

*In the matter of the
Complaints Commissioner Law (2006 Revision)*

Own Motion Investigation

**Public Service Pension Board:
Failure to comply with certain statutory
obligations?**

Own Motion Investigation Report Number 12

**Prepared by the Office of the Complaints Commissioner
Date: 16 February 2009**

Published under the authority of the Office of the Complaints Commissioner



Office of the Complaints Commissioner

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Aim of the Office: To investigate in a fair and independent manner complaints against government to ascertain whether injustice has been caused by improper, unreasonable, or inadequate government administrative conduct, and to ascertain the inequitable or unreasonable nature or operation of any enactment or rule of law.

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1. Executive Summary

1.1 Background

Between 2006 and 2008, the Office of the Complaints Commissioner (“OCC”) conducted an Own Motion Investigation into whether the Public Service Pension Board (“PSPB”) was adhering to some of its legal duties and obligations. This investigation was launched immediately after a separate inquiry into the PSPB’s failure to provide timely annual reports, which had brought to the OCC’s attention a number of reporting and management issues.

The OCC decided to conduct an investigation because many stakeholders were affected, and because some of the stated provisions of the Public Service Pension Law 2004 as amended (“PSPL”) may have been overlooked or ignored, which may have led to an injustice. In the event they were not overlooked or ignored, the public should be informed. The OCC “can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw blinds.”

The Own Motion Investigation lasted for more than two years because it was adjourned from time to time, principally to allow the administrative office of the PSPB (“the Agency”) to move forward with preparing its financial statements for the Financial Secretary and the Auditor General; to settle questions of the lawful authority of the investigation by the OCC (see part 2.2); and to allow the PSPB to continue efforts to put its house in order.

1.2 What was considered?

In outline form, the OCC looked into the following aspects of the PSPL 2004 as part of its investigation:

Sections 5 and 6: This section of the law relates to the creation of the Board of Directors/Trustees, their duty to administer the Board and the Fund (i.e., First Schedule).

Section 10 (a): This sub-section relates to the PSPB’s duty to produce a Public Service Pensions handbook.

Section 10 (b): This sub-section relates to the PSPB’s duty to produce annual benefit statements.

Section 10 (f): This sub-section sets out the regulations that the PSPB must comply with – e.g. regulation 12 states that the PSPB needs to conduct annual inquiries to ensure that a beneficiary is still alive (and thus, still qualifies to receive pension payments).

Section 11: This section relates to the PSPB’s duty to submit financial statements through the Financial Secretary to the Auditor General and then the stakeholders.

Section 16: This section relates to the investment of the funds and the appointment of investment managers.

Section 26: This section relates to the PSPB's duty to make payments to people wishing to leave the Plan prior to their retirement.

The PSPB felt that the issues finally investigated were not serious enough to justify the investigation. The OCC gathered information from approximately 25 witnesses and among those interviewed were some of the directors/trustees of the PSPB and their advisers. The OCC also obtained and read many documents including the minutes of director/trustee meetings, relevant reports to the trustees, reports by the Auditor General and a report commissioned by the PSPB and prepared by Deloitte (*Review of the Critical Operational Processes*). In addition, Chief Financial Officers of government entities were required to produce records of the payment of employer and employee contributions into the PSPB. The OCC was assisted by advisors including the Superintendent of Pensions, Mr Cyril Theriault.

1.3 Findings of the investigation

1.3.1 Directors/Trustees

The PSPL 2004 provides for the appointment of directors/trustees and requires quarterly meetings. The law states that the Board should consist of the following directors/trustees: the Financial Secretary (as chairman), the Deputy Financial Secretary (deputy chair), the Chairman for the Public Service Commission, the Deputy Chief Secretary, the President of the Cayman Islands Civil Service Association or his substitute, the President of the Public Managers Association or his substitute, a Crown Counsel appointed by the Attorney-General as legal advisor to the Board, and three directors/trustees appointed by the Governor, one of whom shall have substantial professional investment experience and another who must be a retired participant under this Plan, and the Managing Director.

The Public Managers Association and the Public Service Commission are defunct and thus do not appoint a director/trustee. The lack of these director/trustees is significant for three reasons: it makes it harder to obtain quorum at meetings; there may be insufficient experience amongst the board members; and government employees may not be properly represented. This leads to the following declaration by the OCC:

DECLARATION #1: It is declared to the Legislative Assembly that the PSPL 2004 be amended to remove the appointment of directors/trustees from the Public Managers Association and the Public Service Commission and to provide for the appointment of two additional directors/trustees to the Board.

The PSPL prescribes quarterly meetings. The records indicate less than appropriate levels of attendance by directors/trustees at quarterly meetings and highlight the poor attendance of those directors/trustees who were senior civil servants. This leads to the following comment by the OCC:

COMMENT #1: Directors/trustees who do not attend meetings regularly are failing in their responsibilities and should be replaced.

Evidence was also gathered that raised questions about the level of training given to trustees. The investigation discovered that orientation exercises for trustees were postponed during 2005 and 2006. More recent training was given on 27 June 2008. The OCC states that it is important to accept and apply training. And it is fair to state that the director/trustees are able to draw on the expertise of the Agency staff and independent advisors.

1.3.2 Receiving funds

In the course of the investigation, it became clear that the PSPB was not receiving funds into the Plan in a timely manner. For example, during the period 2004-2005, the Health Services Authority ("HSA") collected its employees' contributions but did not then forward the money to the Plan. Nor did the HSA forward its own contribution. At one point in time, the HSA owed approximately \$1.7 million to the Fund.

Evidence indicated that past contribution problems had been significantly lessened as a result of action taken by the PSPB with the chief executives of various government entities. For example, a memorandum was sent from the Agency to chief financial officers in July 2007 reminding them to submit their pension payments on time, and warning them of the late payment penalty.

A large proportion of PSPB time was spent chasing contributor organizations. This had a negative impact not only on the PSPB Finance & Investment Department but also on Plan administration. OCC investigative work in 2005 had flagged this problem, and, as the Deloitte report in 2006 confirmed, such late payment could affect the accuracy of benefit statements and reduce investment returns, as well as hamper the ability to comply with the payment out obligation in section 26 compliance. This leads to the following comment by the OCC:

COMMENT #2: The Board and Agency should inform the stakeholders when government entities fail to pay pension contributions in a timely fashion.

1.3.3 Acting on important information

After the first inquiry by the OCC into the failure of the PSPB to produce timely annual reports, and after the continuing efforts of the Auditor General to obtain financial records which were of sufficient quality as to merit an audit, the PSPB took the initiative to retain Deloitte to examine and report on the operational condition of the PSPB. Deloitte's final report was completed in June 2006. The news was announced in a press release from the PSPB that described the Deloitte paper as a "positive report".

The OCC went to considerable – including legal – lengths before it was finally permitted to review the Deloitte report. On seeing it, the OCC found that it could not be accurately described as “positive”, and it did contain many valid and useful points on the better administration of the PSPB, many of which are highlighted throughout this report. But the directors/trustees delayed reviewing the report and ensuring implementation of its recommendations. (The minutes state “As the Managing Director had tabled the [Deloitte] Report in 2006, the Board is unable to distance itself from the Deloitte Report; it was therefore agreed that the Managing Director submit management’s response to the Deloitte Report [for] the Board’s consideration.”) This amounted to an injustice that exposed the Fund to unnecessary risks and expenses through failure to improve administration. This leads to the following recommendation by the OCC:

RECOMMENDATION #1: It is recommended that the directors/trustees consider potentially material information in a timely fashion.

1.3.4 Advising oneself

The current statutory constitution of the PSPB is that a Crown Counsel sits as a constituent member of the Board of Directors/Trustees as well as being legal advisor to the Board. This is not appropriate. Trustees should not be in a position where one of their number is advising himself. Having Board members with legal training and who can give legal input is one thing; having a statutory role as a “legal advisor” is quite another. This leads to the following declaration by the OCC:

DECLARATION #2: It is declared to the Legislative Assembly that the Legal Advisor to the Board should not be a member of the Board.

1.3.5 Potential conflict of interest of Chairman

The OCC considered whether the Chairman was in a position of conflict of interest by being also the head financial officer for the employer (Cayman Islands Government). In brief, the employer, through its head financial officer (and deputy financial officer), could decide whether or not funds which were due and owing to the Fund would be paid and when.

Evidence indicated that having the Financial Secretary as Chairman assisted the PSPB in having its issues raised in Cabinet meetings. Assuming that the Chairman was honouring his fiduciary duty to the Plan members, this may be true. Yet, without passing judgment on the Chairman, the potential for actual conflict of interest is too great. The PSPL 2004 allows the Financial Secretary to act as Chairman of the PSPB, but the OCC states that the law is unreasonable. The situation should be remedied by amending the law to provide that a director/trustee other than an officer of the employer or senior civil servant be chairman. This leads to the following declaration by the OCC:

DECLARATION #3: It is declared to the Legislative Assembly that the PSPL should provide that the Chairman of the PSPB be a person other than an officer of the employer or a senior civil servant.

1.3.6 PSPB handbook and website

In the first place, the handbook provided to the OCC as a sample of the one then currently in use was clearly out of date. After raising this with the PSPB, the OCC was able to report that a new edition of reasonable quality was produced in August 2007. In April 2008 and December 2008, the PSPB website was corrected and brought up to date and now provides a good complement to the handbook.

1.3.7 Benefit statements

The PSPB failed for many years to provide benefit statements. This breach of statutory obligation was maladministration and also an injustice to stakeholders, undermining their ability to cross-check many of the operations and the overall security and integrity of the Fund. Benefit statements now are being produced annually.

The statement of the PSPB was accepted that it “has always been in statutory compliance with generating and distributing the annual pension continuation certificates to pensioners, required under section 10(f), in conjunction with regulation 12 of the associated regulations”.

The OCC’s and Deloitte’s investigations highlighted the fact that there was a significant backlog of data not entered into the Agency’s Pension Administration System (“PAS”) from the 1990-1999 period. More recently, the PSPB has purchased software, which it claims meets its needs. The OCC has not been able to confirm whether this has been implemented successfully.

