen Elizabeth's Jubilee).

FROM THE PUBLIC:

I don't know what you said to them, but you got the ball rolling. Thank you.

THANKS FOR PRESENTATION:

I would like to extend our deep appreciation for your engaging and informative presentation yesterday to our summer law students. It is a good sign when the only complaint is that we would have benefited from several more hours of your informative sharing.

Notwithstanding Immigration's conclusion, Immigration then allowed Employer to change the temporary work permit from the title of Manager to Vice-President / Manager. Further, Immigration issued a five year work permit for the title of Vice-President / Manager.

Worker E resorted to our office. We found that Immigration failed to properly investigate the complaint that this was a sham advertisement. Further to our recommendations, Immigration apologized to Worker E and conducted a proper investigation into the Employer's conduct.

Immigration presented its findings to the Minister that, indeed, the advertisement was unacceptable. The Minister issued a warning to the Employer but decided not to revoke the work permit in any event.

Ministry of Finance

H.M. Customs Department ("Customs")

Visitor F complained about his treatment by Customs. Customs found an item that Customs believed was intended to be left in Bermuda. Visitor F maintained that the item was his own. Customs told Visitor F that he would need to leave the item at the airport and collect it upon his departure.

After further searches and a lengthy wait, Customs told Visitor F that he could take the item with him but he would have to pay duty on it. Visitor F's experience with Customs lasted around 2 hours.

Visitor F complained to our office alleging that: (a) he was humiliated by Customs' extensive search and the threat of being x-rayed; (b) when he sought to complain to a higher authority within Customs he was directed to the Ombudsman instead; and (c) Customs improperly charged him duty.

We decided not to conduct a formal investigation into this complaint, but recognized the opportunity to facilitate an informal resolution.

Customs agreed that they should have directed Visitor F to its internal two-tiered review process before directing him to our office.

As Customs had photographic evidence that Visitor F left the island with the item, they refunded the amount that Visitor F paid in duty (after a delay).

Customs has taken the steps of printing off electronic complaint forms for passengers wishing to file complaints and these forms are also available on Customs' website www.customs.gov.bm.

Pension Commission ("Commission")

Worker G, who had a terminal illness, applied to the Commission for a pension rebate based on Shortened Life Expectancy ("Pension Rebate"). Worker G was still working for her employer, but only part time.

The Commission requested that she provide documentation stating that she had only five years to live. Worker G did not find this requirement stipulated in the National Pension Scheme (Occupational Pensions) Act 1998 ("Pension Act"). The Pension Act stated only that *"a pension plan may provide for the payment of greater benefits...to a member by reason of the mental or physical disability of a member that is likely to reduce considerably his life expectancy."*

Although, the Commission received a report from Worker G's physician that confirmed that her prognosis carried a 5-year survival rate averaging no more than 20%, she complained to our office that the Commission's request was contrary to law.

After conducting our inquiries we made the following findings:

Eligibility of disability benefit

- It is not a policy member's automatic right to receive a disability payment, such as the Pension Rebate. Whether a policy member receives such a payment depends on whether or not their employer's pension plan contains such provisions. Worker G's pension plan provided for payment of a disability benefit, but only after an employee terminated their employment. As Worker G was still working on a part time basis she was not eligible for such payment.

Five year life expectancy requirement

- In order to satisfy the "considerable reduction of life" aspect of s. 34 of the Pension Act, the Commission requires a Registered Medical Practitioner to provide certification that a patient has five years or less to live as a result of a disability. This is not a written policy but a long established practice. Plan administrators are informed of the practice during the initial registration of their plans and reminded when an application for a disability benefit is submitted.

FROM THE PUBLIC:

I appreciate all the help that I got from your office.

FROM THE PUBLIC:

I have had no written response to any of the emails that I have sent in these past 9 months.

(except from the Ombudsman's Office)

THANK YOU TO AUTHORITIES:

The National Drug Control and Bermuda Addiction Certification Board for exceedingly prompt and helpful responses.

The Human Rights Commission for thorough responses and follow-up.

The Department of Financial Assistance for prompt responses and for acting immediately to resolve complainant issues.

UK Principles of Good Administration: Seeking Continuous Improvement

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

UK Principles of Good Administration: Acting Fairly and Proportionally

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

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

- While empathizing that, given her situation, Worker G may have found this request to be cold and insensitive, we did not find maladministration in the Commission's request that she provide certification by a Registered Medical Practitioner that she had five years or less to live in order to receive the Pension Rebate.

Ministry of Justice

Department of Legal Aid ("Legal Aid")

Prisoner H was incarcerated at Westgate. He had appealed his conviction to the Court of Appeal which ruled against him.

Prisoner H wished to launch an appeal to the Privy Council but sought assistance from Legal Aid to finance his appeal. Legal Aid denied Prisoner H's application but did not give reasons for its decision. Prisoner H wrote to Legal Aid seeking to know why his application was denied but did not receive a response for over five months.

He complained to our office about Legal Aid's unresponsiveness. After communicating with Legal Aid we discovered that Legal Aid had never received Prisoner H's letter requesting reasons. We found that there was no maladministration on the part of Legal Aid which did address his concerns after we brought them to Legal Aid's attention.

Ministry of National Security

Department of Immigration – Border Control ("Immigration")

Guest Worker I complained that Immigration had treated him improperly by placing him on the Immigration Stop List ("Stop List") and had failed to give reasons for placing him on the list. Guest Worker I was engaged to a Bermudian but the Work Permit and Entry / Re-entry Permit, which had previously allowed him to work on the Island, had been revoked, and he was instructed to leave Bermuda.

After consulting with Immigration, Guest Worker I left the Island, but returned the very next day. Immigration met with him as a result of his rapid return and told him he could be added to the Stop List.

Guest Worker I left Bermuda again and returned a month later not realizing that he

had, indeed, been placed on the Stop List just four days earlier. (He received the letter informing him of this 3 weeks after traveling to Bermuda). Once he arrived in Bermuda he was denied entry.

Guest Worker I claimed:

- that in his first meeting with Immigration he was told he could return to Bermuda, as a visitor even just one day after the expiration of his work permit
- in his second meeting with Immigration, after his return on a Visitor's visa, Immigration made disparaging comments and the meeting felt like an interrogation rather than an interview
- he had not received timely written notification that his name was put on the Stop List.

The Ombudsman's investigation entailed six discussions with relevant Immigration officers, one with Guest Worker I and his fiancé and three with his fiancé alone. We also thoroughly reviewed Immigration's file on this matter.

We found no evidence to support his claim that he was told that he could return to Bermuda one day after his departure. Further, we found that there was no maladministration with steps taken by Immigration in: (a) informing Guest Worker I that his behaviour caused concern; and (b) then notifying him that his name was added to the Stop List.

Ministry of the Environment, Planning & Infrastructure Strategy

Department of Planning ("Planning")

Applicant J regularly makes planning and building permit applications to Planning on behalf of clients. He complained that he had to wait five months for Planning to approve a planning application and seven months for a building permit approval. During this period there were long periods when Planning did not respond to his queries. He claimed that such delays are commonplace and that Planning should provide responses in a more timely manner.

Our office has previously discussed delays in responding to queries and the processing of applications with Planning. Planning took steps to review its operations and implemented improvements. However, Planning acknowledged that, even with a significant backlog in the Department, it took too long to respond to Applicant J's queries. Further their letter requesting revisions was not as clear as it could have been.

UK Principles of Good Administration: Putting Things Right

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

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

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

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

FROM THE PUBLIC:

We really appreciate the work you've done for the three of us.

FROM THE PUBLIC:

I realize that when you get involved things move forward and get done...

FROM A CARIBBEAN OMBUDSMAN:

I am not surprised by the courtesy nor by the thoroughness of your response.

FROM THE PUBLIC:

First let me thank you for your quick response I truly appreciate the information you provided.

We found that Planning's delay in responding to Applicant J's queries were unreasonable and amounted to maladministration. But we made no recommendations as approval for the two applications had been granted.

Applicant J further expressed concerns that Planning did not have enough experienced planners, with inexperienced planners causing delays with unnecessary requests and misreading plans. Planning responded that in this case, the issue was not that the Inspector misunderstood or could not read the plans; he was concerned with whether or not the plans complied with the spirit of the Building Code 1998 with respect to safety. We did not find this due diligence to be unreasonable.

Applicant J highlighted an issue that we heard before: applicants feel reluctant to complain for fear of retaliation against current and future projects. We have no factual evidence to substantiate the fear of retaliation. Clearly, however, it will be a long-term challenge for Planning (and other Government departments) to convince the public that there is a culture of welcoming complaints.

