2005
Annual Report

Pensions
OMBUDSMAN
Fear an Phobail um Pinsin

Annual Report of the Pensions Ombudsman 2005

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Office of The Pensions Ombudsman
36 Upper Mount St
Dublin 2
Telephone (01) 647 1650
www.pensionsombudsman.ie

MISSION STATEMENT

To investigate and decide, in an independent and impartial manner, on complaints and disputes concerning occupational pension schemes and Personal Retirement Savings Accounts (PRSAs).

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Foreword

A Aire,

I am pleased to present my Annual Report for 2005, the second complete year of operation of the Office of the Pensions Ombudsman.

The work of the Office has continued to progress and, as I predicted in my 2004 Annual Report, the caseload has continued to rise, and this has put increased pressure on the small staff of the Office. While we have been able to maintain a good rate of case closure, I am becoming concerned at the length of time it is taking to complete investigations. I am also afraid that the pressures of an increased caseload may have resulted in our being unable to attend to other matters. I address this later in this report.

I will comment later on the sources of the complaints we receive and on the lessons to be learned from them. The casework this year has highlighted a couple of issues which have been referred to the Pensions Board, or to the Financial Regulator, as appropriate.

With this report I have, as last year, published a digest of cases. I hope that this will prove helpful to those whose job it is to consider complaints in the first instance, as well as to those who may be considering making a complaint. As before, the identities of both the complainants and the respondents have been withheld, to protect privacy. Where public authorities are concerned, it is not always possible to conceal a respondent's identity, as it may be obvious from the occupation of the complainant.

I wish to thank you, Minister, for the ongoing support you have given to me personally and to the work of this Office. I particularly value the help and support given to me by the staff of your Department – the Planning Unit, with which I have contact on an almost daily basis, and also Personnel, Accounts, IS Services and Facilities Management. I am also grateful for the help given to us during the course of our investigations, particularly by Scope and Records Sections. I appreciate that all this support is given in a spirit which completely respects the independence of the Office.

Again, I would like to record my thanks to the Pensions Board, whose staff have been most co-operative, and to thank the Board for the access to its files which we are given in the course of our investigations. I would also like to thank staff at the Office of the Ombudsman, the Financial Services Ombudsman's Bureau and the Financial Regulator, as there is a certain amount of two-way traffic in complaints. All of us make a point of trying to find the right 'home' for complaints which are outside our own jurisdictions. In that regard, I have signed a Memorandum of Understanding with my colleagues, Joe Meade, Financial Services Ombudsman and Patrick Neary, Chief Executive of the Irish Financial Services Regulatory Authority, the better to safeguard the interests of consumers of financial services generally.

Finally, I wish to thank my investigators and support staff, who have not wilted under a greatly increased workload, and whose hard work and enthusiasm have made such a huge contribution to the ongoing success of this Office.

Beir beannacht,

Paul Kenny
Pensions Ombudsman

Section 1
Introduction

The whole subject of pensions has become increasingly topical in recent years, not just in Ireland, but also generally in the developed world. One of the major aims of Government policy in this area has been to try to get people to take personal responsibility for planning for their future by persuading them to invest in personal retirement schemes.

In this context I think it is fair to say that the response to the PRSA initiative has been disappointing and it is clear that a fresh approach will have to be adopted if there is to be progress in achieving the target of 70% coverage set in response to the National Pensions Policy Initiative (NPPI). It was in response to the poor take-up of PRSAs that the Government set the Pensions Board the task of reviewing and reporting – a year early – on the state of pension coverage. The report of the National Pensions Review was presented to Cabinet last November and has recently been published. It sets out a series of recommendations aimed at achieving coverage of 70% by providing practical incentives for people to invest in pension schemes. I do not propose to comment in greater detail on the report or its recommendations, which are now being subjected to detailed examination. However, on a general level I have highlighted a number of practical issues in specific areas that I have come across through complaints to this Office. Some of these issues on their own may not appear to be important, but it may be that, combined with other factors, they may have the practical effect of discouraging some people from investing in pension schemes.

One area that I highlighted in last year's report and to which I have again called attention this year is the matter of communications. During the year I was again struck by the poor quality and lack of clarity and precision of many communications. Again, I appeal for the better use of plain English among pension providers and scheme trustees and administrators. I have no doubt that, apart from reducing the number of complaints that they have to deal with, it would also help to promote member and consumer confidence in pension products.

During the year I have come across a number of issues regarding the Internal Disputes Resolution (IDR) procedures, on which I have gone into greater detail in this report. One of the main problems has been the delay in the issue of IDR determinations in certain circumstances. I believe that, in most instances, this failure has occurred either because of ignorance of the requirements of the Pensions Act, or quite simply as a result of bad organisational arrangements. However, there is no doubt in my mind that, in certain cases, the delay or failure was the result of a deliberate obstruction of the process by the trustees of the scheme. I am glad to say that the recent Social Welfare Law Reform and Pensions Act makes provision to allow me to bypass the IDR process and investigate complaints in such cases where there is clearly nothing to be gained from the IDR process.

I am also pleased to note that the Act has introduced a system whereby monetary penalties can be imposed by the Pensions Board for alleged breaches of the Act, which may avoid the need to undertake criminal prosecution in the Courts. I believe this, when implemented will enable the Board to deal with technical and minor infringements and will greatly facilitate the smooth operation of the Act. I had asked in my last

Annual Report that civil penalties be considered, and I thank the Minister for this valuable addition.

I have detailed in the body of the report individual issues that have arisen in relation to specific complaints. However, there is one issue that I would like to refer to here and that is the operation of the Construction Federation Operatives' Pension Scheme, upon which there is more detailed comment below. I have no doubt that there are major difficulties in relation to the operation of this scheme, particularly on the part of employers. These include failure to register with the scheme, failure to include members, failure to remit contributions on time, or at all. In addition there is a distressingly high incidence of employers actually deducting contributions from workers' wages and not remitting them to the scheme. I have no sympathy at all for such people and will do everything in my power to ensure that they pay what is due. Indeed, if it were in my power I would prosecute them for theft.

Section 2
Summary of Activities in 2005

CASE MANAGEMENT

My Office received 389 new cases during 2005 and dealt with 2,375 telephone enquiries. This represents an increase of 31% and 79% respectively over 2004. We 'cleared' or closed 385 cases during the year. I am especially happy with this figure, which represents an increase of 215% over the number of files closed in 2004. I mentioned in my Annual Report for 2004 that one of my priorities had been to complete the recruitment process involved in getting a full staff complement in place. Thankfully, this is now done. The achievement of dealing with the increasing volumes of new cases and general enquiries in this scenario is testimony to the hard work and dedication of staff at all levels in the Office.

However, we entered into 2005 with 287 complaint files still open and ended the year with 291 on hand. A detailed analysis of caseload and case management is dealt with in the next Section of this report. While the types of complaint we deal with are by nature quite complex, involving time-consuming exchange of information and clarification of documentation, I am concerned about the increasing length of time it takes to process a complaint. Overall, average processing times have more than doubled in 2005 when compared with 2004. The reasons for this are varied - I am concerned that the staffing levels in the Office are currently not sufficient and I deal with this in more detail later on in this Section and also, the nature of the complaints themselves, which can be very complex, is a contributory factor.

CASE MANAGEMENT SYSTEMS

Quite a bit of time is taken at present in collating management information statistics which involves the use of a number of different systems. A review of our case management systems was carried out by an in-house group during 2005 and I have agreed with their recommendation that a new integrated Case Management System is necessary. This will automate the production of case management information statistics in a real time environment which will improve the ability of senior management to set targets and quality performance indicators and monitor performance against these targets. I hope to issue a Request for Tender for this system during 2006 with a view to having it in place by early 2007.

CASES BROUGHT TO FINAL DETERMINATION OR SETTLED BY MEDIATION

I issued 76 Final Determinations under Section 139 of the Pensions Act, 1990 (as amended) during 2005. Of these, 32% were upheld either in full or in part and the remaining 68% were disallowed. This mirrors the experience in 2004 and it will be interesting to see if these trends continue into future years.

During the year, 146 cases were settled by mediation; 66% of these were settled with a result favourable to the complainant. This again mirrors the experience of 2004. The differences in what may be termed a positive outcome for the complainant between Final Determination and mediation can partly be accounted for by the fact that I cannot direct a rule change or override a discretionary power of the trustees in a Final Determination. A Final Determination is also binding on all parties, subject to appeal to the High Court, and the financial awards that I can make are limited to the loss of scheme benefit - i.e. I cannot take account of expenses incurred in fighting the case, or compensation for stress or worry, etc. Mediation, on the other hand, allows for more flexibility and can very often

provide a solution that could not be arrived at by a Final Determination.

I have adopted the position that I will normally issue a Preliminary Notice of Determination in advance of a Final Determination which sets out the main facts as established during the investigation and what my likely determination will be, based on these facts. This provides both the complainant and the respondent with an opportunity to clarify aspects of the investigation report and to present any further evidence or comments to me before I make my Final Determination. This process worked well during 2005 but adds nearly seven weeks to the overall time to Final Determination. However, I consider this approach to be practical and in the interest of natural justice and intend to continue with it during 2006.

DELAY

Unfortunately, my Office continued to experience delay in dealing with requests for information from certain public sector organisations. I referred to this in last year's Annual Report and, while there have been improvements, I remain concerned that it has taken a lot of effort on the part of this Office to encourage this improvement. I had to threaten one organisation with referral to the Pensions Board for prosecution before any improvement was forthcoming. This is totally unacceptable and I am considering my options in relation to organisations which show persistent delay. I may in the future identify such organisations by name in my reports, as well as considering referral for prosecution.

INFORMATION

My staff members spend considerable time in giving individual information to the public. People telephone the Office to discuss their problems – even to explore whether they have a genuine complaint, or whether the complaint that they have identified should be made to me at all. The volume of calls to the main Office number has increased substantially since last year, to a total of 2,375, a rise of 79%.

PROMOTIONAL ACTIVITIES

One of the general objectives set in my Statement of Strategy (2004 – 2006) is to establish and promote the role of the Office of the Pensions Ombudsman and to liaise and establish good working relationships with the pensions industry in general, PRSA providers, representative organisations, regulators, private sector companies, Government Departments and other public sector organisations. This is done through our website, www.pensionsombudsman.ie, by a small amount of advertising and by placing articles in various pension publications and other journals. A regular column is written for 'Irish Pensions News', the journal of the Irish Association of Pension Funds (IAPF). We also took out advertising features with a number of publications to further improve general public awareness of the role and remit of the Office, e.g. the 'Inside Government' magazine, IMPACT News, and SIPTU Report. We arranged for details about the Office to be included in the Institute of Public Administration (IPA) and IAPF Yearbooks and on the Consumers' Association of Ireland wallplanner. We reviewed our complaint forms and associated information leaflets during 2005 and involved the Retirement Planning Council in this process to ensure ease of use for older people. In addition, my staff

members have worked alongside the Pensions Board during 'Pensions Awareness Week'. Talks have been given to various professional and representative bodies, including the IAPF, the Association of Pensions Lawyers in Ireland, the Irish Institute of Pensions Managers, the Insurance Institute of Ireland, the Institute of Certified Public Accountants, the Senior Citizens' Parliament, and SIPTU Retired Members' Section. Information desks were provided at the SIPTU Women's Forum in Tralee and the biennial delegate conference of the same union in Cork.