1.3.8 Annual financial statements

As has been noted in reports of the Auditor General and media reports of the PSPB, the agency failed in its obligation to provide timely financial statements to the Auditor General during the years 1999-2007. The record of reporting is startling because the Public Accounts Committee had been pressing the PSPB to resolve its accounting difficulties since 2003.

The audited financial statements for 1999 were eventually tabled in 2003, and the audited financial statements for 2000 and 2001 were tabled in 2006. Also in 2006, unaudited financial statements were submitted for 2002, 2003, 2004 and the first half of 2005. In December 2008, the 2005/2006 audit of the financial statements was completed and, despite the absence of some required information, the 2006/07 audit began.

This failure to provide timely accounts caused an injustice to stakeholders, who were unable to identify whether they were misled or misdirected about the security of the pension. The Auditor General was not able to express opinions in a timely fashion. And the trustees had incomplete information on which to make decisions. It is no answer for the PSPB to say 'we did not mislead' because they simply did not report in a timely fashion. The duty required timely reporting. This leads to the following recommendation by the OCC:

RECOMMENDATION #2: It is recommended that the directors/trustees ensure compliance with reporting requirements.

1.3.9 Investment management

Section 16 of the PSPL 2004 requires that the Fund be invested in a manner to ensure that there is no undue risk of loss and in accordance with professional advice. Such a requirement was undermined during the period 2000-2004, when there were significant delays in the appointment of an investment manager and enlarged cash balances that caused the Fund to under perform in 2000-2003. The PSPB took the position it was only being careful. Investment manager Close Asset Management ("CAM") was retained in March 2004, but by June 2006 it was discovered that investments made were outside those allowed by PSPB, and CAM was terminated after the notice period in April 2007.

Nevertheless, the balance of the evidence gathered from documents and the 2007 interviews suggested that the issues raised regarding section 16 compliance are in the past and have not been carried forward.

1.3.10 Payment out

Section 26 of the PSPL 2004 requires an actual payout under the Direct Contribution Plan within 30 days of effective notification for those who do not hold Caymanian Status and cease to reside in the Cayman Islands. The PSPB has conceded, and the Deloitte report confirmed, that this compliance was not and might never be achieved. Even the Cabinet appears to have accepted this failure to comply.

The OCC agrees that there may be merit to the PSPB's wish to amend the target – say, to one year. And some attempts to make timely payouts have been frustrated by the failure of the employer to make all required payments. Yet the directors/trustees should have formulated a plan to allow for relatively liquid short-term investments to be made available to satisfy anticipated payout obligations. Until legislative action is taken, non-compliance with section 26 is maladministration and it is an injustice to those who have sought timely payment. This leads to the following recommendation by the OCC:

RECOMMENDATION #3: It is recommended that the directors/trustees formulate a system to ensure compliance with the obligation to pay out funds stated in section 26 PSPL 2004.

1.4 PSPB's response

On reading the final draft of this report, the PSPB made the following relevant statements in February 2009:

“The PSPB welcomes and appreciates it when an organisation such as the OCC raises issues with proper justification. When investigations are carried out properly, it can only help to improve the functioning of the organisation. However, all of the issues and questions raised by the Commissioner that are valid are those that the PSPB itself has recognised through reports that it has commissioned on its own initiative, and have largely addressed already. The PSPB therefore sees no value to the OCC's report.

“The achievement of the Board thus far [is] to successfully administer the Fund, valued at about a quarter of a billion dollars, without reducing stakeholders' interests or diminishing the deferred income of pensioners/participants. This goes to the crux of the fiduciary duties of the Board.”

1.5 Conclusion

The evidence gathered in the OCC's Own Motion Investigation leads to the conclusion that the PSPB has failed to comply with certain statutory obligations.

The OCC's investigation led to two important conclusions. First, that the director/trustees and the PSPB as a whole were guilty of maladministration in failing to comply with certain statutory obligations and this maladministration caused injustice to stakeholders. Second, that the PSPB has begun to get its affairs in order and, with continued positive steps, it should be able to operate in an appropriate manner henceforth if it honours its reporting obligations and continues to fulfil its other fiduciary duties.

The declarations made are as follows:

- (1) It is declared to the Legislative Assembly that the PSPL 2004 be amended to remove the appointment of directors/trustees from the Public Managers Association and the Public Service Commission and to provide for the appointment of two additional directors/trustees to the Board.
- (2) It is declared to the Legislative Assembly that the Legal Advisor to the Board should not be a member of the Board.
- (3) It is declared to the Legislative Assembly that the PSPL should provide that the Chairman of the PSPB be a person other than an officer of the employer or a senior civil servant.

The comments made are as follows:

- (1) Directors/trustees who do not attend meetings regularly are failing in their responsibilities and should be replaced.
- (2) The Board and Agency should inform the stakeholders when government entities fail to pay pension contributions in a timely fashion.

The recommendations made are as follows:

- (1) It is recommended that the Board consider potentially material information in a timely fashion.
- (2) It is recommended that the directors/trustees ensure compliance with reporting requirements.
- (3) It is recommended that the directors/trustees formulate a system to ensure compliance with the obligation to pay out funds stated in section 26 PSPL 2004.

2. Introduction

On 10 February 2006, the Office of the Complaints Commissioner (OCC) launched an Own Motion Investigation to examine whether the Public Service Pension Board (PSPB) was adhering to its duties and obligations as written in law.

2.1 Timeframe

The investigation was adjourned from time to time, principally for the following three reasons:

- to allow the administrative office of PSPB (hereinafter referred to as “the Agency”) to move forward with preparing its financial statements for the audits being conducted by the Auditor General;
- to settle questions of the lawful authority of the investigation by the OCC; and
- to allow the Agency to continue efforts to put its house in order.

The final stage of the investigation occurred from April 2007 to April 2008, with limited amounts of information being accepted from the Agency through to the end of October 2008. The PSPB replied to the draft final report of 3 November 2008 on 6 February 2009.

The authority to conduct an investigation as the Commissioner sees fit is found in section 14(2) of the Complaints Commissioner Law, 2003 (2006 Rev) (“CCL”).

2.2 Legal Framework

2.2.1 Role of the OCC

The OCC was established by the CCL “for the investigation of administrative action taken on behalf of the government...” Section 10(3) states: “The Commissioner may investigate any course of conduct or anything done or omitted by any person in the exercise of administrative functions respecting any business of the government not being functions concerned with any action or matter set out in Schedule 2.” Also, the Commissioner “may lay before the Legislative Assembly reports on the inequitable or unreasonable nature or operation of any enactment or rule of law” (section 20(2)).

The Grand Court considered the role and powers of the OCC in the context of another investigation, and the result is instructive. In making its decision, the Grand Court quoted a 1994 Supreme Court of Canada ruling on the scope of the role assigned to the British Columbia Ombudsman, which found that the legislation “should receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fill”. The Grand Court adopted the following dicta: “(The Ombudsman’s) powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman ‘can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw blinds’: *Re Ombudsman Act (1970)*.”

The Grand Court ruled that the Commissioner did have the authority to demand private and confidential information from a government entity and a non-governmental entity concerning government employees and private citizens while investigating a complaint.

In delivering its judgment on 4 September 2008, the Grand Court said that, given the breadth of the provision in the Complaints Commissioner Law, “[I]t can hardly be doubted that the Commissioner is authorized to compel a non-governmental (private) entity to disclose private and confidential information concerning one of its customers, even though that customer is not employed in the government service.”

The Grand Court noted that the Commissioner had the same rights as the Grand Court to demand documentation, and in the Grand Court there are no rights to argue that the evidentiary value of the information is outweighed by the privacy interest at stake. Moreover, it is the court itself that determines the question of relevance, the Court said.

“Applying these principles by analogy to the Complaints Commissioner, I conclude that he may demand the disclosure of private and confidential information from someone unconnected with Government, and indeed from someone unconnected with the subject of the investigation where, in the opinion of the Complaints Commissioner, that information would be relevant to his investigation. He may demand such information from governmental departments and entities, from non-governmental entities and from private citizens,” the Court found.

(Note: The decision arose from these facts. A formal request was made on 5 May 2008 requiring Cable & Wireless (C&W) to produce a list of incoming and outgoing calls during December 2007 and January 2008 to and from a telephone belonging to a C&W subscriber, who was a private citizen who was not employed by any government entity. C&W was uncertain about its obligation to comply with the request and suggested that the Commissioner apply to the Grand Court for a declaratory order.)

2.2.2 Jurisdiction

The PSPB argued that the OCC did not have jurisdiction to investigate it due to section 10(3) and Schedule 2 paragraph 6, which states: “Action taken in respect of appointments or removal, pay, discipline, or other personnel matters in relation to (a) service in any office or employment under the Government; or (b) service in any office or employment, or under any contract for services, in respect of which power to take action, or to determine or approve the action to be taken in such matters is vested in the Government.”

The Commissioner took independent legal advice, and then ruled that the OCC had jurisdiction to investigate the administrative actions of the PSPB as defined in this

investigation. He ruled that he did not have jurisdiction to investigate whether an employee of the Agency should be, for example, terminated or disciplined or promoted.

2.2.3 Maladministration

Maladministration is defined in section 2 of the CCL as “inefficient, bad or improper administration”. It is not limited by some examples given in the law.

2.2.4 Purpose of Investigation

The purpose of investigations by the Commissioner shall be to ascertain whether injustice has been caused by improper, unreasonable or inadequate administrative conduct on the part of any government entity subject to this Law (CCL section 10 (1)). Investigations may be commenced, according to section 11(1), where the Commissioner “is of the opinion ... that there are reasons of special importance which makes investigation by the Commissioner desirable in the public interest”.

2.2.5 Outcome

The Commissioner must set out his findings supporting the decision. He must be “satisfied” on the evidence of both maladministration and injustice in coming to his decision.

Where maladministration and injustice is found, the Commissioner may make recommendations for improvement to the government entity in question and the Legislative Assembly (under section 18(1)(2)). If no injustice is found, he “may make such comments in relation to the case as he thinks fit”.

2.2.6 Procedure

The procedure used in investigation and the presence of attorneys is a matter for the Commissioner, according to section 14 (2).

a) The PSPB noted that there was no clear demarcation between the investigation of a complaint made against the PSPB, which ended on 10 February 2006, and the commencement on the same day of the Own Motion Investigation in this matter. The complaint related to the failure of the PSPB to produce annual reports. That investigation brought to the Commissioner’s attention a number of related reporting and management issues.