Ministry of Youth, Families & Sports

Department of Child & Family Services ("Family Services")

Father K complained that Family Services had been unresponsive to his requests for specific information. During a period of family discord, Father K took his child to a private agency for counseling. The Counselor sent a Child Protection Referral Form to Family Services citing suspicions of abuse.

The Police were alerted but told Father K that he had nothing to worry about. The Police closed their investigation finding no evidence of child abuse.

Following the Police investigation, Family Services met with Father K to inform him that the case had been closed by Family Services. At that meeting Father K asked to see the referral from the Counselor. Family Services indicated that "it would not be a problem" for him to see the referral. Family Services met with Father K several more times and each time he reminded them of his request.

Father K complained to our office that Family Services had been unresponsive to his requests for the referral.

Under the Children Act 1998 no children's officer can communicate information obtained

in the performance of his duties unless giving evidence in Court or authorized by the Director of Family Services or the Minister. Family Services informed us that in its conversations with Father K they explained that, while they had no objection to him seeing the referral, he would need to obtain it directly from the Counselor himself.

We did not find maladministration in Family Services' decision not to provide Father K with a copy of the referral.

We pointed out to Father K that society's interest in protecting children is paramount. Unfortunately, that broad interest may sometimes entail inquiries and embarrassment for individuals which do not result in legal or other consequences. Our understanding of best practices is that the decision of agencies tasked with protecting children to divulge information or not must be based on their own policies and competence.

FROM THE PUBLIC:

I wish to thank you and your team on behalf of (Company) for your professional and timely assistance in the said matter. Hopefully the matter can conclude quickly in a positive spirit.

Presentations and Workshops

Local Presentations (A. Brock and Q. Kumalae)

Bermuda Bar Association • Bermuda College • Bermuda Public Services Union • Centre on Philanthropy • Department of Child and Family Services • Human Rights Commission • Ministry of Education, Middle School Initiative • Pembroke Rotary Club • Probus Club • Seniors' Learning Center • Treatment of Offenders Board

International Presentation (A. Brock)

Curaçao Ombudsman Conference on The Duty of Confidentiality

International Workshops

Commonwealth Secretariat and UN ICC re NHRI Accreditation (A. Brock)

International Ombudsman Institute Board of Directors' Meeting, Zambia (A. Brock)

Queen Mary University – Complaint Handling course (A. Brock vetted for International Ombudsman Institute Board of Directors as Chair of Training Committee)

Forum for Canadian Ombudsman Prison & Probation Course, Halifax, NS (Q. Kumalae)

USOA Conference & Sharpening Your Teeth Investigations Course (C. Hay)

Address Unknown: Return to Sender Policy

A complainant alleged that the 'Return to Sender' provision of the 2009 Post Office Amendment Act ("Amendment") was draconian, inefficient and may be in breach of the Universal Postal Union Treaty of 1875 ("Treaty") – to which Bermuda became bound in 1877. The Amendment requires that incoming mail be returned if not correctly addressed with: unit and building number, street name, parish and postal code.

Our investigation entailed: visits to the Post Office sorting facility at the airport and the Hamilton Post Office; discussions with the UK Postal Services Commission, the UK Royal Mail, US Postal Service, Caribbean officials and a UPU representative. We learned that the UPU does not monitor adherence to the Treaty. Each state may decide on its own national conditions, policy and criteria for returning to senders *"items which it has not proved possible to deliver to the addressees for whatever reason".* Bermuda's Amendment does not appear to breach the Treaty.

However, the Amendment does seem to defy common sense. The public is frustrated that seemingly resolvable address infractions prevent mail from being delivered on our 20 square miles yet mail with serious infractions is delivered in much larger jurisdictions. I have received a report of the following example that occurred as late as January 2012.

Mrs. Tucker
Clarion Mews
Manchester

DELIVERED: despite
NO FULL NAME
NO HOUSE NUMBER
NO POSTAL CODE
NO COUNTRY

Alistair McLaren
Orchard Heights
Warwick West WK 06
BERMUDA

RETURNED TO SENDER: because
NO HOUSE NUMBER

Note: names and addresses have been changed / anonymized to protect the privacy of the actual sender and recipient!

The Post Office argued that the Amendment was necessary to educate recipients in Bermuda to inform senders of correct addresses. People had come to expect that mail would be delivered no matter how poorly addressed. The Post Office clarified that the principle is that mail is delivered to an address, not to a person. Even if a regular post person knows where their recipient lives, a substitute might not. Therefore, mail must be addressed correctly. Prior campaigns to educate recipients to inform senders of correct addresses were unsuccessful.

The Post Office was concerned that an inordinate amount of time and expense was consumed each day by post persons to research correct addresses. This delayed delivery of correctly addressed mail. (Prior to the Amendment only post persons did this research.) The evidence submitted to me was that the research cost for the year ended August 31, 2009 was $147,293. The additional 'return to sender' cost was $20,274. This amounted to a total cost of approximately $14,000 per month to deal with incorrectly addressed mail. This was the cost that the Amendment was intended to save.

A large portion of the incorrect mail was due to the absence of post codes. Further most of the infractions were due to mass monthly mail, e.g. from the utilities, banks and insurance companies. As a result of the Amendment, these large local companies undertook to correct their address databases.

The Post Office submitted evidence to me for the three months ended May 31, 2010 that, as a result of the Amendment, the volume of incorrectly addressed mail had been cut by one-half. In this same period, the monthly cost to deal with return to incorrectly addressed mail dropped from $14,000 to $8,000 (a savings of $6,000 per month). The Post Office did not assert (or submit any evidence of) the $30,000 - $35,000 monthly costs / savings that was reported in the Royal Gazette on December 5, 2011.

Moreover, the Amendment did not end all research completely. Instead of post persons taking the time to research correct addresses for the purpose of attempting to deliver the mail, research continues to be conducted at the airport sorting facility – now by non-delivery staff and for the very different purpose of returning incorrectly addressed mail. Once a piece of mail is identified as having an incorrect postal code, the researcher:

1. researches what the correct postal code should be by locating street names on the Land Valuation website
2. then stamps the mail with the Return To Sender red stamp to signify that it was incorrectly addressed
3. the stamp indicates that the problem was e.g. incorrect post code
4. the staff member then physically writes in the correct postal code on the RTS stamp for the purpose of educating the sender about the correct address
5. finally, the mail is returned to sender.

Ironically, once the correct post code is located, the mail actually becomes *"possible to deliver"* as envisioned by the Treaty. Instead, it is returned to senders. If the salary of the researcher is taken into account, the actual cost savings would be somewhat less than $6,000 per month.

Our comparative practices research revealed:

United States mail is filtered according to zip code. Like Bermuda, mail is deemed to be sent to an address, not to a person. Therefore, mail with incorrect zip codes is not delivered. Such mail is researched and returned to sender with a note of the correct post code and the request: *'please inform recipient of correct postal code'.* The reason given for the strict post code filtering is that there must be a consistent process to handle millions of addresses and also millions of pieces of mail each day.

At the other end of the spectrum are **Caribbean** island states (most of which do not use postal codes). Even in some of the larger islands, country roads may not be named. The delivery of mail is considered to be a social good and every attempt is made to do so. This is highly

dependent on the local knowledge of post persons who know or can find out the names and addresses of recipients. A considerable amount of research is done to identify the correct address. The Cayman Islands does have a postal code system – there, incorrectly addressed mail is researched and delivered to recipients with a stamp indicating that the address was incorrect.

While precise postal codes were introduced in the **UK** decades ago, delivery practice is more like the Caribbean. Every effort is made to research and deliver incorrectly addressed mail. At the local level, it is common for post persons to hand over mail that may belong to neighbouring delivery routes to their colleagues. If that is not possible, then mail is returned to the local sorting facility where the mail is researched, addresses corrected, then returned to post persons. If it is impossible to identify correct addresses at the local facility, then mail is sent to the national sorting facility in Ireland (where it may be opened to ascertain correct addresses for the purpose of another attempt to deliver).

UK authorities believe that the public would not accept any proposal to return incorrectly addressed mail to senders without research effort. It is also considered unfair to penalize recipients for the failure of senders to address mail properly. Once mail becomes possible to deliver (through research or local cooperation of post persons) then, it is delivered. Mail is returned to sender automatically only when a person at the address declares that the mail does not belong to anyone living there and refuses to accept it.