My investigators continued to build relationships within the pensions industry and attended a number of training courses during the year provided by the industry. I consider that attendance at these courses is very useful, both from a training and knowledge management perspective and also as a means of publicising the function of the Office.

CONTACTS WITH NATIONAL AND INTERNATIONAL ORGANISATIONS

As well as the contacts mentioned above, I have had discussions during the year with the Ombudsman, the Insurance Ombudsman of Ireland and with the Financial Services Ombudsman, whose Office has now absorbed that of the Insurance Ombudsman. As noted below, a Memorandum of Understanding has been signed between the Financial Services Ombudsman, the Financial Regulator and myself, designed to protect the interests of consumers of financial services generally. My Office has maintained contact with the Consumer Directorate of the Irish Financial Services Regulatory Authority and the Department of Social and Family Affairs. Discussions have also taken place with the Revenue Commissioners, the Pensions Board, the UK Pensions Ombudsman, the UK Pre-Retirement Association and the Pensions Management Institute. In the course of investigations my Office has also engaged with the Companies Registration Office and the Director of Corporate Enforcement. I would like to record my appreciation of the co-operation received from all of these organizations.

Contact has also been maintained with a number of Trades Unions, with the Construction Industry Monitoring Agency as well as with the Construction Federation Operatives' Pension Scheme, and with EPACE, which monitors compliance by electrical contractors with the Registered Employment Agreement.

I am a member of the British and Irish Ombudsman Association (BIOA), and members of my staff participate fully in its work, and sit on the various interest groups which deal with different aspects of an Ombudsman's work. I consider the work of this Association to be a valuable resource for the work of this Office. The main objectives of the BIOA include encouraging, developing and safeguarding the role and title of Ombudsmen; formulating and promoting standards of best practice to be met by Ombudsmen in the performance of their duties; holding meetings, conferences and seminars; publishing information and engaging in all such other activities as may improve public awareness of recognised Ombudsman schemes and encourage their efficiency and effectiveness.

MEMORANDUM OF UNDERSTANDING WITH FINANCIAL SERVICES OMBUDSMAN & FINANCIAL SERVICES REGULATOR

Discussions took place with the Financial Services Ombudsman and the Financial Services Regulator during 2005 with a view to agreeing a Memorandum of Understanding. The Memorandum, which has recently been signed, provides for exchange of information between the Offices and handling of complaints which might have implications for one or more of the Offices concerned. The purpose of this is to create an environment that is consumer-friendly to the users of financial services.

PUBLIC ACCESS AND AWARENESS

My Office makes every effort to ensure that our services are as accessible as possible. Where complainants had particular access problems to my Office during the year, we arranged to visit him or her at an alternative suitable location, including their own homes.

WEBSITE UPGRADE

During 2005, staff from the Office undertook a review of the Office website to ensure it meets the needs of our clients. Arising out of this review, it is intended to undertake a re-design of the website to enable it to deliver improved access for all users and provide an enhanced service for our clients.

RENOVATION OF OFFICE

I achieved agreement that office space that became available on the ground floor of our present location at 36 Upper Mount Street be re-developed into a public office and reception area. The Office of Public Works went to tender on this during 2005 and I expect that the refurbishment will be carried out in 2006.

TRAINING & DEVELOPMENT

The process of personal training and development continued for all staff during 2005. This involved technical training in pension related areas; instruction in the different areas of information technology; and other training courses identified as part of each individual's participation in the Performance Management Development System. The joint training programme between the Pensions Board, the Revenue Commissioners, the Department of Social and Family Affairs and this Office concluded in 2005.

STAFFING ISSUES

As mentioned previously, I finally had my full agreed complement of staff in place by September 2004. It can therefore be said that 2005 was the first year of operation of the Office with a full staff, even though I was appointed in April 2003. This agreed complement was based on initial estimates made in advance of the commencement of the Office and clearly must be subject to review after a 'settling in' period. One of the difficulties experienced during 2005 was the constraints placed on the Office by the sheer volume of investigative work and general enquiries. While this work is obviously our 'core business', other activities that need attention suffered. For example, it affected

our ability to develop more fully relations with public and private bodies involved in pensions administration; to develop performance indicators; to publish a Customer Service Charter; to conduct customer service surveys; to re-develop our website; and limited our ability to undertake necessary research. I mentioned in my 2004 Report that, until we had more experience, we would not be able to make a more realistic assessment of staffing requirements for the longer term. I consider that 2005 has provided this 'experience' and I intend to make a request for additional staffing during 2006 and am confident that the Minister will be supportive of my request.

Staff of the Office of the Pensions Ombudsman

Section 3

Caseload Summary & Statistics 2005

This year has seen a significant increase in workload over last year as can be seen by the comparisons, where appropriate, in what follows.

There were a total of 287 files brought forward from 2004 and a further 389 new complaints received during 2005 giving a total of 676 complaints. Of these, 385 complaints were closed in 2005 compared to 122 complaints closed in 2004, leaving 291 files on hand at the end of the year. (See Figure 3.4)

ANALYSIS OF CLOSED CASES

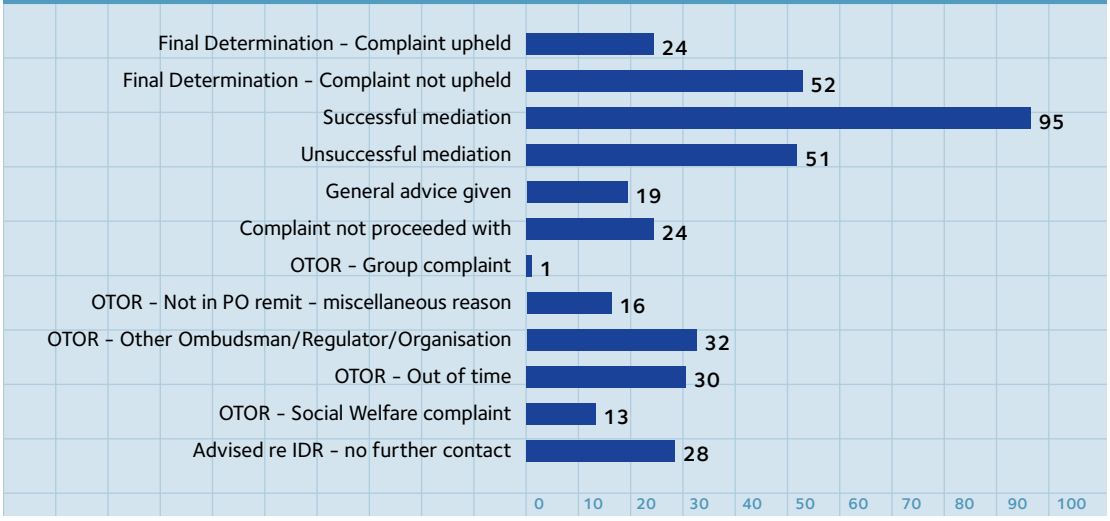
Mediated Cases

Of the 385 cases closed during 2005, 146 were settled by mediation. Of these, 95 cases, or 25% of the total number closed, were resolved to the complainant's satisfaction without recourse to the rigour of a full investigation. This is a particularly pleasing result when viewed in terms of the average overall length of time taken to conclude both types of cases from initial receipt of complaint to closure, i.e. 26 weeks to arrive at a satisfactory resolution through mediation as compared to 47 weeks to issue of a Final Determination in which the complaint is upheld. The remaining 51 (13%) cases which were resolved following mediation by my Office either did not materially alter the complainant's circumstances or did not resolve the issue in favour of the complainant.

Final Determinations

Final Determinations under Section 139 of the Pensions Act were made in 76 (20%) of closed cases which is more than three times the number of Final Determinations made in 2004. Of these, 24 complaints were upheld and 52 rejected. When it becomes apparent, in the course of examining a complaint, that it will not be possible to

Figure 3.1: File Closures by Reason in 2005



Note: IDR – Internal Disputes Resolution
OTOR – Outside Terms of Reference
Unsuccessful mediation – The original issue raised by the complainant was not resolved to his/her satisfaction
Successful mediation – The original issue raised by the complainant was satisfactorily resolved

resolve the issue through the mediation channel, the complainant is notified that a formal investigation resulting in the issue of a Final Determination is to commence. Our statistics show that the average length of time taken to process a case from initiation of a formal investigation to issue of a Final Determination was 33 weeks in 2005 compared to 25 weeks in 2004. I must stress, however, that this is just an average indication, as the length of time taken depends not only on the complexity of the case but also on the cooperation of all parties to the complaint in furnishing information requested in a timely manner, e.g. the maximum number of weeks to process a case from formal investigation to Final Determination in 2005 was 110 weeks while the minimum was three weeks.

In cases where a formal investigation is to take place I generally issue a preliminary view to all parties to the complaint prior to issuing the Final Determination. The preliminary view sets out the material facts of the case and gives an indication of the decision which will be contained in my Final Determination. The purpose of issuing a preliminary view is to give all parties to the complaint the opportunity to respond within a specified period with any additional evidence which may not have been considered during the original investigation and which I can then take into account in making my Final Determination. While this prolongs the duration of the investigation I believe it is beneficial and contributes to a fairer outcome for all concerned.

Outside Terms of Reference

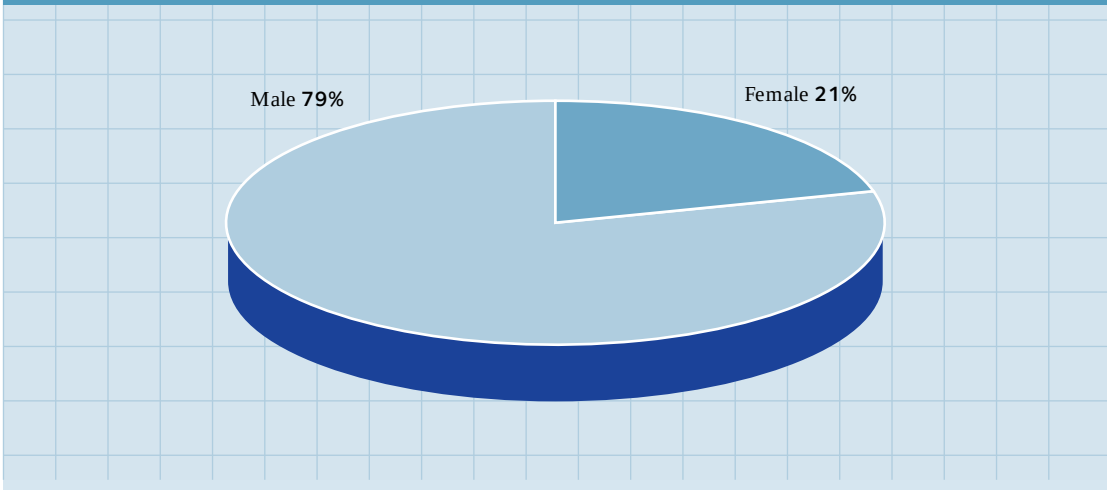
A total of 92 (24%) of closed cases were found to be outside my terms of reference for various reasons, e.g. 32 cases came within the remit of another Ombudsman or Regulator while 30 cases were found to be outside the time limits within which complaints can be investigated by my Office.