The Commissioner ruled that information that came to the attention of the Commissioner before an Own Motion Investigation was declared could be taken into account in the justification of the commencement of an Own Motion Investigation and the findings of the Own Motion Investigation.

b) The PSPB took the position that it was appropriate for the OCC to provide a statement concerning the ambit of the investigation. It was accepted by the OCC that this was a valid request and a statement was provided.

c) The PSPB argued that individual trustees were not required to give evidence before the corporate body speaking as a whole had provided their official position through answers to written questions.

Independent legal advice was obtained, which opined that section 15(1)(2) gave the Commissioner the authority to require the evidence of any person. The Commissioner ruled that individual trustees could be compelled to give evidence even before the official corporate position was presented. He later received the evidence of the PSPB as a whole through an affidavit provided by the chair and its response to the draft final report.

d) A trustee who was required to give evidence requested that he be accompanied by his attorney. The Commissioner ruled that, in the light of the circumstances of the case, the trustee's attorney could attend.

e) The Managing Director refused to provide copies of all the minutes of the meetings of the trustees from 2004 on the basis that the Board Secretary was the official custodian of the minutes. Section 15(1) of the CCL entitled the Commissioner to require of any person the production of relevant documents. Eventually, the minutes were produced after a formal process.

f) The PSPB argued that it was entitled to be informed of the names of the witness who gave evidence during the investigation. The Commissioner ruled that witnesses who feared retribution by the entity under investigation would be permitted to have their identity kept protected from the entity.

g) The PSPB and each of its trustees were given the opportunity to read and respond to the tentative findings of fact and recommendations made in the draft final report. They were invited, for example, to state whether a particular statement was made, or made in a different context, or was simply misunderstood. Independent legal advice was obtained opining that this was an appropriate way to proceed, even though it was not required by the CCL. The Commissioner ruled that this was the way to proceed in the interests of fairness. The PSPB responded as a group to the draft final report and appropriate corrections were made and are reflected in this report.

2.2.7 Appeal

The CCL restricts the avenues of appeal. Section 21 states: "No proceedings of the Commissioner may be held bad for want of form and, except on the ground of lack of jurisdiction, no proceeding or decision of the Commissioner conducted or taken in good faith is liable to be challenged, reviewed, quashed or called in question in any court."

2.3 Public Interest Investigation

The PSPB is a body corporate created by statute to administer the Public Service Pension Plan and Fund. It is a government entity.

It came to the Commissioner's attention in February 2005 by a written complaint by a resident of the Cayman Islands that the Board was failing to report to stakeholders annually, as required by the Public Service Pension Law (2004 Revision – 19 April 2004) as amended by the Public Service Pensions (Amendment) Law, 2004 (12 August 2004, hereinafter "PSPL 2004"). At that time, the last annual report had been made in 1999.

Inquiries into the failure to produce annual reports brought to the Commissioner's attention a number of related reporting and management issues. After completing the investigation into the failure to provide an annual report since 1999, the Commissioner recommended on 10 February 2006 that the Chairman of the Board instruct the Managing Director to provide annual reports for 2000 and 2001 by March 2006. This recommendation was complied with in the meeting of the Legislative Assembly that commenced 28 April 2006.

The related reporting and management issues were, and continued to be, a matter of special importance to the public, and as such, the Commissioner immediately commenced an investigation in the public interest. Notice was given to the Chairman and the Managing Director by e-mail, and acknowledged, on 10 February 2006.

The Commissioner regarded it as a matter of special importance to the public because many stakeholders were affected, and because the stated provisions of PSPL 2004 may have been overlooked or ignored, which may have led to an injustice. In the event they were not overlooked or ignored, the public should be informed.

2.3.1 Who is Affected?

Stakeholders in the proper administration of the Plan essentially comprise three broad groups: the civil servants who are members (participants) of the Plan and their beneficiaries; the government entities who employ civil servants; and the citizens of the Cayman Islands.

Government entities are stakeholders in at least three ways. Government entities, such as the Health Services Authority ("HSA"), are required to collect employee

pension contributions and submit the money to the Agency for timely inclusion in the Plan. Government entities are required also to remit the employer contribution for each pensionable employee to the Agency for timely inclusion in the Plan. The Government was at all times liable for the Plan as its guarantor and sponsor. If the Agency and the PSPB failed to administer the Plan properly, the Government remained liable, via the different obligations due through each type of scheme, whether Defined Contribution (“DC”) or Defined Benefit (“DB”), for the pension benefits due to each member.

Of course, the citizens remain interested in the proper administration of the Plan for the benefit of the Plan members, for the contingent liability of its Government, and for knowing if laws are followed. In addition, the failure to comply with laws may bring into question the reputation of those who are employed in the Agency, the members of the Board of Directors/Trustees, and the Government of the Cayman Islands.

2.3.2 What Could be the Consequences of Maladministration?

In framing the investigation, the OCC considered certain aspects of the administrative duties assigned to the PSPB and Agency and the injustice that may result if there was maladministration. For example, a failure of the PSPB to provide proper pension benefits might result in a loss or gain for certain stakeholders, and have an impact on the Fund which would affect all stakeholders.

In outline form, the following are a few of the potential effects on stakeholders of failing to carry out the duties arising from several sections of the PSPL 2004, which the OCC specifically looked into as part of its investigation:

Sections 5 and 6: This section of the law relates to the creation of the Board of Directors/Trustees and their duty to administer the Board and the Fund (i.e., First Schedule). If the Board fails to comply with the duties stated in section 6, stakeholders would be adversely affected in several different ways, including the inability of the pension plan to collect money, account for money, invest money, and/or pay benefits.

Section 10 (a): This sub-section relates to the PSPB’s duty to produce a Public Service Pensions handbook. The failure to provide an accurate handbook describing the Plan in plain language could undermine the stakeholders’ ability to understand the operation of the Plan and to know their rights and duties and take appropriate remedial steps.

Section 10 (b): This sub-section relates to the PSPB’s duty to produce annual benefit statements. Failure to provide accurate annual benefit statements could undermine the ability of members and employers to monitor their pension accounts, and of individual members to make financial decisions to plan for a retirement income that meets their needs and goals.

Section 10 (f): This sub-section sets out the regulations that the PSPB must comply with – e.g., regulation 12 states that the PSPB needs to conduct annual inquiries to ensure that a beneficiary is still living (and thus, qualifies to receive pension payments). Failure to adhere to the regulations could undermine the integrity of the Fund by decreasing the amount of money in the Fund for payments and investments and by potentially increasing the Fund's expenses through unnecessary payouts.

Section 11: This section relates to the PSPB's duty to submit financial statements through the Financial Secretary to the Auditor General and then the stakeholders. Failure to do so in a timely manner might undermine the goal of transparency and good management of the Fund. It may lead to the inability of the stakeholders to confirm the proper management of the Fund or to uncover mistaken or wilful actions that could result in loss of assets and of the ability to meet obligations in pension payments.

Section 16: This section relates to the investment of the funds and the appointment of investment managers. Failure to invest funds in approved investments in accordance with the Second Schedule may lead to placement of portions of the Fund in investments which carry too much risk and may thus lead to the loss of those funds. Similarly, a failure to appoint an investment manager may lead to the failure to make investments that are necessary for the Fund's growth, or to the placement of portions of the Fund in investments that carry too much risk, which could lead to the loss of those assets.

Section 26: This section relates to the PSPB's duty to make payments to people wishing to leave the Plan prior to their retirement, i.e., those who do not hold Caymanian Status and cease to reside in the Cayman Islands. Failure to properly adhere to the provisions allowing payment out of the accrued benefit may result in an indefinite delay in giving money due to a member who seeks to exercise his right to leave the Plan.

The PSPB had the following response to and comment on the topic selected for investigation:

"In relation to the operations of a pension board, examples of specific circumstances of maladministration leading to injustice which could be investigated are: whether the entity under investigation misled or misdirected complaints as to the security of their pension though the information provided by the entity to the public; whether the entity took various decisions that reduced such security without informing the stakeholders of the consequences of those decisions; or whether the entity has been responsible for unreasonable delays in the winding-up of the pensions scheme. These are examples of maladministration resulting in injustice to stakeholders. They are egregious matters and injustice to the stakeholders is clearly established, unlike the matters that the Commissioner has investigated in his Own Motion Investigation."

The Commissioner states that all of the above issues had merit. Below is recorded the findings of the investigation and conclusions.

3. Background

3.1 History of PSPB and Agency

The Public Service Pensions Law 1999 came into effect on 14 April 1999, repealing and replacing the law that had governed the Public Service Pensions Plan since 1964. The new legislation created a Defined Contribution ("DC") Plan for new participants and continued the Defined Benefit ("DB") Plan for existing participants. It defined duties and responsibilities associated with proper management of an important entity.

The PSPB stated:

"The history of the Board shows a progressive movement of public sector pension schemes from a pay-as-you-go system to a properly structured pension fund with internationally accepted financial planning and funding in place having grown from a mere \$3 million Fund to a Fund now in excess of \$250 million, under the effective management of the Board. The aim historically was to provide a social, economic and political context that underpins the management of pension plans which would give voice to the stakeholders: Government, employers and employees. There were concerns about the perceived politicization of the administration of the Fund and the protection of the pension promise to public servants prior to the establishment of the Board.

"Consequently, an autonomous Board was established to administer the Fund. During the initial stages of the operation, the focus was on attracting and retaining qualified and trained personnel as well as establishing the diversification of investments. Therefore, during the formative years, the organization did not have the personnel to attend to the inherited backlog."

