

Special Report by the Ombudsman

# **LOST AT SEA SCHEME**

December 2009



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## This Report

This Report describes one family's (the Byrnes') unsuccessful attempt for assistance under the Lost at Sea Scheme. This once-off, time-bound, non-statutory scheme was established in 2001 to assist those boat owners with a family tradition of sea-fishing by providing replacement capacity in respect of fishing boats that had sunk in the period 1980 to 1989.

A number of fishermen had lobbied for a scheme following the introduction in 1990 of a new regulatory system for the Irish Sea Fishing Fleet which effectively limited the overall fleet capacity. This meant that "replacement capacity", i.e., tonnage and kilowatts was now required for sea fishing boat owners who wished to continue to fish, fish in a new or larger boat or to commence to fish. It also meant that to get new capacity a boat owner had to "take out" old capacity. The new regime caused difficulties for some former boat owners who believed the new system to be unfair and who claimed they were unable, because of their particular circumstances, to purchase replacement capacity.

The Lost at Sea Scheme was designed to address the needs of those boat owners who had lost their boats at sea in the period 1980 to 1989 and who effectively, but for their misfortune, would have had a boat on which replacement capacity would have been assessed under the new regulatory system at the time of its introduction. Successful applicants under the Scheme would be granted capacity in their own right which would have enabled them to carry on a tradition of fishing. The amount of capacity granted to a successful applicant related to the size of the original vessel which had been lost at sea and to the proportion of the applicant's ownership of the vessel. The Scheme did not provide financial support to successful applicants for the acquisition of a replacement fishing vessel itself and the replacement capacity, i.e., gross tonnage and engine power granted under the Scheme had to be used by the replacement fishing vessel. It could not be sold on or otherwise traded or realised as a financial asset in the tonnage market.

In all, the Ombudsman received six complaints from persons claiming that they were unfairly denied benefit under the Scheme. Five were not upheld, the sixth, which came from the Byrne family, was upheld.

Francis Byrne was the owner and skipper of a fishing boat, the MFV Skifjord which tragically sank off North West Donegal in October 1981. Francis Byrne lost his life along with his 16 year old son Jimmy and three other crew members. Francis Byrne's widow was left with a young family of five boys and three girls.

Following rejection of their application by the then Department of Communications, Marine and Natural Resources, Mr Danny Byrne, acting on behalf of his mother, complained to the Ombudsman.

The Report describes the Ombudsman's investigation. It traces the development and implementation of the Lost at Sea Scheme and describes in some detail the role of the then Minister and his officials in that process. The Report concludes that the design of the Scheme and the manner in which it was advertised were contrary to fair and sound administration and that these shortcomings were factors in the Byrne family not qualifying for assistance under the Scheme.

By way of remedy, the Ombudsman recommended that financial compensation be paid to the Byrne family but the Department of Agriculture, Fisheries and Food, which has taken on responsibility for these matters, refused to accept the recommendation.

While the Department is free in law to reject the Ombudsman's recommendations, this is only the second time in the twenty-five year history of the Office that this has happened. The first occasion was in 2002 in a case involving the Revenue Commissioners, which, with the assistance of the Oireachtas, was ultimately resolved to the Ombudsman's satisfaction.

When the Ombudsman considers that a public body's response to a recommendation is unsatisfactory, her only recourse is to make a special report to the Oireachtas as she is empowered to do under the Ombudsman Act, 1980.

Part One of this Report describes the reasons why the Ombudsman has decided to make a special report in this case. Part Two contains her Report of her investigation of the complaint made by Mr Danny Byrne.



Part One

**SPECIAL REPORT**

to each House of the Oireachtas -  
the reasons why.

## **Special Report to each House of the Oireachtas - the reasons why.**

I hereby submit a special report to each House of the Oireachtas under Section 6(5) and 6(7) of the Ombudsman Act, 1980.

This is only the second special report presented to Dáil and Seanad Éireann following a rejection by a public body of a recommendation by the Ombudsman. The Oireachtas appointed me to hold public bodies to account and to ensure fair play in their dealings with the public. Following my investigation in this case, I regret to say that the Department of Agriculture, Fisheries and Food has failed to meet the standards required by fair or sound administration in their dealings with the family covered by this report.

This investigation arose from a complaint made to my Office by Mr Danny Byrne on behalf of his family. Danny Byrne's father, Francis, was the owner and skipper of a fishing boat, the *MFV Skiffjord*, which tragically sank in a storm off North West Donegal in October 1981. Francis Byrne lost his life along with his 16 year old son Jimmy and three other crew members. Francis Byrne's widow was left with a young family of five boys and three girls.

In June 2001, a special scheme called the Lost at Sea Scheme was launched by the then Department of Communications, Marine and Natural Resources, the purpose of which was to grant replacement capacity to qualifying applicants in respect fishing boats lost at sea in the period 1980 to 1989. The granting of such capacity enabled the successful applicant to return to fishing in his/her own right. The Byrne family's application was rejected by the Department and, following my investigation, I found that the design of the Scheme and the manner in which it was advertised were contrary to fair and sound administration. I concluded that these shortcomings were factors in the Byrne family not qualifying for assistance under the Scheme and I recommended that they be granted a remedy for the adverse effect they had suffered as a result of these shortcomings.

In my investigation report (see Part Two), which I issued in November 2008 to the Department of Agriculture, Fisheries and Food (which had taken over responsibility for the functional area from the Department of Communications, Marine and Natural Resources) and which I copied to the then Minister for the Marine and Natural Resources, Frank Fahey TD, I recognised that it would be inappropriate to attempt to apply the terms of the Scheme by way of a remedy because the Scheme itself had long since expired and because of subsequent developments in relation to Ireland's sea-fishing



capacity. Accordingly, I recommended that financial compensation should be paid to the Byrne family. I asked the Department to calculate the appropriate figure based on the approach set out in the 2008 Decommissioning Scheme for Fishing Boats and to submit it to my Office.

On 11 February 2009 the Department submitted a calculation to my Office in the sum of €245,570 (see Appendix A). I considered the amount to be reasonable and the method by which it was calculated to be fair and by letter of 13 March 2009 I recommended that the Department make the payment to the Byrne family (see Appendix B). To put the recommended compensation in context, I was aware that under the Decommissioning Scheme a total amount of €41.1 million was paid to 46 successful applicants which yielded an average payment of over €893,000 per applicant. In addition, that Scheme provided for some tax concessions to successful applicants.

On 23 April 2009 the Department responded to my recommendation and indicated that financial redress was not warranted given the circumstances of the case. Neither did it accept that the method of calculating the compensation figure was appropriate. The then Minister, Frank Fahey TD also objected to the payment of financial compensation. The Department claimed that it had handled the Byrne family's application fairly and in accordance with the Lost at Sea Scheme (see Appendix C).

On 5 June 2009 I responded to the Department and recorded my disappointment at its rejection of my recommendation (see Appendix D). I pointed out that under Section 6(5) of the Ombudsman Act, 1980, if I find that the response of a public body to recommendations in an investigation report is not satisfactory it is open to me, if I think fit, to present a special report on the matter to the Houses of the Oireachtas and I signalled my intention to do so in this case. I reiterated my view that compensation was merited in this case and explained why I felt that the Decommissioning Scheme provided an objective and equitable method by which appropriate compensation could be calculated.