The UK has expended considerable effort, time and money in the past four decades to educate senders to use correct addressing standards, particularly postal codes. Although education campaigns were never as successful as hoped, no serious thought has been given to dispensing with the research task in order to attempt to deliver the mail. The overriding and enduring principle of the UK post service is that *"the Royal Mail must be delivered".*

This is the citizen-friendly approach that would likely meet the test of a 2009 appeal decision of the Supreme Court of Bermuda. Our Court held – with respect to an unrelated issue – that although a procedure may not be required by legislation, it is appropriate for the government to implement the procedure if it is *"simple and citizen-friendly"*.

Given the fact that the problem of incorrectly addressed monthly mass mail has abated, it is my view that the random individual incorrectly addressed mail ought to be manageable. Once the correct address is found on the Land Valuation database, I recommended that the mail ought to be delivered rather than returned to sender. I also recommended that the true cost of returning researched mail to overseas senders should be determined.

The Post Office resisted my recommendations. I was on the verge of submitting a Special Report to Parliament when I was informed that the rule would be relaxed. The opinion in the Royal Gazette report below echoes a popular sentiment.

Postal U-turn

There was good news in the House of Assembly on Friday when Economy Minister Patrice Minors announced that one of the worst decisions made in the last ten years was being "relaxed".

This was the "return to sender" rule for minor address mistakes. Despite Ms. Minors' best efforts to turn this U-turn into some kind of victory, it must surely be clear that no policy did more to hurt the Post Office and to send it on its way to permanent irrelevance.
The Royal Gazette article published December 5, 2011

However, it now appears that the policy may not have been relaxed on a permanent basis.

Again, I urge the Post Office to deliver the mail that is possible to be delivered after research at the airport sorting facility – rather than returning to sender.

Note: print media reports of the 2nd and 3rd December 2011 announced that the Return To Sender policy would be relaxed for *"minor address infractions such as missing or incorrect postcodes"* in a bid to *"become more customer focused".* Those same media reports indicated that, prior to the amendment, the cost to deliver incorrectly addressed mail was approximately $30,000 to $35,000 per month. The claim is that the savings to the tax payer resulting from the amendment is almost half a million dollars a year. However, the evidence provided to the Ombudsman prior to the December 2011 media report was that the cost of Return To Sender mail was approximately $14,000 per month (not $30,000). The Post Office is working on explaining the discrepancy and I will update Parliament and the public in my next Annual Report.

Update: Bermuda Archives Special Report

Further to *Atlantica Unlocked, the Systemic Investigation into Allegations of Barriers to Access to the Bermuda Archives,* two critical tasks were started in the last quarter of 2011:

- A Shelf List was substantially completed by year end. This is a listing of all items in the Archives according to their shelf location. This allows all staff to know exactly what is in the Archives and where. The Shelf List also provides the baseline for future audits of the contents of the Archives. The Shelf List provides an important database for other forms of lists and organization, including the foundational information needed for the more complex project of cataloguing the entire collection of the Archives.

- There has been significant progress toward completion of the Accessions Register. All items that come into the Archives, whether by purchase, donation or retention of government records, must be recorded in the Accessions Register. Only in very rare cases can or should the public have access to documents and items that are not yet recorded. Our investigation of 2009 found that a substantial number of items that had entered the Archives years before had not yet been accessioned. This updating of the Accessions Register will be welcome news to researchers.

Update: Special Needs Complaint

Department of Education ("Education")

Our 2010 Interim Report details a parent's complaint that Education failed to provide an adequate education in Bermuda for her special needs child in accordance with the Education Act 1996 and the National Policy on Disabilities. We had received complaints in the past about gaps in Education's services for special needs students. Over the years of meeting with Education, we were assured that a strategy would be forthcoming. This investigation showed that very little progress had been made.

We noted *"there is a palpable cynicism and lack of confidence in Education's resolve, leadership and capacity to tackle the task of providing a suitable education locally for special needs students...The country should have an interest in ensuring that all such children receive the training and confidence that will enable them to become functioning, independent, contributing adults. We pay now or we pay later."*

An Ombudsman who merely resolves individual complaints – whilst that is important – is doing only half of her job. Each complaint must be analyzed for possible systemic improvements. Although we were able to resolve the education needs of this student, we also recommended that Education should establish a clear Special Education Needs ('SEN') policy. To its credit, Education took this recommendation to heart almost immediately and set about to develop a strategy with input from parents, teachers and other stakeholders. In order to inform this policy, we also recommended that Education request the Department of Internal Audit ('DIA') to conduct a thorough evaluation of existing operations.

DIA conducted the audit in the last quarter of 2011 and issued its report in March 2012. In my opinion DIA did a stellar job of digging into the considerations necessary to make special needs services more effective. DIA identified serious gaps, in particular, the need for Education to:

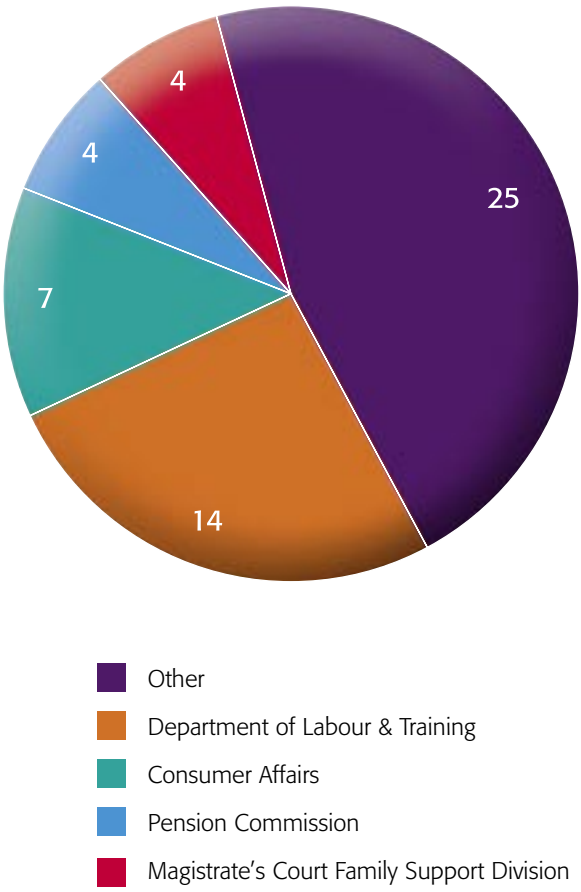
- Ensure that fundamental rules set out in the SEN policy are set out in regulations (in light of the past 15 years of incessant change in directions and priorities by some nine Ministers of Education and ten Permanent Secretaries)
- Learn about and incorporate Education's responsibilities under the National Policy on Disabilities
- Assess and anticipate which students would require what services (especially students with multiple needs) over the medium and long-term
- Develop realistic job descriptions that actually reflect work done and that remove disparities in qualifications for relevant education officers
- Draft thorough, actionable, consistent and measurable Individual Education Plans
- Accurately document interventions and school visits by education officers in order to assess the impact of the strategies and services for special needs students.

Education has already begun the process of drafting proper job descriptions and is on board to incorporate the other considerations raised by DIA. We thank the parent who made this complaint. Ultimately, the complaint not only provided a resolution for her child, but also more broadly will lead to enduring strategies to ensure that Bermuda improves its educational services for all special needs students.

Statistics

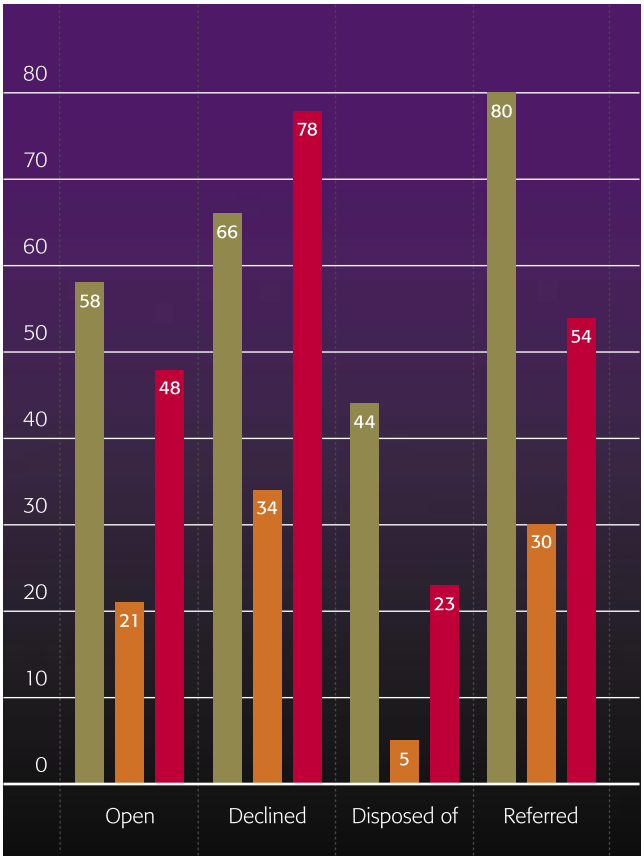
COMPLAINTS REFERRED

Number (54 total) / Where Referred



STATUS OF COMPLAINTS

Number / Status at July 31 and December 31, 2010 and January 1 to December 31, 2011