3.2 Current Leadership of PSPB and Agency

The Board of Directors/Trustees is chaired by Hon. Kenneth Jefferson, who also serves as the Financial Secretary for the employer, the Cayman Islands Government. (This point will be explored below in the context of conflicts of interest.) Other trustees include Mrs Sonia McLaughlin, Deputy Financial Secretary and Deputy Chairman; Mr Donovan Ebanks, Deputy Chief Secretary; Mr Kirkland Nixon, Pensioners' Representative; Mr James Watler, President of the Cayman Islands Civil Service Association; Mr Wayde Bardswell, Crown Counsel, Legal Advisor; Mr Leonard Ebanks, Private Sector Representative; Mr Eric Crutchley, Private Sector Representative; and Mrs Jewel Evans Lindsey, Trustee and Managing Director (non-voting). At the time of writing, two director/trustee posts are vacant as their appointment was to be from now defunct bodies, the Public Service Commission and the Public Managers Association.

The Managing Director, Mrs Jewel Evans Lindsey, has the advice of an experienced actuarial & benefits consultant, Mr Mani Sundaresan, formerly of Watson Wyatt Worldwide, who was hired in June 2006. The Agency had 26 posts in total, four of which were vacant, at the time of writing.

3.3 About PSPB and Agency

The PSPB's website, www.pspb.gov.ky, gave at 25 March 2008 the following account, which the Commissioner accepts as substantially accurate. (Minor editorial modifications have been made to bring it into conformance with the style of this report and corrections made to the webpage in December 2008 were noted.)

Pre-14 April 1999

The PSPB was established by Executive Council (now the Cabinet) on 25 February 1992 under the Pensions (Amendment) Law, 1991, that came into effect on 1 January 1992. This Law also established the Public Service Pensions Fund. Employees began contributing to the Fund at 4% effective 1 January 1990. Employers began matching this with an additional 4% contribution with effect from 1 January 1991.

Contributors to and beneficiaries of public service pensions comprised permanent and pensionable Caymanian employees of the Cayman Islands Government; Caymanian civil servants seconded to Statutory Authorities; and elected members of the Legislative Assembly. Prior to July 1996, Caymanian Group Employees received a reduced monthly allowance on retirement. In July 1996, the Pensions (Amendment) Law, 1996, made provision for the payment of full benefits to this category of employees on the same basis as those hired on a permanent basis and added Group Employees as contributors to the Fund.

In January 1996, the government increased the employer contribution rate to 6%. This increase was later followed by a similar increase in employee contributions in January 1998.

Prior to 14 April 1999, pension benefits were paid out of general revenue and were regulated by the Pensions Law. At this time, the Plan was solely a DB scheme. The Pensions Law provided for payment of retirement benefits to eligible employees with 10 or more years of pensionable service to the Government. Normal retirement age was 60 but pension benefits could begin at age 55 or, in special cases, at age 50 with the approval of the Governor.

The maximum pension payable could not exceed two-thirds of the highest pensionable emoluments drawn by employees at any time during the course of service. The formula used to calculate benefits varied depending on whether the employee joined the service before or after 10 July 1980, with a reduced benefit accruing to those who commenced service after. Those employees who retired with less than 10 years of pensionable service received a gratuity not exceeding five times the annual amount of the pension that might have been granted if there had been no

qualifying period. If pensionable employees served less than 10 years, there was no provision for pension contributions to be refunded.

Post-14 April 1999

With the coming into effect of new legislation on 14 April 1999, the Public Service Pensions Board ("the Board") was re-established as a Statutory Authority. The Board's (and Agency's) main office was established in Cricket Square (Century Yard), George Town, and as at 31 December 2007 employed 15 staff.

The Board is responsible for, among other things, administering the Public Service Pensions Fund ("the Fund"), communicating with Plan participants and employers, recommending contribution rates in accordance with the latest actuarial valuation, and recommending amendments to the Public Service Pensions Plan ("the Plan") as needed.

The Public Service Pensions Law, 1999 ("the Law") repealed the Pensions Law (1999 Revision) and is the main law governing the Fund. The Law is in essence the Plan text. The Fund's main functions are to receive and invest pension contributions from public sector employers and employees and to pay out pension benefits as due under the Law. The Fund is vested in the Board.

The Plan has a defined benefit and a defined contribution component. All participants who joined the Plan prior to 14 April 1999 were enrolled in the DB part of the Plan. Those participants joining after this date were enrolled in either one of the two components, depending on their circumstances. The Public Service Pensions (Amendment and Validation) Law, 2000, was passed on 20 June 2000 to amend the date after which all new employees were to be enrolled in the DC plan to 1 January 2000 and to close the DB plan with effect from 31 December 1999. Those employees receiving Contracted Officers Supplement (COS) were exempted from participation in the Plan.

Additionally, it should be noted that the Board is statutorily required to administer the Parliamentary Pensions Plan and the Judicial Pensions Plan, with their resulting Plan Funds being pooled together with the Plan Fund of the larger, main Plan (Public Service Pensions Plan) for investment purposes.

4. Investigation

4.1 Witnesses Interviewed

During the course of this Office's investigation, evidence was gathered from approximately 25 people, including:

- 1) Mr Dan Duguay, Auditor General
- 2) Hon. George McCarthy, Chief Secretary, former Financial Secretary and former Chairman of the PSPB

- 3) Hon. Kenneth Jefferson, Financial Secretary and Chairman of PSPB
- 4) Mr Joel Walton, former Deputy Financial Secretary and a former Deputy Chairman of the PSPB
- 5) Mrs Jewel Evans Lindsey, Trustee and Managing Director, PSPB
- 6) Ms Faith Ebanks, Director of Finance and Investments, PSPB
- 7) Ms Kimberly Davis, former Director of Finance and Investments, PSPB
- 8) Ms Melanie Ebanks-Jackson, Technical Director of Plan Administration, PSPB
- 9) Mr Mani Sundaresan, Actuary & Consultant, PSPB.

The OCC was assisted by advisors and investigators Mr Rex McCafferty and Mr Neville J. Smith, and Superintendent of Pensions Mr Cyril Theriault.

4.2 Documents Gathered

During the course of its investigation, the OCC obtained and read many documents including, but not limited to, the following:

- Minutes of the meetings of the trustees
- Reports of relevance that were appended to the minutes
- Reports of meetings where some trustees discussed matters but could not conduct business being in-quorate (i.e., there were insufficient numbers of Board members present to make binding decisions)
- Selected unaudited and audited financial statements
- Sample statements issued to Plan participants and participant handbooks
- Relevant special reports of the Auditor General: *The State of Public Finances* (2001); *Public Service Pensions Fund's Financial Statement for the year ended 31 December 1999*, and the response of the PSPB on 18 August 2003; and *Special Report of the Auditor General on the State of Financial Accounting Reporting* (April 2008 – not yet public)
- Presentation slides made in July 2003 by management consultant Watson Wyatt & Company (e.g., Mr Mani Sundaresan), and a summary of his report found in the Minutes of the Twenty-Seventh Meeting of PSPB, 14 July 2003, p6
- The consulting report commissioned by the PSPB and prepared by Deloitte's Economic & Business Consulting Practice in June 2006, entitled *Public Service Pension Board: Review of the Critical Operational Processes* (the "Deloitte report")
- The Annual Reports of the PSPB (note: 2002 and 2003 Annual Reports were tabled in the Legislative Assembly on 1 December 2006. The 2004 Annual Report was tabled on 17 September 2007)

In addition, Chief Financial Officers of government entities were required to produce records of the payment of employer and employee contributions into the Agency.

5. Board of Directors/Trustees, Administration of the Fund, and Obligations under PSPL 2004

5.1 Directors/Trustees

Section 5(1) of the PSPL 2004 states: "There is established the Public Service Pensions Board in which the Fund shall be vested and which shall, subject to this Law, be responsible for administering the Fund." The Board shall consist of directors/trustees in accordance with the First Schedule.

The First Schedule, Part 1 of the PSPL 2004, provides for the appointment of directors/trustees and requires quarterly meetings. It states that the Board shall consist of the following directors/trustees: the Financial Secretary [as chairman]; the Deputy Financial Secretary [deputy chair]; the Chairman of the Public Service Commission; the Deputy Chief Secretary; the President of the Cayman Islands Civil Service Association or his/her substitute; the President of the Public Managers Association or his/her substitute; a Crown Counsel appointed by the Attorney-General as legal advisor to the Board, and three directors appointed by the Governor, one of whom shall have substantial professional investment experience, one who must be a retired participant under this Plan, and the Managing Director.

The Public Managers Association and the Public Service Commission are defunct and thus do not appoint a director/trustee. The lack of these trustees is significant for three reasons: it makes it harder to obtain quorum at meetings; there may be insufficient experience amongst the board members; and government employees may not be properly represented.

The President of the Cayman Islands Civil Service Association is the only trustee nominated by the legal owners of the Fund. The Commissioner here invokes his power to lay before the Legislative Assembly a report on the inequitable or unreasonable nature or operation of any enactment or rule of law found in section 20(2) of the CCL. It is the Commissioner's decision that this is an inequitable or unreasonable state of affairs as a result of the law. The Commissioner finds that the PSPL 2004 should immediately be amended to facilitate better execution of the fiduciary duty through broader representation and potentially more relevant professional experience.

DECLARATION #1: It is declared to the Legislative Assembly that the PSPL 2004 be amended to remove the appointment of directors/trustees from the Public Managers Association and the Public Service Commission and to provide for the appointment of two additional directors/trustees to the Board.

5.2 Directors/Trustees' Duties and Responsibilities

Section 5(2) empowers the board to employ an administrator/director and staff to administer the Plan. The duties assigned to this officer, the Managing Director, are found in the First Schedule Part 2 of the PSPL 2004:

- (a) giving direction to any investment managers appointed by the Board under section 16(2);
- (b) managing the cash flow of the Fund;
- (c) liaising with Plan actuaries;
- (d) assisting auditors;
- (e) developing fund policies;
- (f) interpreting the Plan;
- (g) assisting in the preparation of reports of the Board required under this Law;
- (h) supervising staff assigned to administer the Plan; and
- (i) performing such other duties as the Board, in its discretion, may assign.

The responsibilities of the director/trustees are detailed sections 5 (1a)(1b)(1c) and section 6 and 6(1a) of the PSPL 2004. For example, the Board "shall be responsible for the policy and general administration of the affairs and business of the Board" and "shall comply with the provisions of the Public Management and Finance Law".