Miscellaneous Closure Reasons

My Office cannot normally investigate a complaint or dispute until the matter has been submitted to an Internal Disputes Resolution (IDR) procedure. Twenty-eight (7%) cases were closed as a result of the complaint not being proceeded with following advice to the complainant to submit to the IDR procedure.

A further 24 (6%) cases were closed as a result of the complainant not proceeding with the complaint for a variety of reasons and 19 (5%) were closed following the provision of general advice being sufficient to satisfy the complainant's query.

Figure 3.2: Complaints received from Men and Women in 2005



GENERAL STATISTICS

During 2005, 79% of complaints were brought by men as compared to 21% by women which is similar to the 2004 pattern of 78% men and 22% women. The trend in the relatively low number of complaints received from women bears out the Pensions Board's concerns regarding women and pensions as reported in their press release to mark International Women's Day in March 2006 that ".....women are particularly vulnerable in the area of pension provision. Only one third of working women outside the public service, and just 46% of the women in the Irish workforce overall, currently have pension coverage."

The breakdown of complaints received in 2005 classified by pension scheme type is almost identical to that of 2004, i.e. private occupational pension schemes accounted for 58% of the complaints received in 2005 as compared to 59% in 2004 while the figure for public pension schemes is 41% for both years. There were just two complaints received in 2005 concerning Personal Retirement Savings Accounts (PRSAs) while there were no PRSA complaints in 2004, as might be expected given that PRSAs only came into existence in 2003.

Figure 3.3: Complaints by Scheme Type in 2005

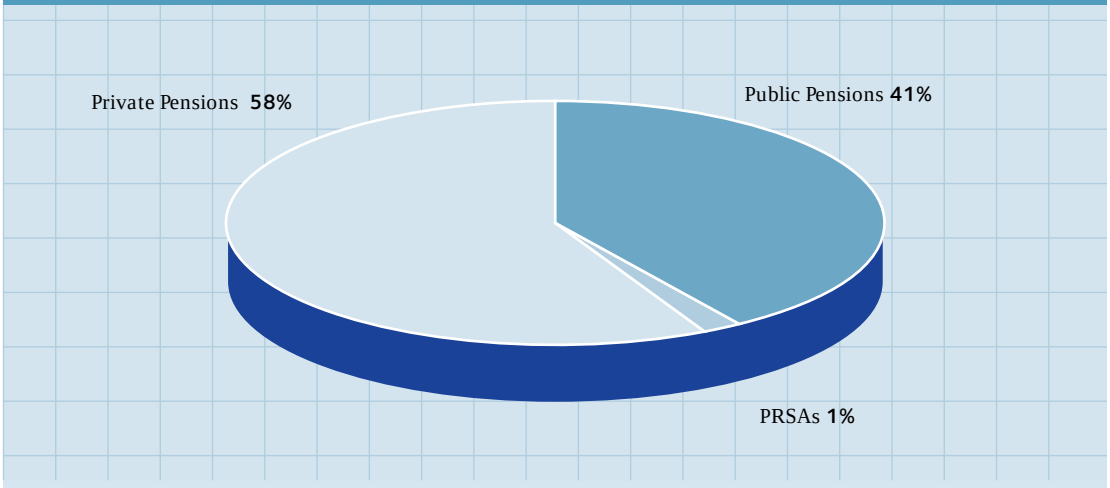
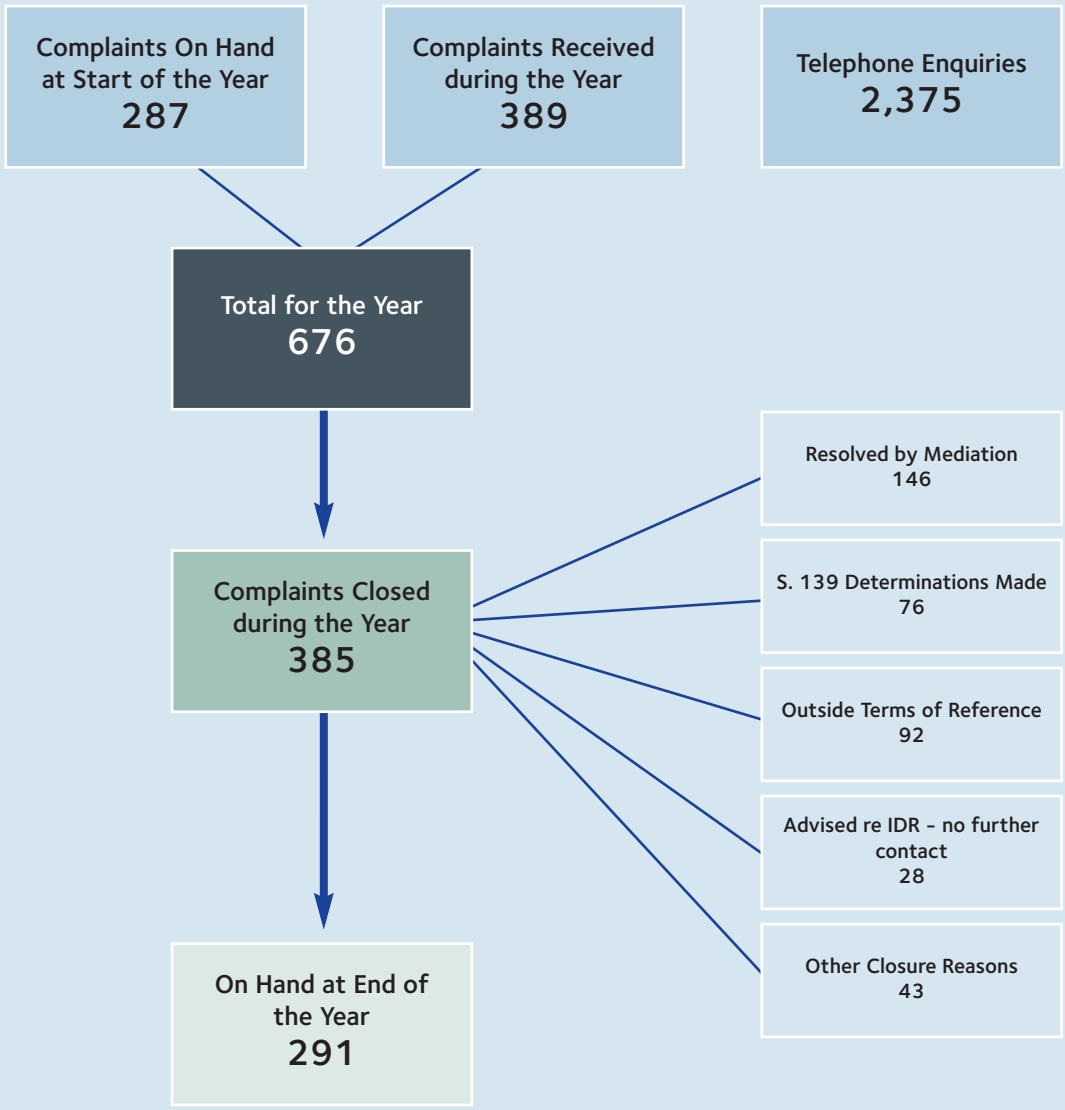


Figure 3.4 – Workflow Summary 2005



Section 4
Lessons Learned

GENERAL ISSUES

Pensions Coverage

One area of concern that has again come to my notice during the year is the whole question of poor pension coverage in the population generally. This is obviously an issue which is constantly being highlighted elsewhere and we are all too well aware of the fact that up to 900,000 people in the State will have to rely solely on the State pension when they retire. There are, however, a number of specific areas which I would like to highlight and which I have become aware of through various complaints that I have received.

On a general level I have no doubt that much of the problem has to do with the effects of public policy in the past. For a long period women were kept out of pension schemes if they got married, and indeed women in the Civil Service and elsewhere had to resign their position when they married. Unfortunately the effects of this policy are still being felt. Our attitudes toward this at the time were perhaps misguided, and as a result, women often did not see themselves as being in the pensionable sector of the workforce. Consequently, many of them opted out of pension schemes. They were given the opportunity to do so at the time. Despite the declared policy of the Government to increase pensions coverage, particularly as far as women are concerned, their requests to be allowed to join the schemes now are being denied, even for future service. It is not certain that these people are being offered PRSAs as is required by law; but, even if they were, the employer need not contribute.

Indeed there is a perception out there that this is an issue that is perhaps limited to the private sector. However, this is not so and the perceived wisdom that the public sector is well catered for is not necessarily true.

Notwithstanding the fact that the Protection of Employees (Part Time Work) Act has been in operation since December 2001, there are many hundreds of workers for whom no satisfactory arrangements are yet in place. I am aware of considerable delays in areas of the University sector. Another example is the non-teaching staff of primary schools. A pension scheme for them was introduced in 1987 and many people, particularly women, opted out and are not now allowed to opt in, even though they regret their decision.

I discovered another case where a man who worked in a semi-State body for 30 years was not entitled to membership of the pension scheme because he was employed on a temporary basis for all those years. In this case, there was no entitlement to a gratuity either. This on the face of it would appear to be a ludicrous state of affairs. However, it is an employment rather than a pensions issue, and I can do nothing about it.

Where there is no pension scheme available, the employer has a legal obligation to offer a standard PRSA. Although the Department of Finance has reminded public sector employers of their obligations in this area, there is some evidence that these obligations are not being universally honoured. In any event, even where a PRSA is being offered, there is no obligation on the employer to contribute to it, so these workers can be very badly off by comparison with their pensionable colleagues.

Overprotective Legislation

The Pensions (Amendment) Act, 2002 changed the preservation rules by providing for the compulsory preservation of benefits after two years' membership of a scheme rather than the previous five.

I have been approached by a number of workers from overseas, who were upset by the manner in which this change was introduced. Most were health service workers and, when they had taken up contracts of employment, one of the 'selling' points was that they would receive a refund of their superannuation contributions if they left after less than five years. They were given no information when the rules were changed.