Complaints Not Referred	Aug 1, 2005 Dec 31, 2010	Jan 1, 2011 Dec 31, 2011	Total
Complaints Brought Forward at Dec 31	76	48	**124**
New Complaints Not Referred	–	149	**149**
Complaints Closed / Declined during 2011	31	101	**132**
Complaints Open at December 31	45	48	**93**

Open Complaints

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

MINISTRY (January 1, 2011 - December 31, 2011)				
TYPES OF COMPLAINTS		INEFFICIENT	IMPROPER	UNREASONABLE DELAY
Economy, Trade & Industry	**22**			
Bermuda Post Office	(1)			
Department of Immigration – Work Permits	2	1		
Department of Labour & Training	20		1	6 / 1
Education	**6**			
Department of Education	6			
Psycho-Education Committee	(1)			
Environment, Planning & Infrastruct. Strategy	**18**			
Department of Environmental Protection	1			
Department of Planning	16		1	3 / 2
Rent Commission	1			
Finance	**12**			
Accountant General Office – GEHI	3	1		
Bermuda Monetary Authority	1			
Department of Social Insurance	4	1		
HM Customs	1		1	
Office of the Tax Commissioner	2			1
Pension Commission	1			
Government Estates & Information Services	**1**			
Charities Commission	(1)			
Public Land & Buildings	1			
Health	**17**			
Bermuda Psychologists Registration Council	(2)			
Council for Allied Health Professions & Physio. Board	1			
Department of Health	2			2
Health Insurance Department	2			
King Edward VII Memorial Hospital	10	1		1
Mid-Atlantic Wellness Institute	(1)	1		
National Office for Seniors & Physically Challenged	2			
Justice	**16**			
Court Services	1			
Department of Corrections	6			
Magistrates' Court – Legal Aid	2	1		
Magistrates' Court	2			
Magistrates' Court – Family Support Division	(1)			
National Drug Commission	1			
Parole Board	1			
Supreme Court	1			
Treatment of Offenders Board	2			
National Security	**12**			
Bermuda Fire & Rescue Service	1			
Bermuda Police Service	1			
Defense	1			
Department of Immigration – Border Control	8	1		3
Police Complaints Authority	1	1		
Public Works	**7**			
Bermuda Housing Corporation	1			1
Government Quarry	1			
Operations & Engineering	5	1		1
Transport	**7**			
Department of Airport Operations	2			
Department of Marine & Ports Services	2			
Public Transportation Board	2			
Transport Control Department	1	1		
Youth, Families & Sports	**11**			
Department of Child & Family Services	1			
Department of Community & Cultural Affairs	1			
Department of Financial Assistance	5	2		
Human Rights Commission	4	1		1
National Sports Centre	(1)			
Other	**20**	1		
TOTALS	**149 / 30**	**9 / 5**	**2 / 1**	**17 / 5**

Figures in red represent complaints open at the end of 2010 which were closed in 2011.

ABUSE OF POWER	CONTRARY TO LAW	UNFAIR / OPPRESSIVE	MISTAKE OF LAW OR FACT	ARBITRARY	NEGLIGENT / UNRESPONSIVE	OTHER
			1			
		1				
					8 / 2	5
		3		1	1 / 2	1
		1				
						1
	1	3	1	1	3 / 2	3
		1				
		1	1		1	
		1			1	
		1			1	1
						1
		1				
	1	1				
					1	
					1	
					2	
	1					
		1			1	
2					3 / 1	4
		1				1
		1				
3		1		1		1
					1	1
		1				1
						1
					1	
		1				
		1				
		1			1	
						1
		1				
						1
		1	1		1	3
		1				
		1				
						1
						3
		2				
		1				1
						2
					1	
					1	
		1			2 / 1	
	1					2
1						
	1	2	2			14
5 / 1	**4 / 1**	**31 / 1**	**4 / 2**	**3**	**26 / 13**	**48 / 1**

MINISTRY (Jan. 1 - Dec. 31, 2011) # of new Complaints		OPEN	DECLINED		
DISPOSITION OF COMPLAINTS NOT REFERRED			Not in Jurisdiction	Existing Process	Time Bar/ Withdrawn
Economy, Trade & Industry	**22**				
Bermuda Post Office	(1)				
Department of Immigration – Work Permits	2	1			1
Department of Labour & Training	20	8	4	4	
Education	**6**				
Department of Education	6	1	3		1
Psycho-Education Committee	(1)				
Environment, Planning & Infrastruct. Strategy	**18**				
Department of Environmental Protection	1			1	
Department of Planning	16	6	4 / 2	2	1
Rent Commission	1	1			
Finance	**12**				
Accountant General Office – GEHI	3				
Bermuda Monetary Authority	1	1			
Department of Social Insurance	4	2	1		
HM Customs	1		1		
Office of the Tax Commissioner	2	1			
Pension Commission	1				1
Government Estates & Information Services	**1**				
Charities Commission	(1)				
Public Land & Buildings	1	1			
Health	**17**				
Bermuda Psychologists Registration Council	(2)				
Council for Allied Health Professions & Physio. Board	1	1			
Department of Health	2	1	1		
Health Insurance Department	2		1		
King Edward VII Memorial Hospital	10	4	4		1
Mid-Atlantic Wellness Institute	(1)				1
National Office for Seniors & Physically Challenged	2	1		1	
Justice	**16**				
Court Services	1		1		
Department of Corrections	7	5			
Magistrates' Court – Legal Aid	2	1		1	
Magistrates' Court	2		2		
Magistrates' Court – Family Support Division	(1)		1		
National Drug Commission	1				
Parole Board	1	1			
Supreme Court	1		1		
Treatment of Offenders Board	1	2			
National Security	**12**				
Bermuda Fire & Rescue Service	1		1		
Bermuda Police Service	1	1			
Defense	1		1		
Department of Immigration – Border Control	8			3	2
Police Complaints Authority	1		1		
Public Works	**7**				
Bermuda Housing Corporation	1			1	1
Government Quarry	1		1		
Operations & Engineering	5	1	2	1	1
Transport	**7**				
Department of Airport Operations	2	2			
Department of Marine & Ports Services	2	1	1		
Public Transportation Board	2		2		
Transport Control Department	1	1			
Youth, Families & Sports	**11**				
Department of Child & Family Services	1				
Department of Community & Cultural Affairs	1				
Department of Financial Assistance	5	2		2	
Human Rights Commission	4	1	2	1	
National Sports Centre	(1)				1
Other	**20**	1	19		
TOTALS	**149 / 30**	**48**	**53 / 3**	**17**	**8 / 3**

Figures in red represent complaints open at the end of 2010 which were closed in 2011.

CLOSED AFTER PRELIMINARY INQUIRY OR INVESTIGATION				
Mediation/ Informal Resolution	Maladministration		No Maladministration	
	Specific Complaint Recommendation	General Practices Recommendation	Value Added	No Action
	1			
2 / 1	1		2 / 1	
2			1	
	1			
1			3 / 1	
2			1 / 1	
			1	
1				
1				
1				
			1	
				1
2				
	1			
1			2	
			1	
			1	
1				
3	1		1	
			1	
			1	
			1	
			1 / 1	
1				
11 / 8	1 / 4	–	11 / 11	1

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

Did You Know?

Department of Immigration's Policy on Advertising for Posts

• For applications for initial work permits, Immigration's Advertising Criteria Policy REF: W3 ("Advertising Policy") requires that an employer must have advertised the position with specific details including the *"title of the job being filled"* and a description *"consistent with the normal functions associated with the job"*.

• For applications for *"the renewal of a work permit, including a periodic work permit"* the Advertising Policy requires that employers must have advertised the jobs held by non-Bermudians before Immigration would consider renewing the work permit. Moreover, the Advertising Policy specifies requirements for: quarterly general advertisements; applications to waive advertisements; and, applications for permission-in-principle to hire up to 6 months after an advertisement (rather than 3 months). Advertisements must state *"that person's job category"*.