Section 6(1) says the Board shall be responsible for:

- (a) The administration of the Fund, including:
 - (i) receiving into the Fund all sums due to it;
 - (ii) calculation and payment from the Fund of pensions due under this Law;
 - (iii) payments from the Fund necessary for the administration of the Fund;
 - (iv) investment of the Fund in accordance with this Law;
 - (v) accounting for all moneys collected, paid or invested under this Law;
 - (vi) causing a periodic actuarial review of the Fund under section 12; and
 - (vii) the sale of investments as necessary to meet immediate liabilities and needs, and for reinvestment;
- (b) liaising with the Chief Secretary and statutory authorities regarding collection of data;
- (c) liaising with the Financial Secretary and statutory authorities regarding contribution payments;
- (d) accounting and reporting in respect of the Plan, as provided in section 11;
- (e) (repealed);
- (f) record keeping, as provided in section 11;

- (g) recommending for approval amendments to the Plan, as provided in section 18;
- (h) adopting and maintaining a schedule of benefits payable under section 27(2) and 42(2) with respect to persons who resigned, retired or died prior to the 14th April 1999; and (hh) adopting and maintaining a schedule setting out the participant account opening balances relating to defined benefit participants; and
- (i) administering such other pension plans or *ex-gratia* payments as the Governor may direct; except that no assets of the Fund shall be used to pay for any benefit or expense of such other pension plans or *ex-gratia* payments unless the Government prepaid such amounts.

It is the Board which is responsible for recommending to the Governor in Cabinet contribution rates payable under the Plan (section 6 (1a)).

During his 2003 presentation to the trustees, Mr Mani Sundaresan, then of management consultants Watson Wyatt & Company, cautioned the trustees thus (Minutes of the Twenty-Seventh Meeting of PSPB, 14 July 2003, p 6):

[...] each Trustee will be accountable, which will increase fiduciary responsibility and will have a specific role for their asset accomplishments and performance, as well as performance in administration and other areas of pensions management. Board members must be willing to invest the time to acquire the necessary expertise to function with the increased responsibilities.

There is no shortage of guidance for trustees generally. The following words from the book *The Role of the Pension Fund Trustee*, 4th ed. (John Cunliffe, FT Law & Tax, Guildford, Great Britain, 1997) p 66, are instructive:

A new trustee must first of all familiarize himself or herself with the rules of the scheme, the assets and the members. The trustee will need to study the booklet, and read the trust deed and rules. He or she should get a list and valuation of the scheme's investments and details of the members. The new trustee should also study the latest actuarial valuation and the trustees' last annual report. He or she will face an onerous task; one that should not be undertaken lightly.

Cunliffe explained that another core function of the trustee is to see that money owed to the plan is paid:

The problem here is unpaid contributions, usually from the employer. Employee contributions are deducted from pay by the employer and handed over with the company contributions to the trustees at regular intervals. That, at any rate, is how life should be. It sometimes happens, however, that an employer gets into financial difficulties and, in effect, borrows the employee contributions for the purposes of the business. Ultimately, if all goes well, both employee and company contributions are passed over to the trustees for investment. If all goes badly, this does not happen; the employer becomes insolvent and the contributions are lost.

Also of use is the "Checklist for Trustees on Key Points in Section IX [Interrelation of the Administrative Manager with the Trustees, Plan Professionals, Participants and Other Parties]" by Marc Gertner, *Trustees Handbook*, 5th ed. (International

Foundation of Employee Benefit Plans Publications, Brookfield, Wisconsin, 1998), p 365.

1. Does the trust board review from time to time the quality of administration services?
2. Are participants and their beneficiaries treated courteously by the administration staff?
3. Are the administration services provided at a cost that, upon analysis, is reasonable?
4. Does the administrator provide reports on a timely basis?
5. Are the reports provided sufficient to control the significant financial elements of the operation?
6. Are effective claims cost-control systems operating within the welfare fund?
7. Are all accounting and financial reports clearly explained for trustee understanding?
8. Are administration functions performed by those clearly most capable, and in the most effective manner?
9. Are meetings effectively organized by those having administration responsibilities?
10. Is the trust fund using the equipment that will allow for the most cost-effective operation?
11. Do those with administration responsibilities demonstrate an understanding of the impact of laws on fund administration?
12. Do the trustees understand the major elements of trusteeship tools: financial statements, actuarial reports, annual audits, insurance experience statements, investment performance reports and comparison to benchmarks and so on?
13. Do the trustees read minutes and material sent by the administrator and advisors in preparation for meetings?
14. Has the trust board regularly reviewed the performance of all those to whom fiduciary responsibility has been delegated?
15. Have the trustees reviewed administration difficulties to avoid communication gaps between the participants and the fund?
16. Do the trustees delegate decisions and work that could best be performed by others, such as the fund administrator and staff?

The evidence of the Chairman given on 7 September 2007 (p4) was that the Board “takes its role and responsibilities very seriously. It has a fiduciary responsibility to the participants of the various plans, and must ensure the proper administration of the Fund, which includes the receipt of contributions, the investment of funds, payment of pensions due, and the necessary reporting required by law.”

5.2.1 Attendance

The Law prescribes quarterly meetings. The records indicate less than appropriate levels of attendance by directors/trustees at quarterly meetings and highlight the poor attendance of those trustees who were senior civil servants.

Of particular importance is a report of a meeting of some of the trustees held on 11 February 2005, recording (p4) that those “in attendance expressed concern about the availability of members and their attendance at meetings. It was noted that the last meeting was 18 May 2004.” At this 2005 meeting, Hon. Sybil McLaughlin advised

that she intended to resign from the Board due to its failure to meet quarterly and the resulting failure to fulfil its duties. The Managing Director and the Acting Chairman sought the indulgence of Mrs McLaughlin to remain on the board and she stated that "should the board get back on track with its quarterly meetings she would then reconsider".

The trustees were advised by Mr Mani Sundaresan (Minutes of the Twenty-Seventh Meeting of PSPB, 14 July 2003, pp7-8) as follows:

He expressed concern that the Board has difficulty meeting quorum sometimes, which is why he is suggesting that each Trustee have fixed but renewable terms. In closing, Mr Sundaresan said that the Board could benefit from inviting an experienced, professional trustee to the Board.

The evidence of the Chairman given on 7 September 2007(p2) was that the Board "has from time to time experienced difficulty in reaching quorums for meetings". The PSPB and the Commissioner agree that it is irresponsible for directors/trustees to not attend meetings. It is a core requirement for trustees.

The Commissioner believes that in some cases it would be appropriate for the participants and/or the Chairman to call for resignation and/or replacement of recalcitrant directors/trustees by the Governor and the Cabinet.

COMMENT #1: Directors/trustees who do not attend meetings regularly are failing in their responsibilities and should be replaced.

5.2.2 Knowledge

The Minutes of the first meeting of the PSPB for 2005 (18 March 2005), p3, record the efforts of the Managing Director to organise an ongoing educational programme for directors/trustees: "She advised that she, however, had not been able to get the commitment of the Trustees to attend the Orientation." Subsequent minutes record other efforts to organize training events. An orientation was finally held more than a year later on 16 June 2006 (Minutes of the third meeting of the PSPB for 2006 (26 June 2006), p6).

The evidence of the Chairman given on 7 September 2007 (p5) was that "training is an important component of ensuring that trustees have the support and knowledge that they require to comprehend fully the scope of their duties and responsibilities such as increased accountability and transparency".

More recent training was given by pension expert Ms Jayne Casanova on 27 June 2008. She emphasised that board members "have assumed all the legal and fiduciary obligations that a member elected to the Board of Directors of a corporation or other organization has assumed". All directors/trustees attended her seminar with the exception of the Chairman (as the Legislative Assembly was in session) and Mr Donovan Ebanks. Mr Wayne Bardswell and Mr James Watler subsequently attended trustee training in the United States.

It is important to accept and apply training. And it is fair to state that the director/trustees are able to draw on the expertise of the Agency staff and independent advisors.

5.2.3 Receiving funds

In the course of the investigation, it became clear that the Board and Agency were not receiving funds into the Plan in a timely manner, or at all. (The Minutes of the second meeting of the PSPB for 2005 (18 March 2005 p2) record the need to list delinquent entities and to apply a penalty.)

For example, during the period 2004-2005, the HSA collected its employees' contributions but did not then forward the money to the Plan. Nor did the HSA forward its own contribution. At one point in time, the HSA owed approximately \$1.7 million to the Fund.

Oral evidence given to the OCC indicates that past contribution problems have been significantly lessened as a result of action taken by the Agency with the chief executives of various government entities. For example, a memorandum was sent from the Agency to chief financial officers in July 2007 reminding them to submit their pension payments on time, and warning them of the late payment penalty.

Also, the 2007 interviews indicate, and the Deloitte report confirms, that a large proportion of Agency time was spent "chasing" contributor organizations. As the Deloitte report explains (pp5-8 and pp28-30), this had a negative impact not only on the PSPB Finance & Investment Department but also on Plan administration. OCC investigative work in 2005 had flagged this problem, and, as the Deloitte report confirmed (pp28-29), such late payment can affect the accuracy of benefit statements and reduce investment returns, as well as hamper the ability to comply with the payment out obligation in section 26 compliance. As the PSPB has acknowledged, the delinquency affected both employee and employer contributions to both the DB and DC plans (e.g. evidence of the Chairman given on 7 September 2007 (p6)).

Evidence was taken by this Office from the Financial Secretary and the Chief Secretary on 1 November 2007 on the question of employer payments and the forwarding of employee contributions to the Plan. Also, the OCC required the Chief Financial Officer (CFO) of each Government entity to provide evidence of timely payment of the required contributions into the Fund. While one Ministry did admit in October 2007 that "we found areas of concern which we would like to address before reporting" the records for 2006-2007, the evidence on the whole gave support to the Financial Secretary's overall view that the problem of receiving funds into the Plan was dissipating.

The PSPB stated: "Whilst the Board and Agency accepts responsibility for reporting on non-compliance by CFOs and following up for the purpose of collecting delinquent contributions, we cannot accept accountability for non-payment which lies

with the CFOs. In contrast, under the National Pensions arrangement, the onus for compliance lies with the employer, who can be prosecuted under the National Pensions Law for default. It should be noted that the PSPB has no such statutory recourse.”