The Department submitted a further letter to my Office on 30 July 2009 (see Appendix E). It again raised a number of points which I had already dealt with in my Investigation Report. The Department also suggested, *inter alia*, that there was no legal basis to pay compensation to the Byrne family because the Lost at Sea Scheme does not provide for the payment of compensation. I would make the point that the legal authority for the payment of compensation in this case does not flow from the Lost at Sea Scheme but rather from the statutory authority granted to my Office under Section 6(3)

(b) of the Ombudsman Act, 1980. This provides that, following an investigation, I may recommend to a public body that “measures or specified measures be taken to remedy or alter the adverse affect of the action...”.

The Department’s letter of 30 July 2009 suggested that my findings and recommendations in this case will “give rise to a major financial liability” arising from claims from others who were unsuccessful applicants under the Lost at Sea Scheme. I do not accept this suggestion. My investigation involved only one complaint, that of the Byrne family, and my analysis, conclusions and findings flowed from the particular circumstances of that case alone. My recommendation for compensation applies solely to the Byrne family and has no implications for other unsuccessful applicants. The Scheme itself related only to boats which sank at sea between 1980 and 1989 and clearly only a certain number of potential applicants was likely to emerge following the launch of the Scheme. By upholding the Byrne family’s complaint I did not suggest that all persons who failed in their applications were treated unfairly. To illustrate the point I indicated in my Investigation Report (see Section 8) that, in addition to the complaint made by the Byrne family, my Office has dealt with five separate complaints from persons claiming that they should have been entitled to benefit under the Lost at Sea Scheme but, having regard to the circumstances of those cases and the terms of the Scheme, I did not uphold those complaints.

The letter also pointed out that the Byrne family did not go back into fishing, or buy a replacement boat, which they might have done out of the insurance monies received from the loss of the boat. It is my understanding that in the immediate aftermath of the tragedy Mrs Byrne, perhaps understandably, was very resistant to the idea of any of her surviving young family going back into fishing. When the Byrne family subsequently became aware of the Lost at Sea Scheme many years later, it was the intention, if the application was successful, that one of the Byrne family would use the replacement tonnage to return to fishing with a family relative. Furthermore, I am aware that in at least one other case an applicant was deemed successful under the Lost at Sea Scheme who had never been involved in sea fishing and whose husband had been lost when his boat sank in 1986. It subsequently emerged that, due to the fact that none of her immediate young family members could use the tonnage, she could not draw down the tonnage awarded.

The fact that insurance had been previously granted to applicants for the Lost at Sea Scheme was not of itself a barrier for accepting and approving such applications.

The letter of 30 July 2009 also suggested that, notwithstanding the tragic circumstances of the case, it did not provide a basis to transform a mechanism dealing with tonnage for fishing vessels into a system for compensation. I fully accept that successful applicants were granted replacement tonnage under the Scheme, rather than compensation. I also accept, for the reasons outlined in my investigation report, that following my recommendation that redress was warranted in this case, it was not possible to grant tonnage to the Byrne family at that stage. It was in those circumstances, and having regard to the power of my Office to recommend appropriate redress in a given case, that I recommended that financial compensation should be paid.

The Department also suggested that the Supreme Court judgment in *Bode v The Minister for Justice, Equality and Law Reform* [2007] IESC 62 case had implications for this present case. I do not accept this. In the Byrne case my finding was that the design of the Scheme and the manner in which it was advertised were contrary to fair and sound administration. As a consequence of these shortcomings the Byrne family did not qualify for assistance under the Scheme. I concluded that appropriate redress was warranted to remedy the adverse effect suffered in this particular case. I should also point out that in every case I take great care to ensure that my recommendations for redress are both appropriate and proportionate. The Ombudsman Act imposes no restriction on how I choose to formulate a remedy in any particular case.

The Office of the Ombudsman relies on the authority which comes from its independence, impartiality and competence to gain fair play for people who have been wronged by public bodies. As Ombudsman I do not make binding decisions. The Department is free in law to reject my recommendations. My only recourse, when I consider that a public body's response to a recommendation is unsatisfactory, is to make a special report to each House of the Oireachtas under the Ombudsman Act, 1980. This is such a report.

I respectfully ask the Houses to consider my report and to take whatever action they deem appropriate in the circumstances.

Emily O'Reilly  
Ombudsman  
December 2009

## Appendix A

### RESPONSE OF THE DEPARTMENT OF AGRICULTURE, FISHERIES AND FOOD TO THE INVESTIGATION REPORT

Ms Emily O'Reilly  
Ombudsman  
Office of the Ombudsman,  
18 Lower Leeson St.  
Dublin 2.

**Re: Complaint by Mr Danny Byrne into rejection of application for replacement tonnage under the Lost at Sea Scheme in respect of the fishing vessel MFV Skifjord.**

Dear Ombudsman,

I refer to your letter of 4 November 2008 and the enclosed final Report and recommendations in relation to the above.

Thank you for affording additional time for the Department to consider your complex and detailed report.

As a general observation in relation to this Report, I would like to clarify that this Department maintain the overall views that it and its predecessor, the Department of Communications, Marine and Natural Resources had submitted in relation to this matter. The Department continues to maintain that the views it had previously expressed in relation to the draft findings remain valid and were and are of considerable merit and persuasion.

It is noted that you have appended a copy of the response of the Department of Communications, Marine and Natural Resources to the Statement of Complaint, as requested, as well as this Department's letter of 2 July 2008 and two submissions by Deputy Frank Fahey, T.D., Minister in that Department at the time the scheme was devised. Also the amendment as requested by Mr Tom Carroll, former Secretary General.

You asked for the submission of a calculated sum using the methods set out in the Department's 2008 Decommissioning Scheme for fishing boats to be used as a first step in the calculation of monetary compensation for the

Byrne family. These calculations and the methodology used are at Appendix A to this letter.

If you have any questions in relation to the calculations and methodology cited, please do not hesitate to contact me.

Yours sincerely

Tom Moran  
Secretary General  
Department of Agriculture, Fisheries and Food  
11 February 2009

### *Appendix A*

- 1 Gross Tonnage (GT) and other measurements for the MFV Skifjord used in these calculations are taken from the “Report of Preliminary Inquiry into Marine Casualty” prepared by Captain William A Kirwan of the Dept of Transport -document on file dated 25/06/82.

The 2008 Decommissioning Scheme (the 2008 Scheme) operated by the Minister is confined to vessels over 18 metres in length, but that test cannot be applied in this case.

- 2 The 2008 Scheme provides for a basic payment of **€1,000** per GT for successful applicants. The MFV Skifjord was 245.57 GTs and on that basis a payment of **€245,570** would be indicated.
- 3 The 2008 Scheme also provides for a number of additional premia subject to compliance with certain criteria, as well as reductions in some cases and specifies maximum amounts payable: These are:
  - an additional payment of **€2,500** per GT for those with tradeable or transferable tonnage. This additional payment does not apply to vessels with non-tradeable or non-transferable tonnage. (NB: Tonnage obtained under the original “Lost at Sea” Scheme is not tradeable or transferable and so this additional premium has not been included in calculations for the Skifjord nor it is contended, could it be properly applied to the Skifjord).
  - a pelagic premium of **€1,000** per GT for vessels over 65 feet (19.81 metres) licensed without a ‘mackerel and herring preclusion’ (i.e.

could have fished legally for those (pelagic) species). The Skifjord was over 65 feet and was described on the application form as having been fishing for pelagic species. As the vessel was on its way to pair trawl off the north-west of Ireland/West of Scotland are (per the accident report cited above) and given the time of year, the probability is that pelagic species were being targeted. For decommissioning applicants this premium applies only to applications received before 31 December 2007; however, that condition could not properly be applied to the Skifjord case.