To such workers these compulsory pension contributions represented savings that could be very useful on their return to their own countries. However, they see little value in small deferred pensions, payable in Euro, with the expense implied in currency conversion, to be paid many years into the future – if they survive. Moreover, Ireland does not operate double taxation agreements with many of the countries concerned.

Again this is something that I have raised with the Minister for Social and Family Affairs, as I feel that the law in this case is overprotective and not genuinely beneficial to the member. Refunds of mandatory pension contributions can be given in Australia to non-residents who are leaving that country for good. I feel it ought to be possible to take a similar pragmatic approach here.

Communications Issues

This is a matter that I raised in my last Annual Report but feel it needs to be repeated. The pensions area by definition has to be, and generally is, well regulated. Codes of practice must be followed and various standards must be met. This is as it should be - it is important that the interests of members are protected at all times. However this can, in some instances, be a double edged sword. Although Disclosure Regulations under the Pensions Act prescribe the information that must be given to scheme members and other beneficiaries in different situations, I am again struck by the poor quality and lack of clarity and precision in many communications. The problem is that a provider may be tempted to issue documentation that meets all legal and regulatory requirements – on paper – without the information being clear to the person buying the product. Again I would encourage the greater use of plain English among pension providers. I have no doubt that additional investment in effective communication would greatly reduce the number of complaints that trustees and their administrators have to deal with. It would also serve to promote member and consumer confidence in pension products.

I have also come across problems with literacy when dealing with complaints. This is a more difficult problem because even what we consider to be plain English may not be clear to people who have reading difficulties. People with hearing or sight difficulties also present a challenge to communication.

There are many organisations available to help us to meet these challenges. For instance, I have decided that all new forms, booklets and information leaflets issued by my Office will be vetted at least by the National Adult Literacy Agency.

I will not be sympathetic in cases where a communication is clearly designed first and foremost to ensure that regulatory requirements are met to the letter - i.e., to protect the provider, with no thought for whether they can be understood by the consumer.

STRUCTURAL ISSUES

Internal Disputes Resolution (IDR) Procedures

The Pensions Act and the Pensions Ombudsman Regulations require that a complaint be submitted to an Internal Disputes Resolution (IDR) procedure before I can accept it for investigation. Even where there is no prospect of an investigation taking place, I recommend the use of the IDR process, though it may be clear that the subject of a complaint is outside my jurisdiction – for example, by being out of time. The IDR process, used in the right spirit, can often resolve problems that seem intractable, even without the prospect of an investigation at the end of it.

I am, however, concerned that some complaints are being submitted for 'pensions IDR', which are in reality not pensions disputes, and which could not be resolved by the pension scheme trustees. Sometimes, disputes will arise which have their origins in purely contractual matters, outside the rules of a pension scheme, or which are essentially industrial relations, rather than pensions, issues. It can happen that a pension scheme member, faced with a problem, may have already tested the industrial relations (IR) processes available without achieving a remedy, or may lack confidence in the IR machinery. Many pensions issues are bound up with IR problems anyway, so it may be tempting to 'bundle' everything and dress it up as a pension problem, in the hope that this Office will sort it out.

Some IDR procedures incorporate a step within them which is designed to filter out cases which do not fall within my terms of reference.

On a preliminary examination of such matters it is often possible for us to see that the complaint being made is outside my remit, or that only one aspect of a complaint may bear investigation. The complainant will be appropriately advised in such cases. We will also be pleased to advise trustees if they are in doubt over whether a complaint is likely to fall within the terms of reference of the Office.

Delays in IDR

I have again come across several cases during 2005 where for one reason or another IDR determinations have not been issued within the three month time period provided for. In some instances this may have occurred because of either ignorance of the requirements of the Pensions Act, or quite simply as a result of bad organisational arrangements. However, there is no doubt in my mind that, in certain instances, the delay or failure to complete the IDR process was as a result of a deliberate obstruction of the process by the trustees of the scheme. The problem is, however, that under the Pensions Act at present there is no specific provision for me to deal with the failure to issue a determination within the statutory time period. I have been in contact with the Department of Social and Family Affairs in relation to this issue and this is in the process of being remedied.

I did mention in my report for 2004 that there were particular difficulties in the Health and Education sectors with the timely completion of IDR. I am pleased to say that there has been considerable improvement in both areas, which I will continue to monitor.

In one case this year a complainant, who was a deferred beneficiary, was told – incorrectly – that she was not a member and was therefore not entitled to bring her complaint to an IDR process. In this case, the employer was the person in correspondence with the complainant. She

received notification that she did not qualify for IDR one day before the expiry of the three month time limit specified by the Pensions Act. The employer was acting upon incorrect legal advice and was promptly disabused by this Office. The IDR process went ahead eventually, but the investigation of the complaint was unnecessarily delayed.

Duties of Trustees following IDR

A number of queries arose during 2005 in relation to how trustees of schemes should operate their IDR procedures. I have previously stated that this is primarily a matter for the trustees themselves to consider. However, some questions raised particular issues which I feel might usefully be addressed in my Annual Report.

The issues were raised in the context of the Local Government Superannuation Scheme, but are applicable across all pension schemes.

The question raised with me was in the context of the trustees, having reviewed a complaint in relation to the non-inclusion of 20 hours' overtime in the calculation of final pensionable remuneration, decided that five of these hours should be considered pensionable on the basis that they met the relevant criteria. The matters that needed clarification were:

1. Should the trustees arrange a review of the complainant's pension benefits and pay any arrears due if the complainant refuses to accept the Notice of Determination from the trustees and brings a complaint to me?

2. Should the trustees arrange a review of the complainant's pension benefits and pay any arrears due if the complainant accepts the Notice of Determination from the trustees, without prejudice, but indicates to them that he will take his case for the remaining element of the overtime to me as a complaint?

3. Should the trustees arrange a review of the complainant's pension benefits and pay any arrears due if the complainant simply fails to respond to the Notice of Determination?

4. What happens if the complainant accepts the Notice of Determination from the trustees but later brings a complaint to me?

The procedures for internal resolution of disputes are set out by regulation under the Pensions Ombudsman Regulations, 2003 (S.I. 397 of 2003). I believe that article 5(3)(b)(ii)(D) is the relevant issue here. This articles provides that the Notice of Determination under the scheme's internal disputes procedure shall include a statement that the determination is not binding upon any person unless, upon or after the making of the determination, the person assents, in writing, to be bound by it. Therefore, in a situation where the complainant does not agree with the decision, the question arises as to whether the trustees should implement it especially if they are aware of a complaint being made to me.

My answer to this is that they should, especially where the decision is in any way to the benefit of the complainant. The trustees have a fiduciary duty to the member and to all the members and, if they are aware of an incorrect payment, whereby the member is receiving benefits that are less than those to which they have decided he is entitled, they must take all immediate and reasonable steps to address this, so as to limit any continuing loss to the member. This is without prejudice to any investigation and determination that I may make in relation to the complaint. Any

failure to do this could in itself be considered maladministration.

However, where the decision of the trustees is against the member (e.g. reducing benefits), the trustees should consider the position more closely. Taking the fiduciary duty of the trustees into account again, it may be in the interests of the trustees and the complainant to take immediate steps to reduce payments so that an overpayment does not continue to grow. However, there may well be situations where the trustees quite correctly decide to hold off implementing a decision until after it has been investigated by me. This must be decided on a case by case basis.

Therefore, in relation to the scenarios listed at (1), (2) and (3) above, I consider that they should immediately review the complainant's entitlements. In relation to scenario (4), I would take the view that, if the complainant agreed in writing to be bound by the Notice of Determination, he should not be bringing his complaint to me. The exception to this would be where the complainant alleges he was in some way misled or coerced into accepting it, or the determination was inherently wrong and the complainant was in an unfairly disadvantaged situation and not in a position to realise this.

Having said all that, there may be cases in which a decision made during the IDR process, which appears to confer a benefit on the complainant, actually conceals a much more complex situation. We are aware of cases where the 'headline' rate of pension should be increased, on the face of things, but where there may have been significant overpayments in the past. These cases need careful review. Unfortunately many of those involved are quite old, and time for review is short.

Civil Penalties

I am particularly pleased that the Social Welfare Reform and Pensions Act, 2006, has introduced a system whereby monetary penalties can be imposed by the Pensions Board for alleged breaches of the Act, which may avoid the need to undertake criminal prosecution in the Courts. I believe this will enable the Board to deal with technical and minor infringements and will greatly facilitate the smooth operation of the Act. I had asked in my last Annual Report that civil penalties be considered, and I thank the Minister for this valuable addition. It remains to be seen how the system works in practice.

GENERAL MATTERS ARISING FROM COMPLAINTS

Withdrawal of a Complaint

2005 saw some attempts to withdraw complaints before a determination was made. What I found was that the complainants had either received a preliminary view, which indicated that the decision might not be in their favour, or realised anyway that there was little likelihood that I would uphold their complaint. They would like to continue their battles elsewhere, but couldn't do that in the face of a binding determination. Once an investigation is begun, a determination must be made. When a person makes a complaint against another person – whether it be an employer, an administrator or a trustee - the person complained against has a right in equity to have the matter decided, for better or worse. It would be grossly unfair to respondents if complainants were allowed to withdraw a complaint, simply because they did not want a binding decision given against them.

Impartiality of the Office

One complainant (who also sought to withdraw his complaint) was quite unhappy with the fact that the staff of this Office are civil servants, who are being asked to investigate the activities of other civil servants in cases involving the public service. I had no difficulty in repudiating any allegations of partiality on the part of the staff of this Office, in whose integrity I have the utmost confidence.

Unsolicited Representations

On the subject of impartiality, I have received, over the course of this year, a number of letters making representation on behalf of complainants. In some cases, these came from public representatives and I fully understand the work which they do on behalf of their constituents. In many cases, the intervention of public representatives has been helpful, in the sense of ensuring that people put a coherent case to me when initiating their complaints.

What has not been helpful, however, is the receipt of unsolicited representations from third parties with no discernible interest in the matter of a complaint, urging me to find in favour of the complainant on various grounds. Such representations are always ignored.

Terms of Reference

A number of complainants during the year have complained about what they perceive as the restricted powers of my Office. Specifically they were unhappy about the fact that, under Section 139 of the Pensions Act, I am not allowed to order a change to the rules of a scheme or the conditions of a PRSA contract; nor am I allowed to direct the substitution of my decision for that of the trustees of a scheme in relation to the exercise of discretionary power under the rules of the scheme.

The Oireachtas chose to place some restrictions on the scope of my decision-making powers. The restriction relating to trustee discretions is not unusual. Even the High Court would not take on the exercise of a power which properly belongs to a trustee. It is also logical that I should not interfere with scheme rules, because it is not my place to alter the intentions of the sponsoring employer who made the rules in the first place. I am bound to examine complaints in the light of the rules of the scheme and to satisfy myself as to whether these rules have been complied with or not.