On 16 November 2007, the Financial Secretary sent an email to the Managing Director of the Agency directing that he be notified “when government agencies and other public authorities do not pay over pension contribution to the Pension Board by the required pay-over period – 15th of the month”.

It is hoped that the employer will continue to seek full compliance with its obligation.

COMMENT #2: The Board and Agency should inform the stakeholders when government entities fail to pay pension contributions in a timely fashion.

5.2.4 Acting on Important Information

What can only be described as the “saga” of the Deloitte report – during which this Office was required to use legal measures rather than requests – is telling about the Board and Agency in a number of respects.

After the initial portion of the OCC’s investigation raised a number of red flags and after the continuing efforts of the Auditor General to obtain financial records which were of sufficient quality as to merit an audit, the Managing Director of the PSPB took the initiative to retain Deloitte to examine and report on the operational condition of the PSPB. The final report was completed in June 2006. The news was announced in a newspaper article on 24 July 2006, based on a press release from the Agency that described the Deloitte paper as a “positive report”.

On 7 August 2006, the OCC requested a copy from the Managing Director. She replied on the same day, refusing to provide a copy and citing the report as “an internal working document” which had not been reviewed by the Board of Trustees nor approved by the Board.

When this Office’s investigation resumed in April 2007, the Managing Director again failed to provide the Deloitte report because it had not been “dealt with in-depth” by the Board of Trustees, though it had been “made available” to the board at the time of its completion in 2006. In the intervening time, she said, the Deloitte report had been “on the agenda” of several trustees’ meetings but discussion of it had been superseded by more pressing matters. As a result, the Managing Director said she would not provide the report to the OCC. The report was eventually discussed during the trustees’ meeting of 28 August 2007, after initially being deferred in the meeting of 31 July 2006 and 7 December 2006.

The Minutes of the first meeting for 2007 (as continued on 7 June 2007) record the following on page 2:

As the Managing Director had tabled the [Deloitte] Report in 2006, the Board is unable to distance itself from the Deloitte Report; it was therefore agreed that the Managing Director submit management's response to the Deloitte Report [for] the Board's consideration at its next meeting on 14 June [2007].

The Minutes of the second meeting for 2007 (on 14 June 2007) record on page 2 that discussion of the Deloitte report was deferred.

The OCC was surprised that the directors/trustees left it so long before studying the report, which was a comprehensive piece of work by an independent third party that had been commissioned to address some long standing administrative issues.

The Chairman testified to this Office on 7 September 2007 (p10) that the Board "has taken the position that where the Deloitte report raised valid and useful points that they have been actioned or are being actioned by the Board".

Having seen the Deloitte report, the Commissioner finds that it cannot be accurately described as "a positive" report but it did indeed contain many valid and useful points on the better administration of the Agency, many of which are highlighted throughout this report. It is an injustice that the directors/trustees failed to take notice and thus exposed the fund to unnecessary risks and expenses through failure to improve administration.

RECOMMENDATION #1: It is recommended that the directors/trustees consider potentially material information in a timely fashion.

5.2.5 Advising Oneself

The current statutory constitution of the Board is that a Crown Counsel sits as a constituent member of the Board as well as being legal advisor to the Board. This is not appropriate. Trustees should not be in a position where one of their number is advising himself. Having Board members with legal training and who can give legal input is one thing; having a statutory role of a "legal advisor" is quite another.

The trustees were cautioned by Mr Sundaresan (Minutes of the Twenty-Seventh Meeting of PSPB, 14 July 2003, p7) as follows:

He explained that conflict of interest is a concern; all government officers serving as trustees have conflicts on the Board, as a trustee they act on behalf of all the participants, as well as the Government, and as a participant themselves. He said the Chairman is perhaps the most difficult position followed by the legal representative.

The Board is authorised to "take such professional advice as it considers appropriate and pay for it out of the Fund" (PSPL section 6(2)) and it states that it does use independent legal experts. It is unreasonable to require a director/trustee to advise a board of which he is a member.

DECLARATION #2: It is declared to the Legislative Assembly that the Legal Advisor to the Board should not be a member of the Board.

5.2.6 Potential Conflict of Interest of Chairman

The Commissioner considered whether the Chairman was in a position of conflict of interest by being also the head financial officer for the employer (Cayman Islands Government).

In brief, the employer, through its head financial officer (and deputy financial officer), could decide whether or not funds which were due and owing to the Fund would be paid and when. This would violate the PSPL 2004 and the Public Management and Finance Law. The latter places duties and responsibilities on Chief Officers of government entities to properly manage, including paying pension funds. An order not to pay to the Fund would likely be challenged by at least one Chief Officer.

However, as our interviews reveal and the Deloitte report elaborates, an unproductive and large proportion of PSPB time has been spent “chasing” contributor entities. Also, the Deloitte report stated (pp5-8 and pp28-30) that this not only has had a negative impact on the Finance & Investment Department of the PSPB but also has negatively impacted Plan Administration.

It is clear that the Legislative Assembly intended the Financial Secretary to serve as chair. But that does not eliminate the risk of this decision. The roles of Financial Secretary and Chairman can be complementary, and also can be confused. For example, in 2005 it was estimated that the HSA owed approximately \$1.7 million to the fund. (One million dollars of this delinquent account was collected in the last quarter of 2005, according to the minutes of the meeting of 14 December 2005, p4.) In this situation, by failing to act, the Board had in effect made an unsecured loan to the HSA or an unauthorised investment in unsecured debt without interest.

In another example, Hon. Mr Kenneth Jefferson signed a letter written on PSPB letterhead dated 9 March 2005 as the “Financial Secretary” and not as the “Chairman PSPB”. The letter, titled “Past Service Liability Recognition for Statutory Authorities”, states the Government’s position on the way forward and directs government entities to designate a manager to lead the discussion between their office and the PSPB.

The trustees were cautioned by Mr Sundaresan (Minutes of the Twenty-Seventh Meeting of PSPB, 14 July 2003, p7) as follows:

He explained that conflict of interest is a concern; all Government officers serving as trustees have conflicts on the Board, as a trustee they act on behalf of all the participants, as well as the Government, and as a participant themselves. He said the Chairman is perhaps the most difficult position, followed by the legal representative. Mr Sundaresan recommended that the Board should prepare itself for the impending changes to the Government structure with a view to minimizing conflicts of interest and increasing security for participants.

A report of a meeting of some of trustees held on 11 February 2005 noted at p4 that those in attendance “suggest that the Board be completely separated from the

government and said that it should be independent of senior civil servants and Members of Cabinet. Members were additionally concerned about the conflicting roles which the Chairman held."

The qualifications of directors/trustees and the composition of the Board were discussed by the trustees on 26 June 2006 (Minutes of the third meeting of the PSPB for 2006 (26 June 2006) p5 and appendix 1).

The evidence of the Chairman given on 11 October 2007 (pp1-2) was:

The Financial Secretary as a stakeholder has a vested interest in the Fund and hence all the workings of the PSPB which can only be viewed as positive. The Financial Secretary has been a significant factor in the level of funding that Government has given and continues to give due to his role in Cabinet where he has been able to put forward the views of the Board.

There will always be potential conflicts of interest in any role and it is a question of managing them and deciding which conflicts are manageable. In this case, the main conflict of interest would be in terms of financing, where the Government may feel that more urgent priorities may mean a delay in contributions. Ultimately, the contribution requirements will have to be met one way or the other as the promise to pay pensions is solidified in the Government's balance sheet as a contingent liability.

Trustees testified to the OCC that having the Financial Secretary as Chairman assisted the PSPB in having its issues raised in Cabinet meetings. Assuming that the Chairman was honouring his fiduciary duty to the Plan members, this may be true. However, it is likely to impair the achievement of the goal stated recently by the PSPB: "It is our focus to establish good corporate pension governance and the clear separation of functions between Government, as the main employer participating in the Plan, the Board, as policy-maker and the executive and management, as implementers of policy."

Without passing judgment on the Chairman, the potential for actual conflict of interest is too great. The state of the law is unreasonable. The situation should be remedied by amending the law to provide that a director/trustee other than an officer of the employer or a senior civil servant be chairman.

DECLARATION #3: It is declared to the Legislative Assembly that the PSPL should provide that the Chairman of the PSPB be a person other than an officer of the employer or a senior civil servant.

6. Handbook, Website and Obligations under Section 10(1)(a) PSPL 2004

Section 10 (a) states the obligation to produce a Public Service Pensions handbook. The handbook provided to the OCC as a sample of the one then currently in use was clearly out of date. The failure to provide an accurate handbook describing the Plan in plain language undermined the participants' ability to understand the operation of the Plan and to know their rights and duties and take appropriate remedial steps.

It was suggested to the Agency by the OCC that the handbook be brought up to date and that the handbook text include a version reference number and date so that the reader could judge its completeness and accuracy in terms of the prevailing law and PSPB practice. The evidence of the Chairman given on 7 September 2007 (p7) was that the Board "has recognised the need for an updated version of the handbook and the necessary steps have been taken to ensure this is undertaken as a matter of priority".

The OCC is able to report that a new edition of the handbook of reasonable quality was produced in August 2007.

The evidence of the Chairman given on 7 September 2007 (p8) was that the Board "recognises the need for improved communication in this area and plans to launch a dedicated web-based communication system as part of development of a new pension administration system. However, in the interim, steps are being taken to improve the information on the current website."

In April 2008 and December 2008, the PSPB website was corrected and brought up to date and now provides a good complement to the handbook. The PSPB wrote recently that it "takes seriously its obligation to communicate with its legal owners under section 10 of the PSPL and has expanded its communication programme with its first edition of the Official Newsletter ... in Fall 2008".

7. Annual Benefit Statements and Obligations under Section 10(1)(b)-(f) PSPL 2004

Three issues were explored in this part of the investigation. The first issue was whether employees were actually registered in the Plan (so that when their pension was deducted it could be applied to their specific account). The second issue was the group of questions surrounding serving and empowering the participants. Finally, the issue of the management of continuation of benefits was considered.

The Managing Director had given evidence to the Public Accounts Committee (meeting held to review the Special Report of the Auditor General on the state of public finances of the Cayman Islands' Government for the year ended 31 December 2000) in February 2003 (at p31) that the Agency was completing registrations in an

appropriate manner. "During its evidence sessions, the Committee received assurances that almost all eligible employees have now been entered into the pensions system," said the Minutes.