- a ‘catch incentive premium’ of up to **€3,000** per GT based on the declared landings (in every case tonnes weight) of specified whitefish stocks and up to 1/3 of the catch of non-specified stocks, but only in respect of applications received up to 31 December 2007. This premium has not been included in calculations for the Byrne family because it is not possible to estimate the possible landings. The only indication of possible use of the replacement tonnage, had it been granted, was by Mr Anthony Byrne in partnership with another person outside of the scheme, and so only a maximum of 50% of the putative catch could be counted towards calculation of the premium, assuming Mr Anthony Byrne would have been in a 50/50 partnership. Although a replacement vessel could have been at least of similar size, and could therefore have reached the maximum landing of whitefish to have earned the maximum premium, there is no landing data to rely on, as is statutorily required for decommissioning applicants.
  - for vessels aged between 15 and 30 years, the rate of decommissioning is reduced by 1% per year over 15. No replacement vessel was introduced in this case, so it appears there would be no proper or legal basis on which to make any such reduction.
  - for vessels 30 years or more decommissioning is reduced by 15%. Again, there appears to be no basis on which to make such a reduction as no replacement vessel was purchased by the Byrnes.
  - all grants are subject to a **maximum ceiling of €7,500** per GT for vessels over 19.81 metres without a mackerel or herring preclusion, and **€6,500** per GT in the case of all other vessels.
  - There are also provisions for favourable taxation arrangements for beneficiaries under the 2008 Decommissioning Scheme, for which this Department is not in a position to compute a value.
- 4 In conclusion the Department would put forward, as a reasonable suggestion for compensation, a figure in the region of, €245,570.

## Appendix B

### RESPONSE OF THE OMBUDSMAN TO THE DEPARTMENT'S LETTER OF 11 FEBRUARY 2009

13 March 2009

Mr Tom Moran  
Secretary General  
Department of Agriculture, Fisheries and Food  
Kildare St  
Dublin 2

Dear Mr Moran

Thank you for your letter to my Office dated 11 February in relation to the quantification of redress arising from my investigation into the complaint made by Mr Danny Byrne regarding the rejection of his family's application under the Lost at Sea Scheme.

As you know the outcome which was sought by the complainant when he made the complaint to my Office was the granting of tonnage denied to him under the Lost at Sea Scheme. However, given the reasons outlined by your Department, I accepted that such an outcome was not achievable given the current national and EU restrictions which apply to the granting of additional tonnage. My view was that some form of financial redress was the only alternative, provided that the sum to be paid was calculated on a fair and objective basis and was not based on arbitrary criteria. That is why I felt that for the purpose of the calculation of redress the 2008 Decommissioning Scheme could provide a fair and objective methodology to arrive at a redress figure given that this Scheme was designed to compensate certain fishermen, including those who had re-entered the fishing industry through the Lost at Sea Scheme, who were now willing to surrender their tonnage and leave the industry.

I note that your Department has calculated a sum amounting to a total of €245,570 which is the basic payment allowable under the Scheme. This is based on a payment of €1,000 per gross tonne of the Byrne family's boat which sank. The Department has indicated that the additional payment of €2,500 per gross tonne which is allowable under the scheme for boats with transferable tonnage is not warranted in this case as Lost at Sea tonnage was not tradeable or transferable and I accept this. The Department has also

indicated that the additional “catch incentive premium” of up to €3,000 per gross tonne should not be part of the calculation as this is based on declared landings in respect of certain types of whitefish stocks (and up to one third of non-specified stocks) for applicants who applied under the Decommissioning Scheme before 31 December 2007. Again, I agree that the Department’s approach in this regard is reasonable. I also note that the Department has agreed not to apply the decommissioning reductions based on the age of vessels.

Having regard to the foregoing I am satisfied that a sum of redress amounting to €245,570 represents a fair and reasonable amount to bring about a full and final settlement of this complaint and under the provisions of Section 6(3) of the Ombudsman Act, 1980 I recommend accordingly. You are requested to notify me of your Department’s response to the recommendation not later than 27 March 2009.

Yours sincerely

Emily O’Reilly  
Ombudsman



## Appendix C

### RESPONSE OF THE DEPARTMENT OF AGRICULTURE FISHERIES AND FOOD TO THE OMBUDSMAN'S LETTER OF 13 MARCH 2009

23 April 2009

Ms Emily O'Reilly  
Ombudsman  
Office of the Ombudsman  
18 Lower Leeson St  
Dublin 2

**Re: Complaint by Mr Danny Byrne into rejection of application for replacement tonnage under the Lost at Sea Scheme in respect of the fishing vessel MFV Skifjord.**

Dear Ombudsman,

I refer to your letter of 13 March 2009 recommending the payment of a sum of €245,570 in settlement of the above complaint in accordance with Section 6(3) of the Ombudsman Act 1980.

This amount derives from the figures provided by this Department in response to your request for the submission of a calculated sum using the methods set out in the Department's 2008 Decommissioning Scheme for Fishing Boats, with an accompanying explanation of the methodology used. To that extent the Department provided information required by your office. The Department's position in relation to the case has not changed and it should be clear that the Department is not supporting the payment of financial redress in this case.

The complainants did not apply for the scheme within the timeframe and were over a year late in applying. The family did not meet some of the criteria of the scheme. The Department maintains its position that the scheme was, once the Minister decided to proceed with it, scrupulously and fairly administered, in that each applicant was treated fairly under the scheme within specific terms, rules and conditions.

The Department is also of the view that financial redress is not warranted given the circumstances of the case, and that direct application of the 2008 Decommissioning Scheme rates is not appropriate. The situation of the

Byrne family, where no replacement vessel was bought in the 20-odd years between the sinking of the MFV Skifjord and the inception of the Lost at Sea Scheme, and where no family member continued in the fishing industry, is not the same as a vessel owner who has had the expense of acquiring and operating a vessel for a number of years and who is now prepared to leave the industry, and the Decommissioning Scheme rates are intended to incentivise this. The Byrne family would not have been eligible to apply for the Decommissioning Scheme because only a fishing vessel can be decommissioned -the capacity could not be decommissioned on its own.

While not relevant to the scheme or the specific issues examined by your Office in relation to the Byrne case under the scheme, the Byrne family indicated that they did receive a full insurance payment in respect of the sinking of the Skifjord.

The Department, in all the circumstances, does not support the payment of financial redress in this case.

Yours sincerely

Tom Moran  
Secretary General  
Department of Agriculture, Fisheries and Food

## Appendix D

### RESPONSE OF THE OMBUDSMAN TO THE DEPARTMENT'S LETTER OF 23 APRIL 2009

5 June 2009

Mr. Tom Moran  
Secretary General  
Department of Agriculture, Fisheries and Food  
Kildare Street  
Dublin 2

Dear Mr Moran

I refer to your letter of 23 April 2009 in response to my letter of 13 March 2009 regarding my investigation into the Lost at Sea Scheme.

I must record my disappointment at the fact that the Department has fully rejected my recommendation in this case and has indicated its rejection not only of the quantum of the redress recommended but also the suggestion that any redress is warranted in this case.

Under Section 6(5) of the Ombudsman Act, 1980, if I find that the response of a public body to recommendations in an investigation report is not satisfactory it is open to me, if I think fit, to present a special report on the matter to the Houses of the Oireachtas. I now wish to advise that I have decided to present a special report on this case to the Houses of the Oireachtas. For the sake of completeness, that report will include your Department's response to my recommendations and this letter. As a matter of courtesy, I will advise you in due course, in advance, of the date I propose to present the special report.

Arising from your letter of 23 April 2009 I wish to place a number of points on record.