• "Periodic work permits" are held by people who periodically come to Bermuda, for example technicians and consultants. The Advertising Policy does not apply to "temporary work permits" which are granted on a short term basis when positions must be filled quickly with the proviso that there should be *"no expectation of approval of further permits"*. The Department scrutinizes advertisements and recruitment processes for substantive positions that must go to the Immigration Board.

Department of Immigration Policy on Redundancy of Bermudians

• Immigration encourages employers to preview planned redundancies with the Department and explain why there are no other jobs for Bermudians whose jobs are made redundant. This ensures compliance with the "Laid-off Staff in the Hospitality Industry" provisions of the Policy on Restrictions on Non-Bermudians Seeking or Obtaining Employment REF: W5 ("Redundancy Policy").

• Revocation of current work permits are rare and automatic only in such instances when, for example, Immigration determines that an employer has misrepresented the recruitment process by tailoring a position for a guest worker or claiming that "no Bermudian applied".

• In the case of redundancy of positions held by Bermudians, Immigration may recommend revocation of current work permits only when guest workers hold exactly the same job title and functions of the redundant position. Even then, it is not an automatic process. Immigration would first request the Department of Labour and Training to conduct an apples-to-apples assessment of qualifications and functions. For example, the generic word 'Manager' is not sufficient to require revocation.

• However, in all cases of redundancy in the hospitality industry, an employer does have to explain why a Bermudian cannot be deployed elsewhere.

Staff

Left, standing: Kara Simmons, Arlene Brock, Catherine Hay. Seated: Quinell Kumalae, Georgia Symonds. Below: Tikitta Suhartono.

2011 was a very intense year. For all of our investigations and especially the large systemic investigations, we do a great deal of due diligence to unearth available evidence, research best practices and get a true handle on the context in which the investigated issues arise. Our Evidence Binders are usually about eight times as thick as respective published reports.

The SDO investigation entailed interviews of 72 locals and 23 overseas officials and substantial documentary review. The ability of my entire staff to research, organize and analyze a vast array of complex scientific, legal and international issues was inspiring. They did all of this while still managing to produce important resolutions of everyday complaints. I am so proud of and truly blessed to be able to work each day with these exceptional colleagues:

- Quinell Kumalae, whose stalwart work ranks her not only as an Investigations Officer par excellence, but as my deputy who ensures that our office functions at the highest level.
- Catherine Hay, who joined as an Investigations Officer just after her Call to the Bermuda Bar and whose thoughtful and myriad talents are proving to be invaluable.
- Chrystal Cassidy, who organized the vast volume of materials with such skill that we can locate information at the snap of a finger. Chrystal has moved on to another interesting opportunity and we do miss her intrepid focus and humour.
- Kara Simmons worked with us for a few months in 2010 as an intern. We then brought her back for a short contract to assist with the SDO investigation. She has now returned full-time as the Administrative / Investigations Assistant. She is smart and eager to make a difference – a perfect complement to our team.
- Tikitta Suhartono, Administrative Officer, is the epitome of grace under pressure and helped with SDO research tasks. Congrats on your beautiful new baby.
- Georgia Symonds, Administrative Associate, continues to be the golden glue who keeps us and complainants in good spirits and organizes communication and travel, often far beyond her part-time schedule.

Thanks to all for such outstanding performance!

Courting the ombudsman

Anthony Rich, General Counsel at the Legal Ombudsman and member of the Ombudsman Association's Legal Interest Group, has joined *The Ombudsman* magazine's growing team of contributors. Here he tells us what's being done to share learning about judicial reviews across our community.

It is a sad fact of life that where there is a hotly contested dispute between two people to be decided by a third party, at least one protagonist will be disappointed and want to fight on to the bitter (sometimes very bitter) end.

Ombudsmen schemes only have limited, if any, appeal mechanisms so people unhappy with the outcome of their case will often try to challenge the decision in court by the judicial review process. This is not an appeal or a re-hearing, but an audit by the court of whether the ombudsman made a lawful decision by a lawful, and human rights compliant, process.

While each scheme inevitably has different rules, the court's decision on any particular case can have wider repercussions beyond the scheme from which it came.

While the actual decision may turn on the details of the scheme concerned, there are often useful judicial quotes or lines of reasoning that other ombudsmen can use.

For example, in an Office of the Independent Adjudicator case called 'Sibouremа', Lord Justice Richards helpfully said:

"The decision whether a complaint is justified involves an exercise of judgment with which the court will be very slow to interfere." – a view most ombudsmen will appreciate and want to quote in their defence.

A point of general principle can be raised with far-reaching implications. This was the case when a small investment house challenged the Financial Ombudsman Service last year. The investment house argued that the right to a fair hearing (enshrined in human rights law) meant all ombudsmen's decisions required a pre-decision oral hearing. The European Court of Human Rights eventually ruled that there was no such general requirement, a great relief to all ombudsmen schemes.

So what is the Ombudsman Association doing to keep us abreast of cases that could have wider impact, and help Ombudsmen defend court challenges?

Firstly, the Legal Group is working to collate and share ombudsman cases with wider implications. We hope to provide a database of such cases on the new website later this year.

Secondly, the group acts as an information exchange. So, when the Ombudsman for Bermuda, Arlene Brock, had a case challenging her constitutional position, she was able to use the group to find useful precedents from other countries. Case authorities were then provided which the Bermudan court found to be helpful precedents, and Arlene won her case, which confirmed the wide extent of her jurisdiction. The group benefited when Arlene kindly fed back a range of other relevant judicial decisions her research had identified.

Thirdly, to help readers keep a finger on the judicial pulse, we will print reports of new cases in this magazine.

Of course, other cases that haven't been subject to judicial review can be significant too. For example, the Legal Ombudsman recently took a solicitor to court after he repeatedly failed to produce documents. The relevant Act said this failure could be punished like a contempt of court. The judge imposed a four month prison sentence, albeit suspended.

Although that case turned on the detailed law covering that particular scheme, the judge was clearly intent on supporting the work of ombudsman schemes. As the judge, Mr Justice Wyn Williams, put it:

"What then am I to do in these circumstances? I say without hesitation that the defendant's default is such that a sentence of imprisonment would be justified. It is simply not acceptable for a solicitor to behave in the way that [the solicitor] did in this case. To repeat, he ignored reasonable requests for information in respect of a perfectly legitimate complaint, then he failed inexcusably to deal with a notice served upon him under statutory provisions when that notice informed him that to fail to respond might constitute a contempt of court. Such behaviour by an officer of the court cannot be tolerated by the court. To repeat, in my judgment, a sentence of imprisonment would be justified to bring home to [the solicitor] and to other solicitors who might find themselves in his position that they should not wilfully ignore matters of such importance."

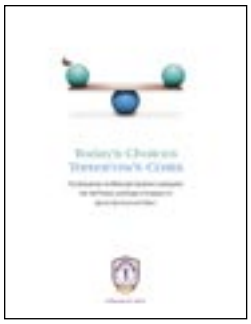
This favourable judicial climate is reflected in decisions involving other ombudsmen schemes too. However, we can best keep that climate favourable if we ensure all ombudsmen are armed with the best base of court decisions we can.

So please do make sure your lawyers, internal or external, support the Ombudsman's Association's work by sending details of decisions of importance, or copies of any court decisions made, to the Legal Group.

You can also send them to me at **anthony.rich@legalombudsman.org.uk** and I will make sure they are shared.

From *The Ombudsman* Issue 46 May 2012 (magazine of the Association of Ombudsman for Britain and Ireland) by kind permission

Excerpts from Special Report



INTRODUCTION: The 2011 Tucker's Point Special Development Order ("TP SDO") was almost the perfect storm. This SDO allows development in the last remaining, most pristine, biodiverse and environmentally sensitive corner of Bermuda. This pitted concerns about the environment and about the transparency of the process against a national interest in revitalizing the tourism industry. In 1995 and 2001, Tucker's Point had been the beneficiary of SDOs that lifted the protection of conservation zoning from approximately 20 - 30 acres of land. The 2011 application initially proposed to open up an additional 25 acres.

In prior years, the Minister responsible for the environment had the sole discretion under s. 15(12)(a) of the Development and Planning Act 1974 ("DPA") to approve SDO applications. An amendment to the DPA of March 1, 2011 was a genuine attempt to make the SDO process more transparent. The amendment provides for the grant of SDOs by the affirmative resolution procedure of the House of Assembly and the Senate. This amendment put the fact that there is to be a decision on a SDO application squarely in the public eye. This enables scrutiny by Legislators and presumes the possibility of public lobbying. However the amendment tackles only *who* makes the decision. It does not at all address the procedure to be followed to inform the decision-makers. The Amendment does not ensure adequate data collection, incorporation of technical expertise or public disclosure.