Our early interviews highlighted the fact that there was a significant backlog of data not entered into the Agency's Pension Administration System (PAS) from the 1990-1999 period. These findings were later confirmed by the Deloitte report (pp29-30), noting the key consequence (at p5) as "the majority of staff members in the Plan Administration Department (PAD) have been spending approximately 50% of their day to day activities dealing the backlog".

The Deloitte report referred repeatedly (pp58-63) to the need to obtain software that would enable a core improvement in efficiency. The Agency has purchased new software called Lynchval, which it claims meets its needs and which was to be in use from 1 July 2008. We have not been able to confirm that this occurred. Recently, the PSPB wrote: "It should be appreciated that customisation/development of pension administration software and transition from one system to another takes considerable time and extensive testing."

The evidence of the chairman of 11 October 2007 (p3) states, for certain processes which are not time sensitive, "there will always be a backlog because there is a continuous high volume inflow of documents and requests that need to be processed. For example, let us take a closer look at new entrant processing or enrolments. If there is a backlog of, let us say several hundred, that would constitute an unacceptable level and some special effort will be needed. However, a backlog of, let us say 20, would be quite acceptable and would reflect a very normal situation." The PSPB recently stated: "Due to the extent of the backlog, Mr. Sundaresan was assigned backlog as a special project to brought to an acceptable level by August/September 2007, which has been achieved."

Regarding the serving and empowering of participants and sub-sections of section 10 in general terms, the evidence of the Chairman given on 7 September 2007 (p4) was that: "The Board acknowledges that it has had significant backlog, primarily in the publication of financial information and the provision of annual benefit statements. Much of the backlog was created by a variety of factors such as human resource gaps and outdated information systems resulting accumulation of data that needed to be updated. The management and staff have made tremendous progress in reducing backlog to an acceptable level." And at p8: "The Board acknowledges that it has not consistently provided benefit statements to all participants on an annual basis."

According to Mr Ravi Persaud, then Audit Manager at the Cayman Islands Audit Office (CIAO), the reason historically that there had not been a confirmation of individual participant accounts was the absence of current benefit account statements to audit.

The Agency conceded that, while a benefit statement (annual or at retirement, resignation or death) for each participant had been produced, with few exceptions, if the contributions from employers had been incomplete, then the statements would have been inaccurate. It stands to reason that if the money is not received (as discussed in part 5.3.3), then it cannot be recorded in the system and an accurate balance cannot be given to the participants. Inaccurate statements, in turn, mislead the participants who got them.

Regarding section 10(b) in particular, the Agency failed for many years to provide benefit statements. This breach of statutory obligation was maladministration and it is an injustice to stakeholders. It undermined their ability to cross-check many of the operations and the overall security and integrity of the Fund.

On 5 December 2006, the PSPB announced through Government Information Services that it had recommenced issuing Annual Benefit Statements to civil servants. The Agency noted that the annual benefit statements, as of 31 December 2005, were issued between October and December 2006.

Regarding the period ending 31 December 2006, Annual Benefit Statements were circulated to members on 31 July 2007. (The evidence of the Chairman given on 7 September 2007(p8).) Mr Sundaresan stated that a six-month lag was to be expected and has been a function of administrative necessity owing to the external source data and documents associated with Fund income account reconciliation. The PSPB is now current in the provision of Annual Budget Statements.

The OCC recalls the provision in section 17(3) PSPL 2004, which says that amounts owed to participant accounts are to be paid to the Agency no later than the 15th day of the month immediately following the date when the deductions are due, and section 17(4) which requires them to be credited to the participants account on the day received.

The statement of the PSPB was accepted that it “has always been in statutory compliance with generating and distributing the annual pension continuation certificates to pensioners, required under section 10(f), in conjunction with regulation 12 of the associated regulations”.

8. Annual Financial Statements and Obligations under Section 11 PSPL 2004

The PSPB failed in its obligation to provide in a timely manner financial statements to the Auditor General for auditing (section 11(2)-(4)) and eventual presentation by the Financial Secretary (section 11 (5)) to the Legislative Assembly (section 11(6)) during the years 1999-2007.

The Legislative Assembly enacted section 11 to ensure that there was a clear duty to report to fulfil the aim of enhancing confidence and accountability in the public

pension system. (It is supplemented by section 5(1c) which requires the board to comply with the provisions of the Public Management and Finance Law.) The evidence of the chairman of 7 September 2007 (p9) states: "The Board acknowledges that it has fallen short of meeting its statutory deadlines in the submission of financial statements to the Cayman Islands Audit Office."

The record of reporting is startling because the Public Accounts Committee (meeting held to review the Special Report of the Auditor General on the state of public finances of the Cayman Islands' Government for the year ended 31 December 2000) in February 2003 (at p31) wrote: "The Committee urges the Public Service Pension Board to take all possible steps to resolve the evident accounting difficulties."

The audited financial statements for 1999 were tabled in 2003, and the audited financial statements for 2000 and 2001 were tabled in 2006. A Board meeting on 26 June 2006 reported: "The Managing Director advised that the 2002 Financial Statements have been certified by the Auditor General and submitted to the Financial Secretary. The 2003 Financial Statements have been completed and are in the process of being audited. The Financial Statements for 2004 and half of 2005 will be submitted for auditing later this week." (Minutes of the third meeting of the PSPB for 2006 (26 June 2006), p5.)

The Auditor General gave evidence on this matter on approximately five occasions, the last time as part of a public statement through the media ("Auditor hits back at critics", *Cayman Net News*, 7 August 2008, p1). This story read, in part:

On Monday, 4 August, Faith Ebanks, PSPB Chief Financial Officer and Director of Finance and Investments, told *Cayman Net News* that since 2004, the board had "submitted our statements on time every year".

"[Mr Duguay's] claim that he has no audited financial statements makes him look worse, in fact," she said. "It means that we have had our stuff in on time and he hasn't gotten around to it yet. Our originals were all on time."

Describing the board as among his "most difficult" clients, Mr Duguay summarised its filing history, citing its 2005/06 report as an example.

"The board's 2004/05 statement is substantially complete," he said, "but their 2005/06 report is not started and their 2006/07 statement is not started -- and the 2007/08 statement is due in three weeks.

"Their 2006 financial statement was submitted to me on September 15, 2006, which isn't too bad, only a couple of weeks late, but it was missing information on its balance sheet, on changes in net assets and benefits and a statement of cash flows. It just didn't add up. The cash flow statement said 'TBA' [to be announced] where a lot of the figures were supposed to be. It also contained no notes, no explanation of the accounts.

"Surprisingly, we did not consider this to be a full and complete submission," Mr Duguay added icily, saying his office had quickly sought the missing information.

"They submitted [the 2006 statement] on July 23, 2008, and it still is not complete. The cash flow statement had no numbers on it. We expect to see a complete set of numbers on a financial statement," he said, suggesting that the original 15 September submission had been little more than an attempt to "game the system".

"The idea seems to be that you can submit something, almost anything, and that makes it our problem. But, no, you cannot do that. It's just not true that because you submit

something your responsibility is done. Under the current law, what they submitted was not anywhere close."

He said the board had recently offered sufficient response to his request for 30 items to enable the auditor to make a start.

"They didn't supply everything, but the Pensions Board is such a priority that we are going in to do the audit anyway. It will just create inefficiencies," Mr Duguay said.

Mr Duguay confirmed to us the facts contained in this account.

Mr Duguay formalised the statement in his written report, titled "Special Report of the Auditor General on the State of Financial Accountability Reporting", which was due to be placed before the Public Accounts Committee on 24 September 2008 and then on 19 November 2008.

Subsequently, the PSPB stated on 6 February 2009 that:

"The financial statements for fiscal year 2005/2006 have been audited and the Annual Report pertaining to this period has been prepared and is in the process of being submitted to Cabinet and subsequently to the Legislative Assembly.

Financial statements for 2006/2007 were submitted to the Cayman Islands Audit Office on 31 August 2007, the planning meeting with the auditors was held on 15 December 2008 and the actual field work commenced on 19 December 2008.

Financial statements for 2007/2008 were submitted to the Cayman Islands Audit Office on 1 September 2008 (deadline of 31 August 2008 missed as a result of both offices being closed due to hurricane Paloma). The Cayman Islands Audit Office has given a commitment to continue their field work at PSPB until all audits are up-to-date. However, for none of the financial statements that have been audited to-date has the Auditor General issued a disclaimer of opinion."

On 12 February 2009, the Audit Office replied:

1. The 2005/06 PSPB financial statement has been audited and an audit opinion was signed on 1 December 2008.
2. The fieldwork for 2006/07 audit started 19 December 2008 after the completion of the 2005/06 audit. There are some schedules outstanding from the client for the 2006/07 audit that we still need in order to finalize the audit.
3. The 2007/08 financial statement was submitted on 1 September 2008. However, supporting schedules were not submitted and not much audit work could take place on these financial statements until the prior years are completed.
4. A meeting was held 15 December 2008 to discuss the 2006/07 audit.

The aim of section 11 was undermined by a breach of duty to 2007. It caused an injustice to stakeholders as they were not able to cross-check the PSPB in a timely fashion. The Auditor General, who assists in good governance by expressing an opinion on the financial statements of the Fund, was not able to express opinions in a timely fashion due to the state of the accounts. The trustees themselves had incomplete information on which to make decisions. The failure to report left the

stakeholders unable to identify whether they were misled or misdirected about the security of the pension. It is no answer for the PSPB to say, "we did not mislead," because they simply did not report in a timely fashion. The duty required timely reporting.

RECOMMENDATION #2: It is recommended that the directors/trustees ensure compliance with reporting requirements.

9. Investment Management and Obligations under Section 16 PSPL 2004

Section 16 requires that the Fund be invested in a manner to ensure that there is no undue risk of loss and in accordance with professional advice. Trustees were to exercise due care and skill "that persons of ordinary prudence would exercise in dealing with property of another".