In terms of examining procedures, I can and do address these and there are numerous instances of procedures being changed at the behest of this Office where the operation of such procedures brought about inequity or injustice. I have also brought matters to the attention of the Minister for Social and Family Affairs and, indeed, of other Ministers, where I believed that matters of policy needed to be examined as a result of facts that had been uncovered in the course of investigations.

Constitutional Rights of a Citizen

In one particular complaint the complainant claimed that my Office could not defend the constitutional rights of a citizen, even though Article 40 of the Constitution puts an obligation on the State and its agencies to vindicate the rights of citizens and, therefore, it was incumbent on the State and its agencies, including this Office, to defend his constitutional rights.

I ruled in this particular case that the rules with which the complainant disagreed had

never been challenged in the Courts in the light of any constitutional provision and, unless and until they are, they must be presumed to be constitutional. My brief is very much limited to maladministration of pension schemes and any finding of fact or law which I might make will be restricted to this area alone.

Priorities on the Winding-Up of a Pension Scheme

Section 48 (3) of the Pensions Act contains a provision which enables trustees of a scheme in winding-up to make a transfer payment to another occupational pension scheme, without the consent of members. I believe that this section was originally intended to facilitate transfers in schemes whose rules did not contain any transfer power, and where the amendment of the rules might prove difficult in winding-up. Complaints were received in two cases where this power had been used, quite legitimately, but the members had not been told by the trustees that the power was being invoked. A great deal of bother could be avoided if trustees took the trouble to notify scheme members of actions that they are about to take, particularly when it involves a transfer to another pension scheme, in respect of which consent is not going to be sought.

A more sinister use of this sub-section emerged in the case of three identical complaints in relation to one scheme. This involved the transfer of members from a scheme in winding-up to another scheme of the same employer. Both schemes were in surplus and the eventual winding- up yielded a large refund to the sponsoring employer. It was decided not to purchase annuities for the pensioners in this case, but to transfer their liabilities into the second scheme. The assets transferred, however, would not have been sufficient to purchase annuities for the pensioners concerned. The complaint in this case was that the pensioners had lost financially and I could not uphold that, because no financial loss had yet been incurred. In fact, because they rank first in order of priorities if the second scheme was wound up, the pensioners are more secure than the active members and deferred beneficiaries of the second scheme. I consider that this is a use of the transfer power which was never intended. Although the complainants in question were not disadvantaged, the members of the receiving scheme are now in a less secure position than they were before the transfers. In the instant case, the waters were further muddied by the fact that a single individual acted as actuary to the scheme, consultant to the sponsoring employer and representative of the Corporate Trustee *in respect of both schemes* – a clear failure by the firm concerned to identify, let alone deal with, an obvious conflict of interest.

Integration Issues

In private sector schemes, supplementary pensions (see below) are not common. Where retirement takes place before State pension age, however, 'bridging' pensions – temporary pensions to cover the gap between the two ages – are reasonably widespread.

An integration issue arose in certain schemes which are, quite frankly, badly designed. We have come across cases where integration with Social Welfare pensions is done in a rather crude fashion – by deduction from pay across the board, to arrive at pensionable salary, whether or not the individual is entitled to a full State pension, or any State pension at all. These private sector schemes typically do not contain any provision for supplementary pensions to be paid if the State pension is not payable, or not payable in full. While an

employer is quite entitled, in principle, to define pensionable salary in any way it wishes, the crude design of schemes like this raises a question of possible discrimination. Clearly, such a scheme discriminates directly against anyone who will not be entitled to a full State pension at normal pension age. In practice, the majority of people who will not qualify for full State pensions tend to be women; and this raises the question of whether there is, in fact, indirect discrimination built into these schemes. I am not aware, however, that any case has been made in relation to this as yet – and equality matters are outside the remit of this Office.

The Pensions Act and Preservation

Another complaint involved a notification given to an employee that certain service, during which he was on sick leave, would not be reckoned for pension purposes. The rules of the scheme contained the power to ignore this service for pension accrual purposes. However, the power to ignore the service had not actually been exercised, nor had the member been notified that the service would not reckon. The Pensions Act requires that all service is reckonable *unless the member has been advised in writing by the trustees that it is not*. In this case, no notification was sent to the member and therefore the service had to be taken into account. This matter was dealt with as a preliminary issue and it never became a formal investigation. However, it reminded me that a great many people may not be fully aware of the requirements of the Pensions Act in relation to preservation.

Small Insured Schemes

Another phenomenon which has come to light is in the area of small, insured schemes. In some cases, insurance companies have been imposing minimum incremental premiums. This practice may well be allowed by the small print of the policy wording, which may also permit the insurance company to vary the amount of the minimum premium that may be required. This is a practice which was specifically discouraged in the case of PRSAs, where providers are not allowed to price themselves out of a market by imposing minimum premiums which are very high. In the case of two complaints received at this Office, minimum incremental premiums of €800 per annum were being demanded. The schemes in question were small insured schemes, for lower paid employees. In one case, the total employer's contribution was 10% of pay which, by the standards of many defined contributions schemes, is relatively high. A minimum incremental premium of €800, however, means that the member in this example would have to receive an increase of €8,000 in salary to justify the premium concerned.

While these products may often be labelled as 'Executive Schemes', it is a fact that they were sold across the board to employers for their staff at all levels, and they were certainly not confined to the sort of people who might be getting increases of €8,000 per annum. In both cases, following my intervention, the insurance companies concerned agreed to accept a lower incremental premium than the one they were seeking to impose, but I referred the practice in general to the Financial Regulator for examination, as I believe it is grossly unfair to employees, who have a right to expect that the premiums paid on their behalf should keep pace with changes in their salary, and to their employers, who are willing to pay the contributions they have promised.

Small Frozen Benefits and Policy Charges

Another practice which I have referred to the Financial Regulator also arises in insured schemes, where benefits are made 'paid-up' when an employee withdraws from employment. In many cases, the member who leaves service does not yet have an alternative pension scheme into which to transfer his benefit, and so they are left as frozen or deferred benefits in the scheme of his old employer. Some insurance companies charge ongoing policy fees in relation to these, often a monthly or annual deduction from the fund. I suspect that this practice is not intended to be oppressive, but arises from automated systems which have not been properly adapted to take into account the position of an employee with a small deferred benefit.

However, such charges can result in the gradual erosion of the benefit, particularly when markets are not performing well, or where the basic benefit is fairly low to start with – policy fees often tend to be flat-rate charges. Again, this practice is being examined by the Regulator.

Construction Federation Operatives Pension Scheme

I have referred to the operation of this Scheme in the 2004 Annual Report but unfortunately I feel obliged to refer to it yet again. The Construction Federation Operatives Pension Scheme (CFOPS) was set up by the Construction Industry Federation to meet the legal requirements of a Registered Employment Agreement, which in turn provides that each employer to whom the agreement applies shall become a party to a contributory scheme, approved by the Revenue Commissioners to provide pension and mortality benefits for construction industry workers. The CFOPS has been approved by the Revenue Commissioners as a bona fide pension scheme for the purposes of the Taxes Consolidation Act 1997 and is considered to be a defined benefits scheme for the purpose of the Pensions Act 1990. Towards the end of 2004 and indeed throughout 2005 I have received a steady stream of complaints regarding the operation of this scheme.

A recent report by Mercer HR Consulting for the Pensions Board on the operation of the scheme has indicated that between 50,000 and 70,000 construction workers in Ireland should be, but are not, in the CFOPS. I personally feel that the figure may be higher than that, as official employment figures for this industry may be understated. One of the major problems is the category of so-called self-employed workers. At present there are approximately 70,000 workers classified as having self-employed status by the Revenue Commissioners and who are thus not eligible for inclusion in the scheme. While such people are technically outside the scope of the PAYE system, they are not allowed to contribute to an occupational pension scheme; nor can any employer make a contribution on their behalf. Mercer identified this problem and maintained that the self-employment of many of these workers was bogus. It has been my custom to ask the Scope Section of the Department of Social and Family Affairs to determine the insurability of individuals for PRSI purposes. So far, Scope Section have determined in relation to any cases referred to them, that the individual concerned was an employee rather than self-employed.

There are obviously major difficulties in enforcing compliance with the CFOPS. I am grateful for the co-operation of the Construction Industry Monitoring Agency (CIMA) which, as part of its efforts to secure compliance, advises workers of the existence of this Office and helps them to formulate complaints. I also co-operate with the Trades Unions in the industry and with

Pensions And Conditions Electrical (EPACE), which monitors electrical contractors in relation to the scheme.

As before, the complaints lie almost exclusively against employers, i.e. failure to register with the scheme, failure to include members, failure to remit contributions on time, or at all. There is a distressingly high incidence of employers actually deducting contributions from workers' wages and not remitting them to the scheme. I have no sympathy at all for such people and will do everything in my power to ensure that they pay what is due.

It is instructive –and somewhat depressing - to note that, overall, complaints about non-remittance of employee contributions have gone up from 17 (6%) of total complaints received in 2004 to 63 (16%) in 2005. A sizeable proportion of these relate to CFOPS.

I am also concerned about firms which describe themselves as employment agencies and claim on that ground to be exempt from the Registered Employment Agreement. One firm, which happens to be a participating employer in the scheme, had evidence given to the Labour Court that it is an agency. It did not at the time have, and never had, a licence to operate as an employment agency. It is high time that the position of agencies was clarified once and for all, so that employers cannot avoid their responsibilities to workers in this way. That said, there are reputable firms which do pay contributions for hundreds of employees and they should not have to operate at a competitive disadvantage against their less scrupulous counterparts.

A disturbing trend has also emerged where workers notify my Office, either directly or through CIMA, of failure by their employers to remit contributions, but we cannot proceed with an investigation because the complainant is afraid to allow his name to be used in connection with an investigation. Unfortunately, in this particular industry, there have been instances of the withdrawal of complaints in circumstances that lead me to suspect intimidation by employers. In addition, there are allegations that a system of blacklisting complaining employees exists so that, even though no direct action is taken against them by the employer complained of, they find it impossible to get work from any employer in the area in which they live. Not surprisingly, I have no direct evidence that such practices exist, but the Construction Industry Monitoring Agency expressed no surprise at the suggestion that they might.

Income Continuance Plans

In the Digest of Cases for this year, I quote the case of a pension scheme member who was receiving income continuance benefit under a plan run in parallel to the pension scheme. In the report on that case, I strongly urged sponsoring employers and trustees to cater specifically under pension scheme rules for those on income continuance benefit, and not to rely on the *ad hoc* use of temporary absence provisions, which are sometimes vaguely worded and often discretionary, to deal with situations they were not designed to cater for.