The TP SDO focused Bermuda on two central questions: (a) what constitutes the national interest; and (b) how do we assess the long-term costs of development proposals. The issue is not whether tourism development should be encouraged. Rather, the essential controversy is whether tourism development should be allowed on land intended to be protected forever from development. The choice is how to balance two equal imperatives – the need to bolster the economy and the sagging tourism industry today with the need to conserve the physical environment for the social and economic good of current and future generations.

Almost everyone seemed to have an opinion – but very little in the way of data. There were allegations on all sides of the issue. Opponents of the TP SDO launched public protests and charged that: proposed development would destroy rare species and habitats; the SDO is a real estate deal disguised as tourism; the SDO was brought to the Legislature in the middle of the annual Budget Debate in order to limit the focus and time for fully informed debate.

Voices in favour of the SDO alleged: opponents were misinformed, hostile to development and alarmist; the SDO is vital to Bermuda's entire tourism industry; opposition would damage Bermuda's reputation with potential foreign investors; failure to issue the SDO would imperil jobs in all sectors of the economy.

This as well as prior controversies alerted Bermuda to serious deficiencies in the SDO process – particularly the vacuum in opportunities for public input. The debate swirling around the TP SDO was heavy with emotion and light on evidence. Speculation and suspicion rushed in to fill gaps in information and process. It is clear that there is neither a consistent process to ensure public input nor guidance for disclosure of adequate information to evaluate SDO applications.

Whether in the legislative process, the media, public opinion or administrative actions, the question of how different national interests should be reconciled deserves the benefit of full, neutral and evidence-based information that should be available to all stakeholders and decision-makers. When Government regulation is involved, it is the role of civil servants to corral all relevant considerations in order to advise the Minister, Cabinet and Legislature. In light of the unsubstantiated claims made about the TP SDO, I decided to investigate the scope and quality of the information analyzed and recommendations made by civil servants. Section 5(2)(b) of the Ombudsman Act 2004 ("the Act") authorizes the Ombudsman: *"on his own motion, notwithstanding that no complaint has been made to him, where he is satisfied that there are reasonable grounds, to carry out an investigation in the public interest."*

I did not investigate the actual decision made by the Legislature to grant the TP SDO. Instead, I investigated the information gathering and analysis that was necessary to inform that decision. During the course of this investigation, I was gratified to learn that the Privy Council made the exact same distinction in the 2004 case of Belize Alliance of Conservation NGOs v. The Department of the Environment (2004) UK PC 6 ("Belize"): *"Distinguish between the procedure to be followed in arriving at a decision and the merits of the decision itself."*

Decisions of the UK Supreme Court (House of Lords and Privy Council) are binding on Bermuda. Four key decisions of the UK Supreme Court have set out that the proper procedure to be followed in arriving at a decision entails Environmental Impact Assessment ("EIA") for proposed developments that are likely to have significant adverse impact on the environment.

For two of those cases, the procedure was mandated by a European Directive. For the Belize case, the procedure was set out in domestic legislation. For the Bahamas case (Save Guana Cay Reef Association v. R (2009) UK PC 44) there is no statutory procedure. EIAs are conducted as a matter of practice, based on the desire of successive governments to take public views into account.

My investigation uncovered that in 2001 Bermuda agreed to conduct an EIA prior to approving development proposals that are major or likely to cause significant adverse impact on the environment. That agreement was made with the UK in the UK Environment Charter ("UK Charter"). The Charter is the route by which the UK complies with its international environmental obligations with respect to the Overseas Territories. Bermuda also agreed to *"commit to open and consultative decision-making on developments and plans which may affect the environment;* [and] *ensure that environmental impact assessments include consultation with stakeholders".*

The UK Charter is more than just a statement of good intentions. There is no enforcement mechanism, however, like the Tax Information Exchange Agreements that Bermuda has entered into in recent years, our signature on the UK Charter has the force of law. Our word must be our bond. While there is no annual reporting requirement, several of the other OTs voluntarily report to the Foreign and Commonwealth Office on their adherence to the letter and spirit of the UK Charter. These commitments effectively acknowledge that protecting the environment is not merely a national priority but is of international importance.

Bermuda's obligations under the Charter are set out in mandatory language. Almost by definition, proposals to develop land that were designated in 1983 with conservation zoning (such as woodland reserve) are likely to have significant adverse impact on the environment. This was the case for the TP SDO proposal. Accordingly, this investigation found that the failure to require an EIA was unlawful as neither the Charter nor decisions of the UK Supreme Court were taken into account.

Bermuda's obligations under the UK Charter mirror the obligations imposed on UK planning authorities by the European Directive 85/337/EEC (European Economic Community). Therefore, decisions of the UK Supreme Court are relevant in determining the nature and extent of obligations assumed by Bermuda as a signatory to the UK Charter.

EIA is now part of national legislation, regulations and other formal procedures in over 100 countries throughout the world. The substance of the impact assessed has evolved from an initial focus on the biological and physical components of development to a wider focus today that includes the chemical, visual, cultural, economic and social components of the total proposed development.

The International Association for Impact Assessment defines EIA as *"the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made"*. An EIA, which is usually project-specific, draws together expert scientific study, policy analysis and public input. The EIA is an objective, independent check on the optimistic projections of proponents of a development as well as on the worst case pessimism of detractors. To be credible, EIAs should be produced by independent professional bodies with no financial or other interest in the proposed projects.

In many jurisdictions, it is a standard business cost for EIAs to be paid for by developers and then for Governments to evaluate them by their own appropriate agencies and/or by independent, reputable consultants (chosen by Governments but also paid for by developers).

Technically, the Environmental Impact Statement ("EIS") is a different document, most often produced by the developer. It summarizes the results of the EIA in accessible language that enables the public to evaluate the potential impacts of the predicted effects of proposed development. The primary value of an EIS is to explore how identified adverse effects can be mitigated and to justify why alternatives may or may not work. In some instances, an EIS is produced by a Government instead of the developer. Effectively then, the EIS is the statement of the decision that sets out the Government's views on the significance of the project's environmental effects, any mitigation measures or follow-up programs deemed appropriate as well as the reasons for the decisions to grant or decline development applications.

Bermuda has not ignored the concept of EIAs entirely. There is provision for the Development Applications Board's (DAB) discretion to require an EIA. However the DAB has the authority only to decide on applications to develop land that is already allowed to be developed. The DAB has no authority to change conservation zoning and therefore has no involvement whatsoever in the procedure to be followed in arriving at a decision to grant Special Development Orders.

The discretion of the DAB to require an EIA for proposals that might have an adverse impact on the environment is intended to enable the DAB to have all pertinent information. Clearly, it is no less essential for the Legislature who grants SDOs to have all pertinent information for proposals that will definitely have adverse impacts on the environment – by virtue of the removal of the protection of conservation zoning.

The final version of the 2011 TP SDO lifted conservation zoning off 12.4 acres of land (1.3 acres Nature Reserve; 8.5 acres Woodland Reserve; 2.6 acres Coastal Reserve). As part of this SDO, Tucker's Point donated some 40.5 acres of its property to the people of Bermuda. Trade-offs of sensitive land for development rights are not unusual for SDOs and agreements under s. 34 of the DPA. The purpose and work of the Department of Conservation Services is to protect as much virgin land, species and habitats as possible. Accordingly, the Department has set a goal of encouraging 110 - 150% of donated lands in exchange for development rights that encroach into conservation areas. The 2011 TP SDO gift of 40.5 acres (versus 12.4 acres of conservation land opened for development) represents, at first glance, a hefty return of 350%. However, as there were no donations for the 1995 and 2001 SDOs, the 2011 donation represents an overall return to the public of TP conservation lands of approximately 100 - 110%.

Cynics point out that almost half of the 40.5 acres is underwater – 18 acres is in Mangrove Lake. Further, some of the other donated land is very steep and thus costly to build on. Moreover, the public will now be saddled with the costs of conservation and management. In my considered opinion, the scale of the gift is still significant and ought to be welcomed given the rapid urbanization of our 21 sq. mile island. Some people do worry that there is nothing to prevent a future government from rezoning, building on or otherwise releasing the gifted lands for development. To date, the documentation to perfect this donation has not been completed.