The Department points out that the complainants made a late application under the Lost at Sea Scheme and did not meet some of the criteria of the scheme. It is also stated that once the Minister decided to proceed with the scheme it was scrupulously and fairly administered and all applicants were treated fairly having regard to the terms of the scheme.

As is made clear in my investigation report I had found no evidence to suggest that, once the scheme was launched, that it was not applied equitably. My finding of maladministration arises from my conclusion that, having regard to the nature and purpose of the scheme, its design lacked equity and it was not properly advertised. I was also of the view that the circumstances of the Byrne family were such that they might reasonably be deemed to have fallen into the category of cases deserving of assistance under the scheme, but, due to the way the scheme was designed they were excluded. Furthermore, the lack of proper advertising led to the scheme not coming to the attention of the Byrne family at the appropriate time. Thus, by excluding the Byrne family from benefit, the outcome of the Lost at Sea Scheme was inequitable having regard to the family's circumstances and the purpose and intent of the Scheme.

The Department states that the application of the Decommissioning Scheme for the purpose of calculating redress was not appropriate and the Department also holds the view that redress is not warranted in any case. The Department indicated that the circumstances of the Byrne family are not comparable to boat owners in the industry applying under the Decommissioning Scheme who had incurred the expense of acquiring vessels and operating them over many years. It also indicated that the Byrne family would not be eligible under the Decommissioning Scheme as only a fishing boat can be decommissioned -the capacity could not be decommissioned on its own.

As you are aware, the outcome sought by the complainant was the granting of tonnage denied to his family under the Lost at Sea Scheme. Based on the reasons outlined by the Department of Communications, Marine and Natural Resources (which previously had responsibility for this matter) I accepted that the granting of tonnage at this point in time would not be possible and I informed the Department and the complainant accordingly. As a general principle, as outlined in my Office's Guidelines on Redress, in cases where I make a finding of maladministration, as has happened in this case, the outcome which my Office seeks to achieve is to put the complainant back into the position he/she would have been in if the public body had acted properly in the first instance.

Having regard to the foregoing, in this particular case I saw the Decommissioning Scheme as an objective and fair reference point to provide a pathway towards determining an equitable form of redress arising from my findings. The purpose of that scheme was to compensate certain fishermen for leaving the industry, including any suitably qualified applicants who may have been granted tonnage under the Lost at Sea Scheme in the first instance. I note

that under the scheme itself payments of €41.1m were made to 46 applicants which amounts to an average payment of over €893,000 per applicant. In the case of the Byrne family the total payment I had recommended was €245,570. In addition, those qualifying under the Decommissioning Scheme may, in some cases, be eligible for certain tax reliefs which would not be applicable in the case of the Byrne family.

I note that you make the point that the Byrne family did not have to incur the expense of purchasing and operating a fishing boat as would have been the case for those being compensated under the Decommissioning Scheme and as such they could not be compared to the Byrne family. If the Byrne family had been admitted under the Lost at Sea Scheme in 2001 and had been engaged in fishing as a result until 2009 the compensation being recommended by me (€245,570) equates to approximately €30,700 net profit per annum from fishing during that period which appears to me to be a reasonable sum. Furthermore, those who had purchased vessels and who are now leaving the industry under the Decommissioning Scheme would, presumably, have the option of selling on their vessels.

While you point out that the Byrne family obtained insurance payments as a result of the loss of their vessel this does not have any relevance in terms of either their eligibility under the Lost at Sea Scheme or the use of the Decommissioning Scheme as a basis to calculate appropriate redress.

I will be in contact with you again as soon as I am in a position to present my report to the Houses of the Oireachtas.

Yours sincerely

Emily O'Reilly  
Ombudsman

## Appendix E

### FURTHER LETTER TO THE OMBUDSMAN FROM THE DEPARTMENT OF AGRICULTURE, FISHERIES AND FOOD

30 July 2009

Ms Emily O'Reilly  
Ombudsman  
Office of the Ombudsman,  
18 Lower Leeson St.,  
Dublin 2.

**Re: Complaint by Mr Danny Byrne into rejection of application for replacement tonnage under the Lost at Sea Scheme in respect of the fishing vessel MFV Skifjord.**

Dear Ombudsman,

I am the head of the legal services division in the Department and I have been requested by the Secretary General to reply to your letter of the 5th June 2009. I should say at the outset that the Department has consulted very closely with the Office of the Attorney General prior to this reply issuing.

I do not intend to revisit the Department's full and extensive response to the findings made by you in any great detail, as this has been consistently set out in the exchange of correspondence over a long period of time, but wish to set out as clearly as possible a number of points, which are relevant to its decision not to comply with your recommendation concerning financial compensation.

1) Absence of any legal basis to make a payment to the Byrne family:

The Lost at Sea Scheme (the Scheme) was set up to assist parties, who made a successful application to participate in the Scheme and most critically met the conditions of the Scheme, to reestablish themselves in the fishing industry. It was at all times a Scheme subject to conditions and those conditions were not overly onerous. It was however not introduced to simply provide a means for any party, who tragically lost family members at sea, to obtain compensation from the State for this loss.

It is a matter of fact and one recognised by the Ombudsman in her find-

ings, at page 59 of her report that the Byrne family did not comply with the Scheme conditions in two regards:

1. The Byrne application was out of time by one calendar year from the official closing date of 31st December 2001. The Scheme itself was launched on the 8th June 2001.
2. The boat owned and operated by the late Mr Francis Byrne had not been operated by him for a considerable period of years for sea fishing of a category covered by the capacity rules, prior to its loss at sea. This period was determined by the then Department of Communications, Marine and Natural Resources to be a period of 2 years, prior to being lost at sea.

In relation to the first point, while the Department would contend that the Scheme was extensively advertised, the Ombudsman has taken issue with that position. The finding by the Ombudsman that the advertising was inadequate is a difference of opinion, rather than something based on fact. I would contend that it is reasonable for any Minister and his Department to exercise a degree of discretion in the amount of advertising to be provided for any Scheme introduced by him. What may be described as a technical failing on the part of the Minister and his officials, has given rise in your recommendation of a very substantial monetary award and this on balance appears to be disproportionate.

In relation to the second point, the Scheme conditions were those fixed at the time and with the benefit of hindsight, it is possible to state that had further research been carried out by the Department and had more time been spent in formulating the conditions of the Scheme that they might have been different. That approach could be applied to many schemes operated by Government, but a scheme has to be introduced on some basis and at a particular time.

It is also certainly the case that had the extra time and research suggested by the Ombudsman been carried out, the Scheme conditions introduced might indeed have been more onerous and excluded some of those who were eventually successful. It cannot be said with any certainty that the result of what the Ombudsman claims the Minister failed to do prior to introducing the Scheme, would have resulted in the Byrne family being in compliance with the terms of any more robust, or more thoroughly researched Scheme that might have been introduced back in 2001.

The thrust of the Scheme was a genuine attempt to assist persons to get back into fishing where there had been a strong family involvement in fishing, rather than just provide monetary compensation where there was a catastrophic human loss. It is a fact that after the loss of the Skifjord in October 1981, the Byrne family did not go back into fishing, or buy a replacement boat, which they might have done out of the insurance monies received from the loss of the boat. The application made to the Scheme was some 20 years after the tragic loss of Mr Byrne senior.

When these factors are carefully considered, it is not unreasonable of the Secretary General to have written to the Ombudsman in the terms of his letter of the 23rd April 2009 and indicating that the Department is unable to act on foot of the findings made by the Ombudsman.