Income continuance plans themselves are not within my remit, but the interaction of these plans with pension schemes inevitably means that they come to my notice. Under group plans which do not need Revenue approval, the employer is generally the insured person, who becomes entitled to the benefit when an employee becomes disabled, and pays this benefit on to the member as if it were pay. There is often, but not always, a provision which enables membership of the pension scheme to be continued without cost to the employer or the member. Modern insurance contracts

require the continuation of the employment contract in order for benefits to continue to be paid. However, certain older policies, under which benefits may still be in payment to some individuals, did not require this, so we are left with a rather bizarre situation. In many cases the worker was actually dismissed or made redundant, but is nevertheless, to all intents and purposes, an 'active' member of the scheme, continuing to accrue benefits within it, though not satisfying the statutory definition of 'active member' under the Pensions Act. This is completely unsatisfactory.

It is, moreover, the case that, because the employer in these plans is the beneficial owner of the policy, these arrangements are also outside the remit of the Financial Services Ombudsman, and therefore there is no redress available to anyone who feels that he has been mistreated under one of these plans. I can deal only with a pension scheme which may interact with an income continuance plan, but not with the operation of the income continuance plan itself. These plans do not fall under the supervision of the Pensions Board either, so this sector of activity in employee benefits is, in effect, unregulated.

PUBLIC SERVICE PENSIONS ISSUES

Supplementary Pensions

Another area I have come across during the year was entitlement to what is known in the public service as a Supplementary Pension. This is an additional pension payable in certain circumstances to an employee who is fully insured under the Social Welfare Acts and whose occupational pension is co-ordinated or integrated with what is now called the State pension (formerly the contributory old-age pension).

Co-ordination, or integration, is the practice followed to ensure that the occupational pension, when added to the Social Welfare pension, equals the occupational pension that would be paid to a similarly-qualified public servant paying the lower modified rate of PRSI, who is not entitled to a Social Welfare pension. There may be situations where the retired member fails, through no fault of his own, to qualify for any Social Welfare benefit (e.g. disability benefit, unemployment benefit, State pension, etc.) or qualifies for a Social Welfare benefit at less than the full personal rate of the State pension payable to a single person without dependants. In these situations, a supplementary pension may be payable to bridge the gap.

This is an important feature of most public service pension schemes but appears to be little known to many members. An example of this during the year related to an elderly widow who was in receipt of a very small integrated public service pension. When attempting to explain to her how integration works, my investigator discovered that she was only receiving a much reduced rate of contributory old-age pension. On enquiry with the administrators of the scheme, it was confirmed that a Supplementary Pension was provided for under the rules, but no one had ever informed this lady, even though she had queried her small pension with them on a number of occasions. Public service pension administrators need to ensure that scheme members paying full PRSI are aware of this very important provision.

Information

On a more general note, I commented on the 'information gap' in public service pension scheme administration in my 2004 Annual Report and endorsed the Commission on Public Service Pensions recommendation that an active policy of pension scheme communication be implemented, involving the provision of user-friendly scheme documentation, annual benefit statements and details of options available to members to improve their overall level of benefits and to plan for their retirement. While some progress is being made on this, I remain concerned at the slow pace of such reform. I am not certain that the new Disclosure Regulations, which permit public authority schemes to disseminate information by drawing attention to electronic access, is an unqualified advantage.

Transfers - Funded Schemes

In the Public Transfer Networks, there are generally several options available in cases where an employee wishes to transfer his service from one participating employer to another. The option most favoured is 'knock for knock', where no money changes hands between the schemes, but the receiving scheme accepts the liability for the previous service. This generally works well in large, *unfunded* public service schemes. The other options available are transfer payments, or ongoing payments after the retirement of the employee concerned.

In all cases, however, it is up to the participating employers to agree, on a bilateral basis, which of the available options will apply to transfers between any two organisations. In one particular instance, there are two semi-state bodies, each with a funded scheme. An employee wishes to transfer his service but is unable to do so, because the first employer has a 'knock for knock' philosophy. The second employer, although a semi-state body, does not enjoy any protection for its funded pension scheme from the State and is therefore unwilling to accept the liability for the transfer of service unless it receives a transfer value payment. In my view, there should not be any suggestion of 'knock for knock' between funded schemes. To the extent that these schemes have been exempted from the provisions of Part III of the Pensions Act (i.e. Preservation and Transfer), I would question whether they should be so exempt, given that they do not fulfil the basic criterion for exemption – that what they offer is at least as good as the provisions contained in the Pensions Act. In schemes that are subject to Part III, a member has a right to require a transfer value to be paid on to another scheme, whose trustees may not refuse it (although they may decide what credit it earns in their scheme).

Pension Abatement

It was brought to my attention during 2005 that a Government Department had issued a revised letter to organisations and agencies under its aegis regarding the method of applying abatement provisions. Abatement of pension is intended to ensure that the total income, from salary and pension, of a pensioner who becomes re-employed in the sector from which he retired, does not exceed the income he would have had if he had not retired. Traditionally, the extent of abatement depends on the period of employment and the amount of work performed in that period. The nature of the complaints brought to my attention related to a change to this traditional approach by insisting that abatement be applied on an hourly basis in all cases. This had the effect of ensuring that the pension would inevitably be abated regardless of the period of employment.

I raised this matter directly with the Department of Finance who confirmed to me that the Department in question had not cleared the instruction to abate on an hourly basis through them. Following some further discussion the Department concerned issued a revised circular, in effect returning to the status quo of abating in line with the public service norm, i.e., reckoning abatement over the period of employment.

As part of the discussion on abatement I raised a number of points generally with the Department of Finance. I noted that the application of abatement can prove counter-productive, in that it discourages experienced and well trained staff from returning to an employment where they are clearly needed. I also noted the anomalous position that abatement appears to only apply to re-employment in the same sector. Therefore, using the nursing example, a nurse retired from a hospital to which the Local Government Superannuation Scheme (LGSS) applies, would have her pension abated if she were to be re-employed by any hospital to which the LGSS applies, but not a hospital to which the Voluntary Health Superannuation Scheme (VHSS) applies. Yet both are public sector pension schemes. Equally, if the same nurse was to be re-employed via an agency (and the hospital or Health Board paid the agency directly) abatement of pension would not apply.

Break in Service

One interesting case I looked at early in 2005 related to a complaint that an organisation to which the Local Government Superannuation Scheme (LGSS) applies erred in placing the complainant on Class A social insurance on her appointment to a permanent and pensionable position and the effect this had on (a) her pension entitlements under the LGSS and (b) the cost to her of her liability to reckon previous temporary service.

On examination, it became apparent that this was more a question as to the proper insurability of the employment for PRSI purposes than a pensions issue *per se*. The individual in question had had a number of small 'breaks in service' during which she claimed unemployment benefit.

While an employer is defined as a 'person responsible' for the management of a pension scheme for the purposes of an investigation by me, this should only be in connection with the pension scheme itself. Complaints relating to employees' contractual rights, or their treatment under employment law or Social Welfare regulations, are matters for industrial relations remedies, through other properly constituted bodies or the Courts. Since decisions as to insurability of employment are more appropriate to the Department of Social and Family Affairs, I referred the matter to Scope Section of that Department. Scope Section is the section of the Department responsible for deciding on insurability of employment issues in accordance with the law and any decision they make is then open to appeal to the Social Welfare Appeals Office, which is an independent body. In making the referral, I asked about the definition of 'break-in-service' being used by Scope Section and whether the fact that a person simply had 'credits' on his or her social insurance record necessarily meant a break in service within the ordinary meaning of employment legislation.

The Deciding Officer in Scope Section found that the complainant did not in fact have a break in service. He explained that casual claims of unemployment benefit do not constitute a break in service under the Social Welfare (Consolidated Contributions and Insurability) Regulations, 1996, S.I. 312/96, the governing Regulations. He also noted that the original decision by the employer to place the individual on Class A social insurance was not based on a formal

decision by Scope Section, but rather as a result of a general enquiry to a Regional Office of the Department. Trustees and administrators should note that Deciding Officers from Scope Section are responsible for making statutory decisions on questions concerning the insurability of an employment based on the evidence submitted, in accordance with the law, and as provided for under Section 247(2) of the Social Welfare (Consolidation) Act, 1993.

As a result of this decision, a revised calculation of liability for pension contributions issued for the complainant which reflected the fact that she was insurable under a modified class of social insurance. This decision may well have implications for similar cases in other public service areas which have similar provisions in their pension schemes.

Administrative Circulars

I would like to say something about the legal structure (the "constitution", as it is called in the Pensions Act) of public sector pension schemes generally.

These schemes are usually authorised by statute and made by secondary legislation in the form of statutory instruments. Occasionally, older schemes may be created by statute and amending schemes are given statutory force by complying with specified conditions. With the notable exception of the Local Government Superannuation Scheme, however, it is extremely rare to see public sector schemes in general amended by legislation. Usually, change is effected by extra-statutory devices in the form of administrative circulars, while the making of new statutory instruments to give formal effect to change may be indefinitely delayed.

Much has been written about the place of these circulars in the administrative machinery, their effects, their advantages and the pitfalls attending them. From a strictly legal standpoint they are hard to justify, as they seem to usurp the powers of the legislature where they purport to amend documents created by a statutory process. On a practical level, they are useful, in enabling administrators to give effect to agreed changes in policy without having immediately to engage in the tortuous process of revising – in effect, completely replacing – existing statutory instruments.

Not all circulars are amending documents. Some are merely explanatory. Some are prescriptive, seeking to direct or shape the way in which powers – often technically discretionary – will be used in practice. Some exhibit all three characteristics.

I have a problem with the widespread use of circulars, particularly as they affect scheme amendments. In many cases, the existence of a circular seems to be regarded as a substitute for amending the rules of a scheme. We are everywhere reminded that the contents of Superannuation Handbooks etc. cannot override scheme rules or regulations - but in many cases these have not been brought up to date, possibly many years after the changes they are supposed to document have been put into force. In effect, the temporary nature of such circulars seems to have been forgotten, and they are now substitutes for revised regulations. This brings anomalies, in that we sometimes find that, because the detailed amending regulations have not been made, the formal rules of a scheme provide no guidance as to what should happen in particular circumstances, and general announcements made to members have not covered the problem in question.

In certain cases, where there are funded pension schemes in the public service, there exists also a trust deed and rules, as well as a statutory instrument, or 'regulations' for a scheme. In principle, the deed and rules reflect exactly what is in the regulations but, if the latter are not updated, the former cannot be updated either, even though the making of an amending deed is a straightforward process. I believe that it should be possible to replace the cumbersome system of statutory instruments by a simpler process which would make it possible to amend the rules of a scheme without unnecessary delay.