Solicitor Cunliffe wrote in his book the following:

Investment is considered to be a specialist field best left to the expert. Trustees should not therefore make investment decisions without taking advice from an expert. Where legal questions arise, the trustees should consult their lawyer. While trustees are obliged to obtain and consider expert advice, they should not merely rubber-stamp it; that would be as bad as not taking the advice in the first place. Experts have a great capacity to be wrong as anyone else. Clearly there are dangers in ignoring the advice of experts, especially if they prove to be right after all. It is not possible to lay down hard and fast rules, but a degree of discretion has to be exercised.

The fact that the period 2000-2004 had seen significant delays in the appointment of an investment manager and enlarged cash balances that caused the Fund to under perform in 2000-2003 was confirmed in meeting minutes and by Mr Sundaresan. For example: "It was noted that the Board has [\$]40 million in cash, although this is against the investment policy, the Board had agreed to not inject any further funds into [investment management firm] Scotia Cassels because the Board had decided to change Scotia Cassels as their investment manager." (Report of a meeting of some members of the PSPB 5 April 2005, p2.)

The PSPB stated on 6 February 2009: "The industry recognises that the transition from one manager to another must be professionally monitored and is a process, if carried out properly to meet fiduciary requirements cannot be progressed with undue haste."

Investment manager Close Asset Management (CAM) was retained in March 2004, but by June 2006 it was discovered that investments made were outside those allowed by PSPB and CAM was terminated after the notice period in April 2007.

The evidence of the Chairman given on 7 September 2007(p6) was that the Board "is confident that the investments of the Fund are well within the constraints of the law".

On balance, the evidence gathered from documents and the 2007 interviews suggested that the issues raised regarding section 16 compliance are in the past and have not been carried forward.

10. Payment Out and Obligations under Section 26 PSPL 2004

Section 26 requires an actual payout under the DC plan within 30 days of effective notification for those who do not hold Caymanian Status and cease to reside in the Cayman Islands. The Agency conceded (the evidence of the Chairman given on 11 October 2007 (p5), and the Deloitte report (p11) confirmed, that this compliance was not and might never be achieved.

Even the Cabinet appears to have accepted this failure to comply. For example, the Annual Budget Statement (2005-06) prescribes some specific services and targets to be provided by government entities and the amounts to be paid to entities to provide those services. In the relevant section (PSB 2), the Cabinet recognises a deliverable target of two months for payouts but with a reduced probability of success of achieving the target.

The OCC agrees that there may be merit to the Agency's wish to amend the target – say, to one year (as suggested in Minutes of the Twenty-Seventh Meeting of PSPB, 14 July 2003, p4), but not two years (as suggested in Minutes of Fifth Meeting of the PSPB, 7 December 2006, p3).

It must be recognized that with respect to the DC plan, the failure of the employer (Government departments and agencies) from time to time to meet their obligation to make their contributions to the PSPB by the 15th of every month does impact the payout process. This was discussed throughout the Deloitte report (e.g., pp9-11 and pp28-33) and was repeated in the OCC's investigation in 2007. Thus, some attempts to make timely payouts have been frustrated by the failure of the employer to make all required payments.

Nonetheless, the trustees should have formulated a plan to allow for relatively liquid short-term investments to be made available to satisfy anticipated payout obligations. Until legislative action is taken, non-compliance with section 26 is maladministration and it is an injustice to those who have sought timely payment.

RECOMMENDATION #3: It is recommended that the directors/trustees formulate a system to ensure compliance with the obligation to pay out funds stated in section 26 PSPL 2004.

11. Reply

The PSPB made the following relevant statements on 6 February 2009:

“The PSPB welcomes and appreciates it when an organisation such as the OCC raises issues with proper justification. When investigations are carried out properly, it can only help to improve the functioning of the organisation. However, all of the issues and questions raised by the Commissioner that are valid are those that the PSPB itself has recognised through reports that it has commissioned on its own initiative, and have largely addressed already. The PSPB therefore sees no value to the OCC’s report.

“The achievement of the Board thus far [is] to successfully administer the Fund, valued at about a quarter of a billion dollars, without reducing stakeholders’ interests or diminishing the deferred income of pensioners/participants. This goes to the crux of the fiduciary duties of the Board.”

12. Conclusions, Declarations, Recommendations and Comments

The OCC states that the evidence gathered in this investigation leads to the conclusion that the Public Service Pension Board failed to comply with certain statutory obligations.

The OCC is to investigate and determine questions of maladministration. Maladministration is defined in section 2 as “inefficient, bad or improper administration”. It can make recommendations after a finding of maladministration and injustice, or if no maladministration and injustice, it can make comment.

The duties of the administrators in this case, the directors/trustees and the Agency, are found in statute. Our investigation led to two important conclusions. First, the directors/trustees and Agency were guilty of maladministration in failing to comply with certain statutory obligations and this maladministration caused injustice to stakeholders. Second, the Agency has begun to get its affairs in order and, with continued positive steps, it should be able to operate in an appropriate manner henceforth if it honours its reporting obligations. The evidence of the Board states that the Fund is in good order.

The OCC is also charged with the duty to “ascertain the inequitable or unreasonable nature or operation of any enactment or rule of law” (see CCL s 20(2)). This is addressed first.

Key Findings

1. The President of the Cayman Islands Civil Service Association is the only trustee determined by the legal owners of the Fund. The employer is overly represented. Two director/trustee posts are vacant due to the lapse of their nominating

organisations. It is the Commissioner's finding that this is an inequitable or unreasonable situation as a result of the law. The Legislative Assembly should act immediately to amend the PSPL to facilitate better execution of the fiduciary duty through broader representation and additional relevant professional experience. It is declared to the Legislative Assembly that the PSPL 2004 be amended to remove the appointment of directors/trustees from the Public Managers Association and the Public Service Commission and to provide for the appointment of two additional trustees to the Board.

2. A Crown Counsel sits as a trustee as well as being legal advisor to the Board. This is not appropriate and puts him in an untenable position as advisor to himself. The Legislative Assembly should amend the PSPL to remedy this situation. It is declared to the Legislative Assembly that the Legal Advisor to the Board should not be a member of the Board.

3. The Legislative Assembly intended the Financial Secretary to serve as chair of the board of trustees. It is time to revisit this decision. The roles of Financial Secretary and Chairman can be complementary, and also can be confused. The potential for actual conflict of interest in the future is too high. It is also appropriate to increase the leadership role of directors/trustees who are not senior civil servants on the Board. It is declared to the Legislative Assembly that the PSPL should provide that the chairman of the PSPB be a person other than an officer of the employer or a senior civil servant.

4. The evidence revealed that some directors/trustees had not regularly attended Board meetings. The OCC finds that it is irresponsible to not attend meetings and such directors/trustees should be replaced by those who appointed them, whether the Governor or Cabinet. It is the Commissioner's comment that Directors/trustees who do not attend meetings regularly are failing in their responsibilities and should be replaced.

5. The Board and Agency were not receiving funds into the Plan in a timely manner and this had a negative impact on the operation of Plan and the value of the Fund. It is hoped that the employer will continue to seek full compliance with its obligation. It is expected that the Board and Agency not remain silent when government entities fail to pay pension contributions in a timely fashion. It is the Commissioner's comment that the Board and Agency should inform the stakeholders when government entities fail to pay pension contributions in a timely fashion.

6. The Board failed to receive and act on material information in a timely fashion and this was a breach of its duty. The Deloitte report was a comprehensive piece of work by an independent third party that had been commissioned to address some long standing administrative issues. This revealed an approach not consistent with the standard of care required of trustees and must not be repeated. The Board accepted that this must not be repeated. Thus, it is recommended that the Board considers potentially material information in a timely fashion.

7. The Agency did not properly meet all of its obligations under section 10 for many years, and this reflected badly on the Board and the Agency. However, the evidence suggests things are improving. The Agency produced a new edition of the handbook and improved its website. This will assist stakeholders in their quest for relevant information. Benefit statements are being issued and this is an important development.

8. The Agency has stated that it purchased new software called Lynchval, which it claims meets its needs and which is in use from 1 July 2008; a fact that the OCC was unable to confirm. The backlog of registration of members and data input has been reduced to marginal importance in 2007 and should be eliminated substantially.

9. The Board and Agency failed to comply with their reporting obligations. The Legislative Assembly made it clear that there was a duty to report. This was to be done under a strict schedule and was to include timely submission to the Auditor General the financial statements so that he had an opportunity to review them and give an opinion. It was meant to fulfil the aim of enhancing confidence and accountability in the public pension system. The aim was undermined by a breach of duty. It was maladministration and injustice and continued to be a major concern until quite recently. It is recommended that the directors/trustees ensure compliance with reporting requirements.

10. On balance, the evidence suggested that the issues investigated regarding investments and compliance with section 16 are in the past and have not been carried forward.

11. Section 26 requires an actual payout under the DC plan within 30 days of effective notification for those who do not hold Caymanian Status and cease to reside in the Cayman Islands. It is maladministration not to obey the law and an injustice to those who seek timely payment. Arrangements must be made to comply until the law is changed. It is recommended that the directors/trustees formulate a system to ensure compliance with the obligation to pay out funds stated in section 26 PSPL 2004.

The declarations made are as follows:

- (1) It is declared to the Legislative Assembly that the PSPL 2004 be amended to remove the appointment of directors/trustees from the Public Managers Association and the Public Service Commission and to provide for the appointment of two additional directors/trustees to the Board.
- (2) It is declared to the Legislative Assembly that the Legal Advisor to the Board should not be a member of the Board.
- (3) It is declared to the Legislative Assembly that the PSPL should provide that the Chairman of the PSPB be a person other than an officer of the employer or a senior civil servant.

The comments made are as follows:

- (1) Directors/trustees who do not attend meetings regularly are failing in their responsibilities and should be replaced.
- (2) The Board and Agency should inform the stakeholders when government entities fail to pay pension contributions in a timely fashion.

The recommendations made are as follows:

- (1) It is recommended that the directors/trustees consider potentially material information in a timely fashion.
- (2) It is recommended that the directors/trustees ensure compliance with reporting requirements.
- (3) It is recommended that the directors/trustees formulate a system to ensure compliance with the obligation to pay out funds stated in section 26 PSPL 2004.

Office of the Complaints Commissioner, 16 February 2009.