## 2) Wider implications of the Byrne findings:

It is also important, in light of the current national financial position to point out that the findings of the Ombudsman in the Byrne case could have far reaching implications for the Department and the Exchequer. I do not wish to diminish the standing of the findings of the Ombudsman where she states that elements of the Scheme design “were contrary to fair and sound administration”, but the possible cascade from what might be described as minor administration failings, may well give rise to a major financial liability, particularly were other cases to be brought to the Ombudsman by other unsuccessful applicants under the Lost at Sea Scheme. What is being suggested is that a substantial sum should be paid out in one particular case where in fact there was no entitlement to a benefit under the administrative Scheme concerned and the terms of the Scheme did not make any provision for payment from the Exchequer or any charge on the State. Once an administrative scheme is applied in accordance with its terms and an applicant falls clearly outside those terms the unsuccessful applicant is in no worse a position than before and his, or her rights are not infringed, see for example the decision of the Supreme Court in *Bode v the Minister for Justice Equality and Law Reform* [2007] IESC 62 which dealt with an administrative scheme for foreign nationals, who were the parents of Irish born children.

The tragic circumstances, which gave rise to application for the Lost at Sea Scheme in this instance, evoke sympathy for the family concerned but this is not a basis to transform a mechanism dealing with tonnage for fishing vessels into a system for compensation. In light of current circumstances, it



would be difficult for the Secretary General to comply with any recommendation for the payment of compensation in this instance.

I note that it is your intention to bring the matter before the Houses of the Oireachtas in September.

Yours sincerely,

Randall Plunkett  
Head of Legal Services Division



# Part Two

## INVESTIGATION REPORT

**on the complaint made by  
Mr Danny Byrne**

**against**

**the then Department of Communications,  
Marine and Natural Resources**

*(now the Department of Agriculture, Fisheries and Food)*

**Office of the Ombudsman  
November 2008**

# Introduction

A full copy of this Report was provided to the main parties involved in this investigation. I received comments on the Draft Report from the Department of Agriculture, Fisheries and Food (which took over responsibility for the Fisheries function which was formerly the responsibility of the Department of Communications, Marine and Natural Resources), and the former Minister of the Department, Mr Frank Fahey, TD. Following a request from the former Minister, I also met him to hear his comments on the Draft Report. This Report includes, where appropriate, my comments on the submissions received.

## 1. The Complaint

**1.1** 1.1 In November 2004, Mr Danny Byrne complained to my Office in relation to the decision of the then Department of Communications, Marine and Natural Resource to refuse his mother, Ms Winifred Byrne's, application under the Lost at Sea Scheme in respect of the *MFV Skifjord* which prevented the award of replacement capacity in respect of that vessel. A copy of the Lost at Sea Scheme is attached as Appendix 1 to this Report. The *MFV Skifjord* was owned and skippered by Danny Byrne's father, Francis Byrne, and went down in a storm off North West Donegal on 31 October 1981 with the loss of five lives, namely, Francis Byrne and his 16 year old son (Jimmy) James Byrne, who was Danny Byrne's brother, Tony O'Brien, James Laverty and Des McGovern. Prior to owning the *MFV Skifjord* Francis Byrne had a boat called *Loretto* since 1975 which had been built in Arklow specially for him. Following the loss of the *MFV Skifjord* Mrs Byrne was left in very poor circumstances with a young family of five boys and three girls.

**1.2** The complainant alleged that the Department's decision was unfair because:

- the special circumstances of his family's case were not properly considered by the Department in drafting the Lost at Sea Scheme;

- the Lost at Sea Scheme had not been properly advertised and this resulted in a late application;
- the Department wrote to a number of potential applicants at the time of the launch of the Scheme informing them of its existence but did not write to the Byrne family;
- the Department already had records of Lost at Sea cases and should have been aware of the case of the *Skifjord*;
- the Byrne family application met the criteria of the Lost at Sea Scheme, apart from the closing date;
- the qualifying condition in the Scheme regarding a “considerable period of time” should not refer to two years as owner and skipper of the lost vessel but should take account of other periods spent as owner and skipper of other boats.

## 2. Background

**2.1** In 1990 a new regulatory system became operative for the Irish Sea Fishing Fleet which effectively meant that “replacement capacity” i.e. tonnage and kilowatts was now required for Sea Fishing boat owners who wished to continue to fish, fish in a new or larger boat or to commence to fish. This meant that the overall fleet capacity was limited and to get new capacity a boat owner had to “take out” old capacity. In practice this led to the development of a market in replacement capacity.

**2.2** As often happens following the introduction of changes to a regulatory system the new regime caused difficulties for some former boat owners who believed the new system to be unfair and who claimed they were unable, because of their particular circumstances, to purchase replacement capacity. In June 2001, the Department launched the Lost at Sea Scheme which it said was designed to address the needs of those boat owners who had lost their Boats at Sea in the period 1980 to 1989 and who effectively, but for their misfortune, would have had a boat on which replacement capacity would have been assessed under the new regulatory system of 1990. Successful applicants under the Scheme would be granted capacity in their own right which would have enabled them to carry on a tradition of fishing. The Scheme did not provide financial support to successful applicants for the acquisition of a replacement fishing vessel itself and the replacement capacity (i.e. gross tonnage and engine power) granted under the Scheme had to be used

by the replacement fishing vessel and could not be sold on or otherwise traded or realized as a financial asset in the tonnage market. The Scheme was initiated by the then Minister, Frank Fahey TD following representations from a number of fishermen seeking replacement tonnage.

- 2.3** Letters regarding the Lost at Sea Scheme were sent on 8 June 2001 by the Department to the following representative organisations: Seán O’Donoghue of Killybegs Fishermen’s Organisation (KFO), Frank Doyle of the Irish Fishermen’s Organisation, Jason Whooley of the Irish South and West Fish Producers Organisation and Mark Lochrin of the Irish Fish Producers Organisation (IFPO) and persons involved in the 16 cases held on file in the Sea Fisheries Division of the Department, which was the section within the Department responsible of drawing up and implementing the Scheme. The letters announced the launch of the Scheme and its closing date and a copy of the Scheme was enclosed. The letters indicated that applications should be made on the formal application together with the necessary supporting documentation. The Lost at Sea Scheme was also advertised by the Department in various commercial fishing publications but not in any regional or national newspapers.
- 2.4** The closing date for receipt of applications was 31 December 2001. The application from the Byrne family, dated 31 December 2002, was received in the Department on 7 January 2003. This application was refused by the Department as being outside the closing date. The Department also claimed that even if the application had been received within the time limit specified in the published Scheme it would have been bound to fail as Francis Byrne was not the owner and skipper of the *Skifjord* for a ‘*considerable period of time*’ (see item (c) of Appendix 1 which was interpreted by the Department as being a two year period) as he had only purchased the vessel shortly before its loss. Mr Byrne had in fact been fishing continuously since 1975, in the *Loretto* until 1981, and then the *Skifjord* from July 1981 until it sank in October 1981. A total of 67 applications were received by the Department, following the publication of the Scheme, of which six were ultimately successful including two of the 16 which were previously held on file by the Sea Fisheries Division of the Department.

### 3. Preliminary Examination

- 3.1** In all, during the preliminary examination process, I received four sepa-

rate reports from the Department. The first was dated 5 January 2005, and on foot of supplementary queries, three further responses dated 4 February 2005, 4 May 2005 and 20 December 2005.