I am most unhappy about the use of circulars to limit the effect of discretionary powers, particularly if they purport to do so on a 'blanket' basis. In principle, attempts to fetter the effects of discretionary powers in anticipation of their use cannot be justified. For example, in the case of a discretionary power to modify the effects of abatement of pension in certain circumstances, it was clearly the original intention of the Oireachtas that such powers should be used on a case-by-case basis, taking into account the particular circumstances of each, to facilitate the better management of the service. A circular advising that the power should be used only in relation to certain jobs and/or grades is not just ill-advised – it is in my mind *ultra vires* and therefore null and void.

I would recommend the utmost caution in the drafting of circulars generally, and I am certain that it is dangerous to rely on circulars as a substitute of indefinite duration for amending the rules of a scheme.

Section 5
Conclusion

The content of this report is a combination of good news and bad news. The fact that the number of complaints to this Office is steadily increasing is a mixture of both – good, that more people are availing of the service; bad, that there is more to complain about; good, because so much is successfully mediated; bad, because it's taking longer to deal with the complaints we receive.

This is, in fact, one of the big worries. Not only is it taking longer to clear complaint cases, but the job of simply running the Office is also suffering. I have mentioned various plans that we have in mind – a Customer Charter, a revamped website and a new complaints tracking system, among other things. All of these take time to plan, to draft, to put out to tender where necessary, and to implement – time that, at present, we simply haven't got.

Because there are so few of us, we have to try to balance the activities involved in running the Office itself, and of fielding the numerous enquiries, with the investigation and determination of complaints.

The biggest problem continues to be the time taken to clear complaint cases. This is not just a problem for us – it affects complainants, who must wait for longer for the outcome of their cases to become clear. It affects respondents, for the same reason. But critically, it could increase the cost of putting things right. Justice delayed may well be justice made more expensive.

I will not accept a lower standard of service. Some of our determinations are very detailed. In a complex case, in fairness to all sides, this is as it should be. I believe that everyone, complainant and respondent, is entitled to know exactly why a case is decided in a particular way. I also believe that detailed reports are invaluable in the event of an appeal to the High Court.

If that standard is to be maintained, then the answer is clear. We need to increase resources, and quickly. I will shortly put forward a detailed proposal for consideration. I hope that, for the sake of a service which has achieved a great deal, and can achieve much more, that proposal will be treated with the seriousness it deserves.

Section 6
Financial Accounts

The Exchequer through the Department of Social and Family Affairs funds the Office of the Pensions Ombudsman. The Office acknowledges the ongoing support of the Department of Social and Family Affairs in relation to its Accounts and Payroll obligations.

ANNUAL ACCOUNTS FOR 2004

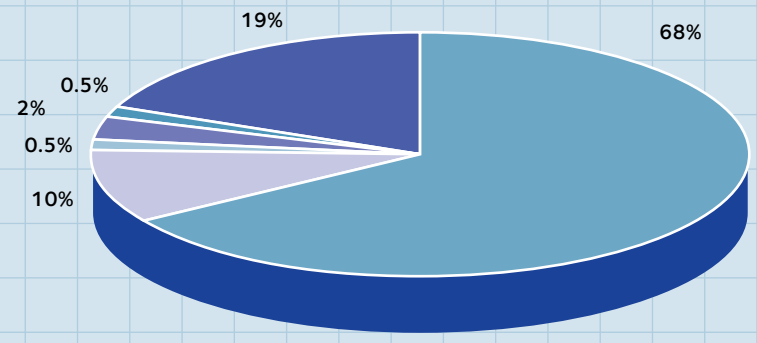
The most recent audited accounts are for the financial year 2004 and these are set out in Appendix 6 to this report.

ANNUAL ACCOUNTS FOR 2005

The financial statements for 2005 are subject to audit by the Comptroller and Auditor General and after audit will be presented to the Minister for Social and Family Affairs for presentation to the Oireachtas. Pending audit by the Comptroller and Auditor General the provisional costs of running the Office in 2005 are as set out in Table 6.1.

Table 6.1 - Costs of Running the Office in 2005

	2005 €
Staff Costs	502,541
Incidental Expenses	70,902
Postage/Telecommunications	1,306
Printing/Stationery	14,469
IT/Office Equipment	939
Office Premises Expenses	143,248
Total Running Costs	**733,405**



Appendix 1
Staffing 2005

Paul Kenny
Pensions Ombudsman

Kevin Lonergan
Head of Investigations

Gerard Hughes
Investigator

Joan Bray
Investigator

Caitriona Collins
Investigator

Jean O'Toole
Office Manager

Martina Brennan
Clerical Officer

Michelle O'Keeffe
Clerical Officer

Appendix 2

Breakdown of Complaints by County 2004 & 2005

LOCATION	2004	2005
Carlow	5	3
Cavan	0	2
Clare	5	6
Cork	39	53
Donegal	7	5
Dublin	107	130
Galway	11	22
Kerry	5	13
Kildare	11	18
Kilkenny	6	4
Laois	2	6
Leitrim	3	2
Limerick	11	21
Longford	0	1
Louth	3	7
Mayo	8	10
Meath	11	18

LOCATION	2004	2005
Monaghan	2	4
Offaly	5	1
Roscommon	1	1
Sligo	3	11
Tipperary	14	7
Waterford	7	8
Westmeath	1	7
Wexford	7	10
Wicklow	12	10
Australia	0	1
New Zealand	1	0
Spain	1	0
United Kingdom	5	7
United States	2	1
Address not known	2	0
Overall Total	**297**	**389**

Appendix 3

Nature of Complaints 2004 & 2005

Nature of Complaint 2004	Total	
OTOR	53	18%
Post-retirement increases	50	17%
Failure of scheme to respond	28	10%
Membership/entry conditions	20	7%
Remittance of employee contributions	17	6%
Calculation of benefits	16	5%
Disclosure of information	14	5%
Incorrect/late/no payment	14	5%
Transfers	11	4%
Additional voluntary contributions	10	3%
Calculation of years of service	8	3%
Winding-up	8	3%
Early retirement	7	2%
Spouses' and dependants' benefits	7	2%
Preservation of benefits	5	2%
Contribution refunds	4	1%
Ill health	4	1%
Incorrect info resulting in financial loss	4	1%
Mis-selling	4	1%
Payment of employer contributions	4	1%
Use of surplus	3	1%
General enquiry	2	1%
Commutation of pension	2	1%
Defined Benefit V Defined Contribution	1	0%
Equal Treatment Issue	1	0%
Total	**297**	**100%**

Nature of Complaint 2005	Total	
OTOR	65	17%
Remittance of employee contributions	63	16%
General enquiry	31	8%
Membership/entry conditions	30	8%
Post-retirement increases	26	7%
Calculation of benefits	25	6%
Failure of scheme to respond	23	6%
Incorrect info resulting in financial loss	18	4%
Transfers	18	4%
Incorrect/late/no payment	14	4%
Disclosure of information	11	3%
Calculation of years of service	9	2%
Spouses' and dependants' benefits	9	2%
Early retirement	7	2%
Additional voluntary contributions	6	2%
Ill health	6	2%
Preservation of benefits	6	2%
Augmentation/enhancement of benefits	5	1%
Payment of employer contributions	5	1%
Winding-up	4	1%
Contribution refunds	3	1%
Defined Benefit V Defined Contribution	3	1%
Equal Treatment Issue	1	0%
Mis-selling	1	0%
Total	**389**	**100%**

Appendix 4

Case Flow Summary and Analysis of File Closures for 2005

Case Flow Summary	2005
On Hand at Start of the Year	287
Received during the Year	389
Total for Year	**676**
Closed during the Year	385
On Hand at End of the Year	**291**

Summary of File Closures

Number of Files Closed	385
Average Weeks to Closure	32.31
Longest Weeks to Closure	140.71
Shortest Weeks to Closure	0.00

Closures by Decision Reason	Number	% of Total
Successful mediation	95	25%
Final Determination – Complaint not upheld	52	14%
Unsuccessful mediation	51	14%
OTOR - Other Ombudsman/Regulator/Organisation	32	8%
OTOR - Out of time	30	8%
Advised re IDR - no further contact	28	7%
Complaint not proceeded with	24	6%
Final Determination - Complaint upheld	24	6%
General advice given	19	5%
OTOR - Not in PO remit - miscellaneous reason	16	4%
OTOR - Social Welfare complaint	13	3%
OTOR - Group complaint	1	0%
Total	***385***	***100%***

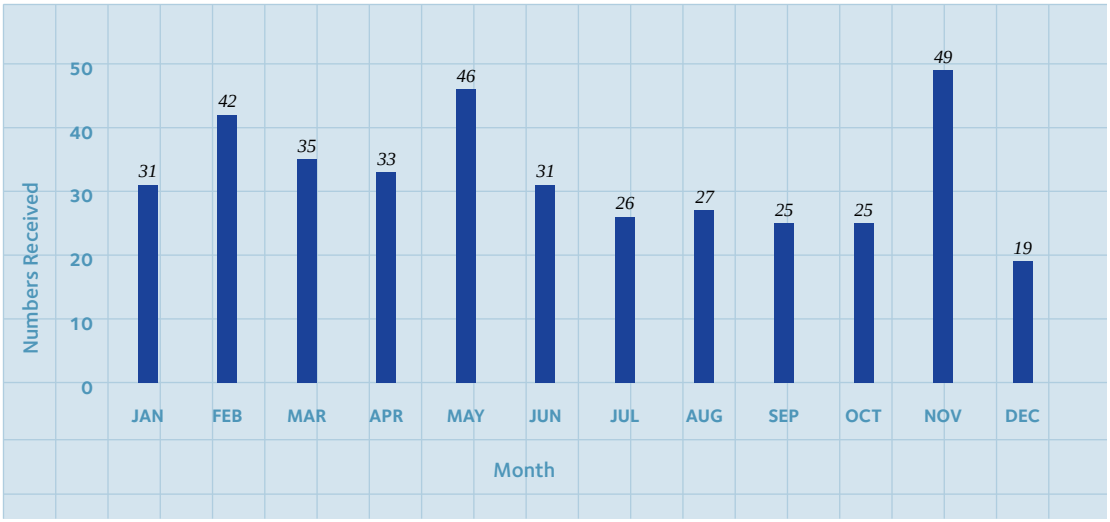
Number of Weeks to Closure

Less than 5 weeks	89	23%
5 – 10 weeks	32	8%
10 – 15 weeks	37	10%
15 – 20 weeks	22	6%
20 – 25 weeks	24	6%
25 – 30 weeks	17	4%
30 – 35 weeks	18	5%
35 – 40 weeks	12	3%
40 – 45 weeks	10	3%
45 – 50 weeks	14	4%
Greater than 50 weeks	110	28%
Total	***385***	***100%***

Appendix 5

Number of Complaints Received by Month during 2005

Month	2005	% of Total
January	31	8%
February	42	11%
March	35	9%
April	33	8%
May	46	12%
June	31	8%
July	26	7%
August	27	7%
September	25	6%
October	25	6%
November	49	13%
December	19	5%
Total	**389**	**100%**



Appendix 6

Financial Statements for year ended 31 December 2004

REPORT OF THE COMPTROLLER AND AUDITOR GENERAL FOR PRESENTATION TO THE HOUSES OF THE OIREACHTAS

I have audited the financial statements on pages 42 to 46 under Section 143(2) of the Pensions Act, 1990 as amended.