Despite the absence of an EIA, civil servants made good faith efforts to raise environmental concerns.

A. The Department of Conservation Services ("DCS") categorized (but without the detail of an EIA) the likely environmental impact on each lot in the original TP SDO proposal (the 59 lots on Catchment Hill were not categorized as these had previously been approved for development):

- *LOW: minimal environmental impact on natural habitat (excluding unknown cave systems)*
- *MEDIUM: limited environmental impact (excluding unknown cave systems) that could be reasonably mitigated by surveying the areas for best development / least environmental impact*

- *HIGH: not recommended for residential development; major impact on existing natural features from woodland fragmentation, specimen trees (endemic / native/ naturalized), habitat value, visual / aesthetic / Bermuda's image and known and unknown caves. Some of these can be mitigated with appropriate planning and conservation assessment but would have significant adverse impacts on Bermuda's environment*

- *VERY HIGH: immediate extreme environmental impacts and critical habitat degradation; greatest impact on recognized environmental "biodiversity Hot Spots", cave systems, critically endangered plant species and habitat and associated resident or migratory specified fauna. Limited mitigation could be provided with surveys, costly engineering solutions and appropriate planning assessment based on a conservation foundation.*

B. DCS recommended (and the Departments of Planning and Sustainable Development reiterated) that there should be no development without a mitigation plan for the lots categorized at risk of medium to very high impact on the environment.

	LOW	MEDIUM	HIGH	VERY HIGH
Proposed Development	6	8	5	4
Final Approved SDO	6	8	5	1

The conditions attached to the TP SDO were crafted without the benefit of a comprehensive EIA – which would have been able to illuminate the conditions that should be attached. Five are, in fact, not conditions at all. Rather, they are requirements for studies:

- habitat survey [condition 3(a)(ii)]
- geotechnical assessment [3(a)(iii)]
- land use impact analysis [3(a)(iv)]
- subterranean topographical survey [3(b)]
- record of critical habitat or existing mature specimen endemic, native or ornamental plants [3(e)]. It is likely that the woodland vegetation retention / replacement / removal program called for by [3(a)(i)] would be based on the study conducted by [3(e)].

Our EIA expert notes: *"Studies, including surveys and other forms of environmental data collection, no doubt need to be conducted as part of an EIA, but these, by my standard, must be done in support of making predictions of the possible impacts on valued ecosystem components. They do not, in and of themselves, come anywhere close to constituting an EIA."*

The remaining do constitute conditions on design, construction and operations re: excavation [3(c)]; water disposal [3(d)]; roads [3(f)]; run-off from roads [3(g)]; sewage disposal [3(h)]; utility trenching [3(i)]; gardening [3(j)]; and Conservation Management Plan for 5 sites [3(k)]. Far from being stringent, however there are questions about the adequacy of some of these.

For example, the condition regarding excavation and boreholes [3(c)] does not set out the drilling methods and, indeed, may not be the best test. Since the shape of caves is highly irregular in three dimensions, it is possible that caves could occur within a foot or two of the

edge of a building site and still not be detected by borehole distribution. As was recently acknowledged during excavation for the new hospital, exploratory boreholes do not necessarily predict the full extent of naturally occurring voids that are a characteristic of Bermuda stone (excavations at the hospital site uncovered sand pockets that need to be removed, often by hand, and filled in with concrete). Note that the electro-magnetic technology used in the TP EIA of 1995, while effective for shallow depths, was criticized as ineffective for hills well above sea level (such as Ship's Hill).

At least one condition [3(h)] regarding sewage treatment is, on its face, self-contradictory: there is an absolute prohibition on septic tanks, yet also an allowance for them as an alternative to connecting new residences to the existing sewage treatment plant. The evidence is that this condition was not thoroughly fleshed out before drafting.

In the absence of an EIA, the TP SDO also missed a number of considerations such as:

- tourism trend analysis to evaluate feasibility of development
- conditions proscribing construction methods, machinery and access (the land use impact analysis condition [3(a)(iv)] does not include the impact of temporary construction)
- provisions for ongoing monitoring and enforcement for failure to abide by the Water Resources Act 1975 or other relevant regulations
- ongoing monitoring of known caves
- traffic survey
- review of compliance with prior SDO conditions or analysis of whether prior SDOs had accomplished stated goals
- check-off of third party compliance. Civil servants should be aware of whether or not applicants are subject to any other Impact Analysis requirements. For example, in 2003, HSBC had adopted the Equator Principles which are applied to new loans of US$10 million or more as well as to *existing loan facilities where changes in scale or scope may create significant environmental and/or social impacts or significantly change the nature or degree of an existing impact.* If the SDO granted to TP brings that project into this definition, then HSBC has committed to require TP to produce a Social and Environmental Assessment
- analysis of saturation of development. Note: Maps provided to Planning did not indicate all existing development (upon which proposed development could be superimposed)
- consideration of genuine alternatives for locations, technologies and designs is an important component of an EIA. The purpose is to identify and evaluate alternative actions that accomplish development goals and still promote sustainable development.

The conditions attached to the TP SDO are clearly no substitute for a comprehensive EIA. There may be cases when an EIA suggests that no development at all should take place on sites that have been approved 'in principle'. This would be a dilemma for developers who may have based financial projections on being able to develop all of the lots approved 'in principle'. This could also be a deterrent to foreign investment if Bermuda becomes known as a jurisdiction that approves development that is incapable of being carried out.

In the absence of an EIA, 'in principle' approval is risky. The TP SDO purports to provide some comfort to the public by stipulating that certain reserved matters must be processed in the regular application process for decision by the DAB. This is thin comfort. DAB decisions on design, construction, landscaping, building height and so on do not cure the failure to obtain adequate information on the preliminary question of whether development should be allowed. The Dockyard cruise pier is a current example of the reported mistakes that can happen when a proper EIA is not done.

There is considerable concern that DAB decisions regarding the reserved matters for the TP SDO can be overruled by the Minister on appeal. The Minister has the sole discretion to overrule DAB decisions – notwithstanding the contrary technical advice of the independent inspector who advises the Minister. The 2010 ruling of the Bermuda Supreme Court [BEST v. Min. of Environment (2008) No. 321]

requires the Minister to give sufficient reasons for overruling decisions of the DAB. However, recent decisions demonstrate that the appeal process is vulnerable to public distrust. An EIA gives the word "transparency" meaning – by disclosing considerations used to make decisions (whether by the Legislature to grant a SDO, or decisions by the DAB or by the Minister on appeal).

CONCLUSION: At the launch of this investigation, a senior civil servant told me that *"there is no value to this investigation"*. I find that there is considerable value in knowing what the law is. Surely, it is important for the civil service to know what obligations Bermuda has agreed to implement. The civil service cannot adequately advise Ministers if they do not know what laws and international standards apply. This is called due diligence. The failure to make the effort to be informed about the key considerations and procedures to be followed by the civil service, prior to decisions being made by Cabinet and the Legislature, amounts to willful blindness at best; gross negligence at worst.

My Report concluded with a note that there remains an elephant in the room. There are members of the public who believe that something untoward went on with the Tucker's Point SDO: *"so and so owns a unit there...was wined and dined...is related to...is being protected...did money change hands?"*. I have uncovered no evidence to support such suspicions of corruption. If I had, the Ombudsman Act 2004 requires me to refer the matter to a more appropriate authority (such as the police). What I do know is how strongly perceptions can become reality and how suspicion and distrust do forcefully flood in to fill gaps in information.