### 3.2 Department's Report of 5 January 2005

In its first report, dated 5 January 2005, the Department stated, *inter alia* that during 1999-2000 representations were made to the Department on behalf of individuals seeking to have the capacity of lost vessels used for replacement capacity purposes. The normal requirement for a fishing boat to be licensed and entered on the Fishing Boat Register was that fishing boat capacity, expressed in Gross Tonnes and in kilowatts of engine power, equal in amount to the capacity of the fishing boat, must be removed from the Register. This was known as the 'entry-exit' regime or the '100% replacement capacity' requirement. Such capacity was, in practice, a tradeable commodity separate from the value of the physical fishing boat and there were a number of individuals known as 'tonnage brokers' who arranged for the acquisition and disposal of fishing boat capacity on behalf of owners or proposed owners of fishing boats. According to the Department's report, the cost of fishing boat capacity varies according to supply and demand. The Department played no role in the purchase and sale of capacity between individuals nor in relation to the prices charged. The Department indicated that it understood that in recent years the price per tonne of capacity varied between €2,000 and €4,000 but it would not have an accurate picture of this. The Department stated that clearly, however, fishing boat capacity is a valuable commodity in the fishing community.

The report explained that in 1989 steps were taken to introduce a new Fishing Boat Register, to replace the then existing Register. The introduction of the new Register took place in the light of European Community requirements on the management of Member State fishing fleets, which took into account the need for modernisation of the fleets while at the same time tackling the overcapacity situation of the fleets. In order for a boat registered on the old Fishing Boat Register to be entered in the new Register it was necessary for the owner to apply for registration before 31 January 1990. This requirement was set out in the Merchant Shipping (Registry, Lettering and Numbering of Fishing Boats) Regulations 1989 (S.I. no. 344 of 1989) under which the new Register was established. The capacity of all boats entered on the new Register was counted towards Ireland's fishing fleet capacity which was controlled under EU rules. There was no provision for boats registered

under the old system, but lost at sea before that time, to be accepted into the new Register.

The Department went on to say that it appeared from its records that towards the end of 2000, at the request of the then Minister (Mr Frank Fahey TD) and despite reservations on the part of the Division, a scheme was drawn up to accept as replacement capacity the capacity of vessels lost at sea before the introduction of the fishing boat register in 1990, subject to specified criteria. According to the Department's report, a major concern of the Division was the need to ensure that Ireland kept within the EU-determined capacity limits. The Division then knew of around 10 cases of such vessels lost at sea between 1980 and 1989. In January 2001 the Minister approved the scheme subject to the conditions laid down and "*subject to PO's agreement that there are no further cases in addition to those of which we are aware*". The industry was consulted on the provisions of the proposed scheme in February 2001. The response was mixed in that some of the representative organisations welcomed it but others had difficulties with the effective granting of free capacity to certain individuals but not to others.

The report went on to say that the Lost at Sea Scheme was launched in June 2001. The closing date for receipt of applications was 31 December 2001. Each of the representative organisations was written to as well as the potential applicants which were then known, with details of the Scheme. The list of known cases had grown to 16 at that stage. In addition, advertisements were placed in the Marine Times, the Skipper and the Fishing News. The Department indicated that the total number of applications received before the specified deadline was 67 and the number approved was six. All of the others were refused on the basis that they failed to satisfy one or more of the Scheme's criteria (see Appendix 1).

The report went on to say that the application from the complainant's family was received in January 2003 under cover of a letter from Minister Mary Coughlan, TD, the then Minister for Social, Community and Family Affairs and the Minister was informed the same month that the application could not be considered because it was not received by the closing date for the Scheme. The report indicated that the complainant's family made a number of points in support of their application. For a summary of these points see paragraph 1.2 above).

In relation to the specific questions raised by my Office, the Department responded as follows:



The Department said it made reasonable attempts as outlined above to ensure that the existence of the Scheme was publicised widely and that every case known was made aware of it. The period of six months given for applications also enabled ample opportunity for existence of the scheme to be disseminated by word of mouth. The fact that the number of applications grew to 67 from a figure of 16 shows that the publicity given to the Scheme had an impact.

The Department stated that before the launch of the Scheme the Fishing Boat Licensing and Registration Division investigated whether there were relevant records within the Department but ascertained that no such records were “*readily to hand*”. It would have required searches of individual files within the Maritime Safety Division of marine incidents, only a minority of which would have related to fishing vessels. In addition, it was considered possible that not all incidents would have been reported to the Department. There was no record within the Sea Fisheries Division of the *Skifford* case nor of any request for replacement capacity in respect of the vessel before the Lost at Sea application was received. It was not considered necessary to have such searches carried out for the purpose of launching the Scheme.

The Department said that if the relevant application had been received before the closing date it would have been refused on the grounds of failure to meet one of the criteria. Paragraph (c) states that *‘the boat in question is shown, by reference to the logsheet returns or other appropriate records, to have been in active and continuous use for a considerable period of years by the person concerned for sea fishing of a category covered by the replacement capacity rules, until its loss at sea’*. The Department, in assessing applications, interpreted ‘*a considerable period of years*’ as a minimum of 2 years. The *Skifford* was lost in the same year as it was purchased. While the Byrne family pointed out that the *Skifford* was a replacement vessel for a previous vessel which had been fished by the Byrne family for a number of years, the terms of the Scheme were quite specific and did not allow a previous vessel to be counted towards the track record required for qualification purposes. If the Department was to relax that criterion in this case, all other applications would have to be reconsidered in the same way. It indicated that there were three other cases where the only reason for refusal was failure to comply with this criterion. At least one of those made reference to a previous boat.

While paragraph (a) of the Scheme criteria (see Appendix 1) provides for the applicant to be the owner and skipper of the lost vessel, the



Department would not have disallowed an application from immediate family members in relation to that criterion in a case such as this. This was consistent with the provision of the Scheme which allowed for capacity granted under the Scheme to be availed of by the applicant or by an immediate relation of the applicant.

The Department stated that the grant of the complainant's application would involve two amendments to the Scheme criteria and would thereby set precedents in that other applications or potential applications would have to be treated in the same way. These issues were:

- By accepting the application for consideration, this effectively would extend the closing date by over one year. Apart from this case the Department had two other requests for inclusion in the Scheme after the closing date. In addition, the staff of the Division received a number of telephone queries from potential applicants after the closing date but these cases were not recorded. It was estimated by the Department that there were at least five such calls. Those concerned were told that the Scheme was closed and any applications from them would not be considered. It was not known how many other cases there would have been had the closing date been extended.
- In relation to an amendment of Paragraph (c) (of the Scheme) relating to track record - the Department's position is set out above.

The Department said that it fully appreciated that the loss of five lives along with the sinking of the vessel was a tragic event and no doubt caused hardship to the families involved. The Department presumed that a number of other applicants could also claim that the events which gave rise to the loss of the vessels concerned were tragic. However, the Department said it was bound, in the interests of fairness, to operate the Scheme in accordance with the criteria laid down in respect of all applications.

Where a vessel on the Fishing Boat Register is lost at sea, the capacity would be available to the owner in the same way as capacity is available to owners who sell and de-register their vessels. Under the current Register Regulations the Registrar General may remove a vessel from the Register which is constructively lost, broken up, unseaworthy or no longer engaged in fishing. Under current fishing boat licensing policy, fishing boat capacity which is 'off-register' must be re-introduced onto the Register (i.e. be used to introduce a fishing boat onto the Register) within two years of its deregistration, otherwise the capacity entitlement

will be lost to its owner. As the *Skifjord* was lost before the introduction of the current Register the capacity involved was not available for re-use.