RESPECTIVE RESPONSIBILITIES OF THE PENSIONS OMBUDSMAN AND THE COMPTROLLER AND AUDITOR GENERAL

The Pensions Ombudsman is responsible under Section 143 of the Pensions Act, 1990 as amended for the preparation of the financial statements of the Office of the Pensions Ombudsman. It is my responsibility, based on my audit, to form an independent opinion on the financial statements presented to me and to report on them.

I review whether the statement on the system of internal financial control on page 41 reflects the Ombudsman's compliance with applicable guidance on corporate governance and report any material instance where the Ombudsman does not do so, or if the statement is misleading or inconsistent with other information of which I am aware from my audit of the financial statements.

BASIS OF AUDIT OPINION

In the exercise of my function as Comptroller and Auditor General, I conducted my audit of the financial statements in accordance with auditing standards issued by the Auditing Practices Board and by reference to the special considerations which attach to State bodies in relation to their management and operation.

An audit includes examination, on a test basis, of evidence relevant to the amounts and disclosures in the financial statements. It also includes an assessment of the significant estimates and judgments made in the preparation of the financial statements, and of whether the accounting policies are appropriate to the circumstances of the Office, consistently applied and adequately disclosed.

I planned and performed my audit so as to obtain all the information and explanations that I considered necessary to provide me with sufficient evidence to give reasonable assurance that the financial statements are free from material misstatement whether caused by fraud or other irregularity or error. In forming my opinion I also evaluated the overall adequacy of the presentation of information in the financial statements.

OPINION

In my opinion, proper books of account and records have been kept by the Office of the Ombudsman, and the financial statements, which are in agreement with them, give a true and fair view of the state of affairs of the Office of the Pensions Ombudsman at 31 December 2004 and of its income and expenditure for the year then ended.

John Purcell
Comptroller and Auditor General

30 December 2005

Statement on Internal Financial Control

RESPONSIBILITY FOR THE SYSTEM OF INTERNAL FINANCIAL CONTROL

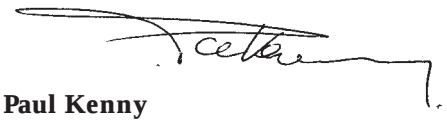
The Office of the Pensions Ombudsman is a small Office in one unit. There is a total staff of 8, including the Ombudsman, a Head of Investigations, three investigators, an office manager and two further officials. The responsibility for ensuring that an effective system of Internal Controls is maintained and operated falls to myself, as Ombudsman.

The system can only provide reasonable and not absolute assurance that assets are safeguarded, transactions authorised and properly recorded, and that material errors or irregularities are either prevented or would be detected in a timely period.

The staff of this Office and I have taken steps to ensure that there is an effective system of financial control in place, by implementing a system of internal control based on regular information on expenditure being supplied to management, administrative procedures including segregation of duties, and a system of delegation of responsibility. This includes the following procedures:

- An annual estimate of financial requirements is provided to our parent Department, the Department of Social and Family Affairs.
- A twice yearly report is provided to the Department which compares estimated and actual expenditure.
- All expenditure by this Office is recorded on the Department's general ledger accounting system. A monthly expenditure report is prepared by the Department's Accounts branch. This is then checked by the office manager against the records held in the Office.
- The office manager prepares a monthly statement of expenditure which compares estimated and actual expenditure. This is circulated to all members of staff and is reviewed by myself.
- A segregation of duties exists between the preparation, authorisation and execution of payments.
- An internal audit function will be provided by the Department of Social and Family Affairs.

I confirm that I reviewed the Office's system of internal financial control during the year 2004.



Paul Kenny
Pensions Ombudsman

22 December, 2005.

Statement of Accounting Policies

1. BASIS OF PREPARATION

The financial statements are prepared on an accruals basis, except as outlined below, in accordance with generally accepted accounting principles under the historic cost convention and comply with applicable financial reporting standards and with the requirements of Section 143 of the Pensions Act 1990 (inserted by Section 5 of the Pensions (Amendment) Act, 2002).

2. OIREACHTAS GRANTS

Oireachtas Grant represents the total of payments made by the Department of Social and Family Affairs on behalf of the Office in the year of account.

3. PENSIONS

The employees of the Pensions Ombudsman, being Civil Servants, are covered by Civil Service pension arrangements with the exception of the Pensions Ombudsman who is appointed by the Minister for Social and Family Affairs. The pension entitlements of the Pensions Ombudsman have not yet been finalised.

4. TANGIBLE FIXED ASSETS

Tangible Fixed Assets are stated at cost or valuation less accumulated depreciation. Depreciation is provided on a straight line basis at rates which are estimated to reduce the assets to realisable values by the end of their expected useful lives as follows:

IT and Office Equipment	20% Straight Line
Furniture and Fittings	10% Straight Line

5. CAPITAL ACCOUNT

The Capital Account balance represents the unamortised value of income applied for capital expenditure.

Income and Expenditure Account

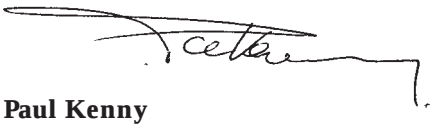
FOR THE YEAR ENDING 31 DECEMBER 2004

	NOTES	2004 €	2003* €
Income			
Oireachtas Grant	1	500,893	341,582
Transfer (to)/from Capital Account	5	4,578	(116,112)
Total Income		505,471	225,470
Expenditure			
Staff Costs	2	379,547	129,074
Administration	3	105,858	78,190
Depreciation	4	20,368	18,206
Audit Fee		3,000	-
Loss on Disposal of Fixed Assets		1,178	-
Total Expenditure		509,951	225,470
Excess of Expenditure over Income		4,480	-

* *28 April to 31 December 2003*

The Office of the Pensions Ombudsman had no gains or losses in the financial year other than dealt with in the Income and Expenditure Account.

The Statement of Accounting Policies and Notes 1 to 6 form part of these financial statements.



Paul Kenny
Pensions Ombudsman

22 December, 2005.

Balance Sheet

AS AT 31 DECEMBER 2004

	Note		2004 €		2003 €
Fixed Assets					
Tangible Fixed Assets	4		111,534		116,112
Current Assets					
Debtors and Prepayments		2,316			
Cash on Hands		11		100	
			2,327		
Current Liabilities					
Creditors & Accruals		(6,807)		(100)	
			(6,807)		-
Net Assets			107,054		116,112
Represented By					
Excess of Expenditure over Income			(4,480)		-
Capital Account	5		111,534		116,112
			107,054		116,112

The Statement of Accounting Policies and Notes 1 to 6 form part of these financial statements.

Paul Kenny
Pensions Ombudsman

22 December, 2005.

Notes to the Financial Statements

1. OIREACHTAS GRANT

Funding for the Office of the Pensions Ombudsman is provided by the Department of Social and Family Affairs which makes all payments on behalf of the Office. The total income of the Office matches the sum charged to the Appropriation Account of the Social and Family Affairs Vote – €500,893 in 2004.

2. STAFF COSTS

The Staff Costs of the Office of the Pensions Ombudsman comprise

	2004 €	**2003** €
Wages and Salaries	371,147	127,985
Travel & Subsistence	8,400	1,089
	379,547	129,074

The number of staff employed by the Office in 2004 was 8, including the Ombudsman.

3. ADMINISTRATION COSTS

The Administrative Costs of the Office of the Pensions Ombudsman were

	2004 €	**2003** €
Incidental Expenses	57,422	20,598
Postage & Telecommunications	2,923	475
Printing/Stationery	26,428	8,146
IT/Office Machinery (Non-Asset)	1,409	1,273
Maintenance, Furniture & Fittings (Non-Asset)	17,676	47,698
	105,858	78,190

NOTES TO THE FINANCIAL STATEMENTS

4. FIXED ASSETS

	IT Hardware	Furniture & Fittings	Total
	€	€	€
Assets at Cost			
Balance as at 1 January 2004	47,735	86,583	134,318
Additions	7,594	9,374	16,968
Disposals	(1,473)	-	(1,473)
Balance as at 31 December 2004	53,856	95,957	149,813
Depreciation Charge			
Balance as at 1 January 2004	(9,547)	(8,659)	(18,206)
Charge for the Year	(10,772)	(9,596)	(20,368)
Disposals	295	-	295
Balance as at 31 December 2004	(20,024)	(18,255)	(38,279)
Net Book Value			
Balance as at 1 January 2004	38,188	77,924	116,112
Movement for the Year	(4,356)	(222)	(4,578)
Balance as at 31 December 2004	33,832	77,702	111,534

5. CAPITAL ACCOUNT

	€	€
Balance as at 1 January 2004		116,112
Profit/(Loss) on Disposal of Fixed Assets 2004	(1,178)	
Purchase of Fixed Assets	16,968	
Amortisation in line with Asset Depreciation	(20,368)	
Transfer to Income and Expenditure Account		(4,578)
Balance as at the 31 December 2004		111,534

6. PREMISES

The accommodation occupied by the Office of The Pensions Ombudsman at 36 Upper Mount Street, Dublin 2 is leased and paid for by the Office of Public Works. There is no charge to the Office of the Pensions Ombudsman in respect of accommodation. Expenditure on premises incurred by the Office of Public Works on behalf of the Pensions Ombudsman amounted to €172,500.

Appendix 7
Governing Legislation

Pensions Act, 1990

Pensions (Amendment) Act, 2002

Social Welfare (Miscellaneous Provisions) Act, 2003

Statutory Instrument No. 119 of 2003

Statutory Instrument No. 397 of 2003

Statutory Instrument No. 398 of 2003

Statutory Instrument No. 399 of 2003

Public Service Superannuation (Miscellaneous Provisions) Act, 2004

Social Welfare (Miscellaneous Provisions) Act, 2004

Social Welfare Law Reform and Pensions Act, 2006

Appendix 8
Publications of the Office

- What can the Pensions Ombudsman do for you?
- Disputes Resolution Procedures – Guidance Notes for Trustees and Administrators
- Instructions and Guidance for Respondents
- Statement of Strategy 2004 – 2006
- Understanding Pensions – The Friendly Guide to Pensions[1]

All publications are available free of charge on request to the Office

1 *Understanding Pensions* was written by Paul Kenny in a private capacity and publication was sponsored in 2004 by the Department of Social and Family Affairs. Copyright is by the Retirement Planning Council of Ireland and the Irish Association of Pensions Funds.