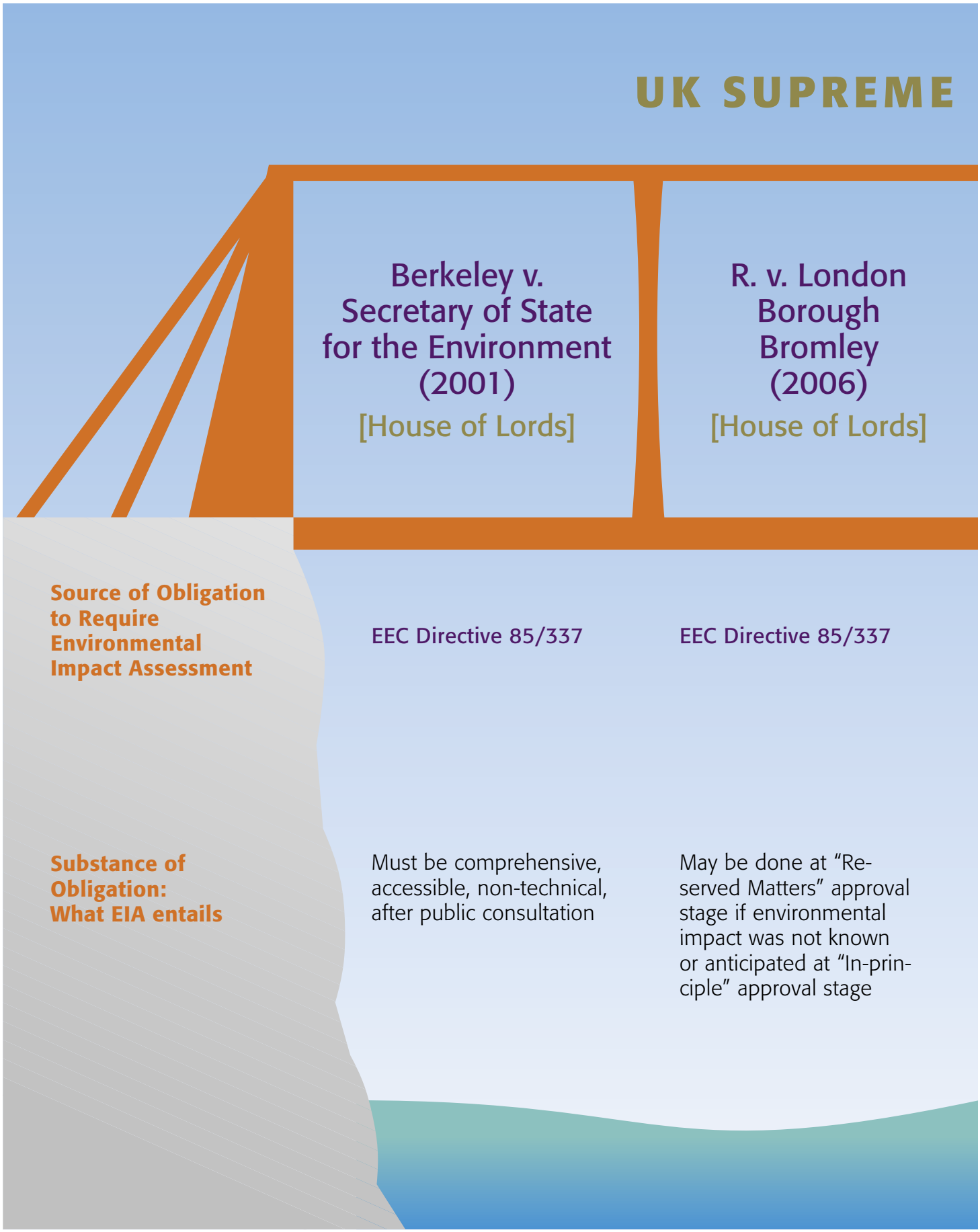
There is value in transparency. A proper process would certainly have muted suspicions of corruption. An EIA process that: fairly balances long term and short term priorities; realistically assesses risks and genuinely explores mitigation; reasonably discloses the business case for SDOs; and, ensures respectful avenues for public consultation (as is best practice all over the world) would have gone a long way toward dispelling animosity and fostering public trust.

The Report found maladministration in:

- the collective failure of due diligence to determine applicable law, international standards and best practice relevant to a decision of national priority
- a resulting failure of process (including proper public consultation) to gather and analyze all considerations relevant to providing advice to decision-makers.

The Report recommended:

- review of all applicable law and obligations, including more robust implementation of the UK Charter, Ramsar and Migratory Species Conventions
- EIAs and EISs be done, including a proper process for public consultation
- 'Joined up' analysis by relevant departments
- attention to best practices and training
- considerations to inform the next Development Plan, including government undertakings to ensure that lands donated for conservation purposes cannot be rezoned for development.


UK SUPREME
Berkeley v. Secretary of State for the Environment (2001) [House of Lords]
R. v. London Borough Bromley (2006) [House of Lords]
Source of Obligation to Require Environmental Impact Assessment
EEC Directive 85/337
EEC Directive 85/337
Substance of Obligation: What EIA entails
Must be comprehensive, accessible, non-technical, after public consultation
May be done at "Reserved Matters" approval stage if environmental impact was not known or anticipated at "In-principle" approval stage

COURT CASES

Belize Alliance of Conservation v. Dept. of the Environment (2004)

[Privy Council]

Local Belize Law

Aims at disclosure of relevant information and public discussion of issues

Save Guana Cay Reef Association v. R. (2009)

[Privy Council]

Legitimate Expectations

resulting from statements of Bahamian officials recognizing need to take account of residents' concerns and wishes

Public consultation should be: at formative stage; with adequate time; and, sufficient reasons for proposals

BERMUDA

UK Environment Charter (incorporating No.17 of the Rio Principles)

Commitment to require EIA prior to approving projects that are (a) major and (b) likely to have significant adverse impact on the environment

Current practice: EIA not required for Special Development Orders; discretionary only for Development Applications Board deliberations. Public consultation not required.

Ombudsman Act 2004 "In a Nutshell"

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

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

The *Ombudsman Act 2004* provides that the Ombudsman

- **Section 2** may investigate administrative decisions, acts, recommendations; failure to do an act or make a decision or recommendation; and failure to provide reasons for a decision or action.
- **Section 2** determines if there is evidence of "Maladministration" which includes actions which are inefficient, bad, improper, unreasonable delay, abuse of power (including discretionary), contrary to or mistake of law, mistake of facts, irrelevant grounds, unfair, oppressive, improperly discriminatory, arbitrary procedures, negligent.
- **Section 3** reviews administrative actions of all Government departments and boards, Public Authorities, other bodies established by Legislature or a Minister or whose revenues or fees derive from money provided or authorized by Legislature.
- **Section 5** The Ombudsman investigates administrative action of an Authority
  - pursuant to a specific complaint or on her own motion – notwithstanding that no complaint has been made – where there are reasonable grounds to carry out an investigation in the public interest; and
  - makes recommendations about the specific complaint and generally about ways of improving administrative practices and procedures.
- **Section 6** The Ombudsman may not investigate
  - until existing procedures or appeals have been exhausted unless she determines that it was not reasonable for the Complainant to have resorted to such procedures; or
  - those matters listed in the Schedule to the Act, including: administrative actions that may not be inquired into by any Court; actions taken by Cabinet, Ministers or Junior Ministers; pardon power of the Governor; action taken for investigation of crime or protecting security of Bermuda; conduct of proceedings before a court of law or tribunal; personnel and employment matters.
- **Section 7** Complaints may be made orally, electronically or in writing by a person aggrieved (or other suitable person) about actions within the last 12 months.
  - Persons detained or confined are entitled to be given a sealed envelope to write to the Ombudsman.
- **Sections 8 & 10** The Ombudsman may make preliminary inquiries before launching a formal investigation or mediation.
- **Section 9** The Ombudsman may decide not to investigate if the Complainant knew of administrative action more than one year prior to complaint; existing law or administrative procedure provides adequate remedy and there is no reasonable justification for the Complainant not to have availed himself of the remedy; the complaint is frivolous, vexatious or not made in good faith or has been settled.
- **Sections 11-13** After notifying the Authority of the intent to investigate, the Ombudsman may obtain information from

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

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

Did You Know?

Responsibilities of Owners re Planning Applications

We have noticed that where an agent acts on a complainant's behalf, particularly with planning matters, the owner may not always be informed of the Department of Planning's ("Department") requirements. For example, in a couple of instances the Department has issued Field Correction Notices but the owner is unaware that such notices affected their property. In other scenarios the owner was not aware that certain aspects of development, which appear to be minor in nature, actually require the Department's approval.

Even if they have hired agents and general contractors, owners must familiarize themselves with the requirements of the Department at each stage of development, for example:

- review the Permit and Inspection Card to ensure that necessary inspections have taken place
- review the planning and building files at the Department to see whether or not any Field Correction Notices or Stop Work Orders have been issued against your building permit
- review the Inspection Reports to confirm what parts of the development have failed inspections
- find out the name of the inspector of your property and have an informal conversation with him about the progress of your development

How to Make a Complaint to the Ombudsman

How do I make a complaint?

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

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

Tel: 441 296 6541 • Fax: 441 296 7734

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

NOTE: Please submit relevant documents when making your complaint.

What can I complain about?

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

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

Who can make a complaint?

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

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

How long does it take?

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

How much does it cost?

Services are free and available to anyone.

COMPLAINT PROCESS – FREE AND AVAILABLE TO ANYONE

Ombudsman may investigate in the public interest even if no complaint

NOTES

- "Own Motion Investigation"