The Department's report concluded by saying that the Scheme was a finite, limited Scheme which effectively involved the provision of a limited entitlement to qualifying applicants, as an exemption from normal rules. The terms of the Scheme were quite limited and restrictive. The Scheme was now closed and there was no provision under fishing boat licensing policy for the Licensing Authority to re-open the Scheme or to vary application of any of its conditions.

The Department said the only basis on which the application from the Byrne family could be considered and accepted would be on the basis of a policy directive from the Minister extending the closing date of the Scheme and amending paragraph (c) of the criteria to allow a track record of previous vessels to be taken into account. The Department indicated that such changes would have implications beyond the case of the Byrne family as, in the interests of fairness, others who applied after the closing date or who would have applied had they been given the opportunity to do so, would also have to be given the opportunity to apply. In addition, a change to paragraph (c) would also bring at least one other vessel into the reckoning for approval. The cumulative effect of these changes would add to Ireland's fleet capacity situation and add to the Department's concern to ensure compliance with their limits. If the limits are likely to be breached it would be necessary, by means of a policy directive from the Minister, to amend the terms of the one-for-one entry-exit regime to require greater capacity to be withdrawn than is to be brought in to the fleet. This would mean that other fishermen would be paying the price for the concession granted to those benefiting from such a re-opening of the Lost at Sea Scheme.

### **3.3 Department's Report of 4 February 2005**

Having considered the Department's response, I found it necessary to seek further information and clarifications from the Department and, in addition, I asked it to provide my Office with particular files relating to the case.

- 3.4** In this second report, the Department pointed out that at the time the Lost at Sea Scheme was drawn up, the Sea Fisheries Administration Division, which was responsible for sea-fishing boat licensing and registration, was not aware of the case of the *MFV Skifjord*. Accordingly, it had

no knowledge as to whether or not any investigation was carried out into the loss of the vessel nor of any reports thereon. It stated that the information contained in its report in relation to the vessel was based solely on information supplied by the Byrne family. The Department said that enquiries were made with the Marine Survey Office and the Maritime Safety Directorate of the Department to ascertain whether they had any records in relation to the loss of the *Skiffjord*. Following a search of their records, the Maritime Safety Directorate had now retrieved from deep storage a file on the sinking of the *Skiffjord*.

The Department said that it appeared from that file that there was an investigation on the sinking of the vessel by an officer of the Marine Survey Office. A report of that investigation was contained in the file and it included a number of recommendations. The Department said that it was important in this context to note that at the time of the launch of the Lost at Sea Scheme in 2001 those responsible for the Scheme within the Department had no knowledge of the *Skiffjord* case. They had carried out some enquiries with the Maritime Safety Division prior to the launch of the Scheme in relation to lost fishing vessels but were informed that information on losses of fishing vessels were not readily to hand.

### 3.5 Department's Report of 4 May 2005

Further correspondence issued to the Department on 10 February 2005 in which, *inter alia*, the following issues were raised:

- There appeared to be a lack of detailed records on the Department's files as to how the conditions for the Lost at Sea Scheme were devised and they did not appear to contain any notes on discussions regarding those conditions before the final draft Scheme was sent forward for approval to the Minister;
- It was noted that among the cases which the Sea Fisheries Administrative Divisions had detailed knowledge of were the *MFV Joan Patricia*, *MFV Spes Nova* and *MFV Kreis an Avel*. These three cases were among the six applications which were ultimately successful following the implementation of the Scheme. It was unclear from the records on file the extent to which the details of those cases informed decisions on the formulation of the Scheme at drafting stage;
- It was suggested that it would have been administratively prudent to research the details of other cases which were stored by the Marine

Safety Division as part of the Scheme formulation process and it was not clear why this action was not taken. An exploration of those files could also have yielded contact details for further potential applicants who could have been informed directly about the Scheme following its launch;

- It was noted that condition (c) of the Scheme (see Appendix 1) did not make provision for an applicant to qualify under the Scheme in a situation where he/she was a skipper and owner who had fished continuously for a considerable period of years, but in two boats, one of which was traded in, to acquire the boat which was lost;
- Some concerns were raised about the limited scope of the advertisement of the Scheme following its launch, particularly in view of the fact that in relation to the limited number cases of which the Sea Fisheries Administration Division had detailed knowledge, those persons were notified directly by the Department about the launch of the Scheme so as to enable them to apply;
- It was suggested that the Department should consider carrying out more detailed research of all available relevant files in order to determine if there were further cases which might legitimately be considered for qualification under the Scheme.

- 3.6** The Department furnished a further report to my Office dated 4 May 2005 in which it reiterated that the Fishing Vessel Lost at Sea Scheme was introduced in 2001 and applications were required to be submitted to the Department by 31 December 2001. It went on to state, *inter alia*, that the Scheme was introduced in the context of the EU policy framework in place at that time.

According to the relevant EU Regulation (2371/2002), which was directly applicable to all Member States, the granting of fishing boat licences and the registration of Fishing Boats on the Fishing Boat Register of the Community must be implemented in such a manner so as to provide that when a fishing boat is introduced into the fleet, full replacement capacity must be withdrawn from the fleet. The new Licensing Policy for fishing boats introduced by the Minister in November 2003 sets down, *inter alia*, that:

*The 1:1 replacement capacity requirement in terms of GT and KW will remain in place other than in the limited cases hereunder. This policy will also apply to the specific segment of the fleet.*

The Department stated that it should be noted that the limited cases covered in the policy related to situations where greater than 1:1 replacement requirements are required and accordingly are fully permissible under the provisions of Council Regulation 2371/2002. The allocation of capacity to the cases approved under the Lost at Sea Scheme 2001 was taken into account in the determination of the amount of capacity to be removed under section H of Policy Directive 2/2003 by certain vessel owners and, accordingly, was in compliance with the requirements of the EU Regulation. According to the Department, the allocation of further capacity, on the basis of a review of the Lost at Sea Scheme suggested by my Office, to individuals who would thereby be permitted to introduce fishing boats into the fleet without removing equivalent capacity, would, in the Department's view, be in breach of the terms of the EU legislation in so far as vessels would be licensed and entered on the Fishing Boat Register, without the removal of equivalent capacity from the Fishing Boat Register.

The Department went on to say that in relation to the State purchasing capacity to allocate to applicants under a Lost at Sea Scheme, EU rules precluded such an initiative. It indicated that EU Regulation 2371/2002 does not permit the State to remove capacity from the Fishing Boat Register with public aid and re-introduce it onto the Fishing Boat Register in any circumstances. The Department indicated that this policy is regarded by the EU Commission as a cornerstone of the new Common Fisheries Policy, in so far as it ensured that the capacity of fishing boats did not increase beyond the level in place on 1 January 2003.

### **3.7 Department's Report of 20 December 2005**

On 11 May 2005 my Office again wrote to the Department asking it to consider the issue of possible redress in this case. At the same time a detailed update was furnished to the complainant. The view was expressed to the Department and the complainant that the Lost at Sea Scheme may have been flawed and deficient in those respects outlined in my Office's letter of 10 February 2005 (see paragraph 3.5 above) to the Department. The Department indicated that it would be seeking legal advice on the matter.

The Ombudsman Act, 1980 makes a distinction between a preliminary examination and a formal investigation of a complaint. It is only following a formal investigation that I can make formal findings and recommendations for redress to a public body. At this stage the case was still

at preliminary examination stage and as such the views expressed as regards the adequacy of the Department's Scheme were preliminary and tentative and were open to rebuttal by the Department.

- 3.8** The Department responded to my Office on 20 December 2005. It rejected the suggestion that the Scheme was in any way flawed. It indicated that my Office appeared to link the issue of the extent to which the Department researched its files prior to the publication of the Scheme to a suggested lack of equity in the scheme design. The Department said that it did not accept that the level of research of previous cases is a determining factor in relation to equity of scheme design. It indicated that the Department was entitled to design the Scheme on the basis of current policy considerations relating to the management of the Irish fishing fleet. The Department considered that arising out of those policy considerations the Department was entitled to impose restrictive conditions and a firm deadline for receipt of applications. The Department also said that it was not necessary to have identified all potential cases in advance of launching the Scheme. It indicated that, as in the case of any call for tenders or expressions of interest, the Department could have no definitive way of knowing in advance the numbers of vessels that might be covered by the Scheme. The announcement of the Scheme in the trade press as well as the reasonably lengthy period for receipt of applications would, in the Department's view, allow for knowledge of the Scheme to be disseminated. The Department went on to say that the fact that the number of applications grew to 67 by the closing date from a figure of 16, indicated that the publicity given to the Scheme had a very positive impact. The Department said that the purpose of the Scheme was clearly for sustaining or maintaining a family tradition of sea-fishing. Any replacement capacity granted would have to be used by the family of the applicant only and could not be sold. Accordingly, it was, in the Department's view, reasonable that the Minister, in introducing the Scheme, would do so in a way that reasonably targeted persons involved in the fishing industry and this was consistent with the purpose of the Scheme being introduced. The Department said the fact that persons who were no longer involved in the fishing industry were not specifically targeted was not inconsistent with the purpose of the concession that was being introduced. It claimed that all applications were fairly assessed and that this seemed to be accepted. It indicated that it did not propose to review or re-open the Scheme.

### **3.9 The Investigation**

Following a thorough review of all the evidence gathered up to that

point I decided to initiate a formal investigation of the complaint. In this regard, I felt that notwithstanding that my Office had been arguing the merits of the case over a prolonged period, the Department had refused to review its decision and had resisted any suggestion that this was a case that may have involved maladministration leading to adverse affect on the complainant. I also felt that this was a case which might, potentially, involve wider systemic issues of public administration. This decision to investigate was notified to the Secretary General of the Department in July 2006, together with a Statement of Complaint which recited the facts established in the preliminary examination of the complaint.

### 3.10 Department's Response to the Statement of Complaint

The Statement of Complaint alleged, *inter alia*, that

- the special circumstances of his family's case were not properly considered by the Department in drafting the Lost at Sea Scheme;
- the Sea Fisheries Division proceeded to draft the scheme based on the detailed information it had on 16 cases available within that Division;
- the manner in which the Department went about devising and publishing the Scheme, appears to have militated against the desired intention of the Scheme -i.e. to sustain or maintain a family tradition of sea fishing - being achieved in the Byrnes' case;
- while there were detailed reasons contained in a file memo outlining why such a Scheme should not be introduced, there were no records available as to why exactly it was decided that a Scheme should go ahead or the precise grounds on which the seven qualifying criteria in the Scheme were drawn up.

The then Secretary General, Mr Brendan Tuohy, responded to the Statement of Complaint on 31 July 2006 (attached as Appendix 2) and in relation to the foregoing points he indicated that these statements appeared to be based on the concept that the level of knowledge of individual cases had a significant impact of the scope of the Scheme as it was eventually drawn up. He stated that this was incorrect. He indicated that the purpose of the request to the Maritime Safety Division in, September 2000, for information regarding lost fishing vessels (see paragraph 5.3 below) was to ascertain an estimate of the number of lost fishing vessels there might have been rather than to analyse the cases



concerned for the purposes of devising a replacement capacity scheme. He stated that at that stage, the Sea Fisheries Division were not drawing up a proposed scheme. The response went on to say that the nature of the Scheme was simple in concept and did not require such analysis. It was simply to accept as replacement capacity proven cases of active fishing vessels lost at sea within the specified period where owners were unable, for *bona fide* reasons, to acquire a replacement vessel before or after the introduction of the new Register in 1990. The detailed conditions of the Scheme were put in place to reflect this objective. In order to avoid difficulties with Ireland's MGP (Multi-Annual Guidance Programme) fleet objectives, the Department was concerned to ensure that the Scheme did not result in other types of cases qualifying for replacement capacity. The Department indicated that the purpose of the Scheme was not open-ended, and it only applied to those who met qualifying criteria. Restrictions relating to the use of any capacity awarded were imposed for the purpose of achieving that purpose. The Department expressed the view that it did not consider that specific knowledge of the Byrne family case or other cases at that time would have affected the scope of the Scheme as eventually drawn up. It did not accept my Office's suggestion that there was a lack of equity in the design of the Scheme or that the design of the Scheme militated against the Byrne family.

In relation to the way the Scheme was advertised, the Department referred to its letter of 20 December 2005 (see paragraph 3.7 above). It indicated that it did not accept my Office's suggestion that the manner in which the Department went about publishing the Scheme militated against the desired intention of the Scheme being achieved in the Byrne's case.

In conclusion, the Department commented on the reference in the Statement of Complaint to the lack of records relating to the reasons why it was decided that a Scheme should go ahead or the precise grounds on which the seven qualifying criteria in the Scheme were drawn up. In this regard, the Department said that it had provided all the documents available and the Department considered that they were quite clear in relation to these matters.

## 4. Investigation Interviews

- 4.1 My officials interviewed the following persons who were centrally involved in the administrative actions of the Department regarding the Lost at Sea Scheme.



Mr Joe Ryan former Principal Officer of the Sea Fisheries Administration Division;

Ms Sarah White, Assistant Secretary;

Mr Tom Carroll, former Secretary General;

Mr Frank Fahey TD, former Minister for the Marine and Natural Resources.

In addition, my officials interviewed the complainant Mr Danny Byrne and his brother Mr Anthony Byrne and also Mr Brendan Tuohy, who succeeded Mr Tom Carroll as Secretary General of the Department and who served in that post until 6 September 2007. I would like to acknowledge the assistance of the full cooperation of all interviewees and of the Department and the former Minister in the course of this investigation.

## 5. The Department's Files and Key Records

**5.1** During the preliminary examination process a number of issues emerged based on consideration of a number of key records on the Department's files which were created during the gestation of the Lost At Sea Scheme. These records formed the backdrop to my Office's approach to the interviews with the persons who were central to the formulation of the Scheme. I will outline hereunder the details of those records chronologically.

### 5.2 Submission of 19 July 2000

A Departmental official, Mr Donegan, wrote a submission dated 19 July 2000 which indicated that the submission was prepared following his having been contacted by Minister Fahey on behalf of a constituent, Mr Tony Faherty, regarding, *inter alia*, the possibility of replacement capacity being granted to Mr Faherty in connection with a vessel named the *Joan Patricia* which sank in 1983 and, as such, was not entered on the Register which was established in 1990 for existing fishing boats at the time. The submission indicated that the issue was a recurring one and that the official was aware of ten other similar cases which he listed in his note. The submission also indicated that in one of those other cases, involving a vessel named the *Kreis an Avel*, the Department had been challenged in the courts and was defending its position not to grant permission to provide replacement capacity for boats which had sunk.

The submission warned that a concession in the case of the *Joan Patricia* would “*open the floodgates to other claims.*”

### 5.3 Memo of 22 September 2000

A memo on file dated 22 September 2000 was created by an official in Marine Safety Division of the Department and was headed **Request from Sea Fisheries Division - Fishing Vessel Sunk 1980-2000**. The memo outlines the outcome of a review of certain files held by Marine Safety Division. The memo indicated that there were over 500 files which had been opened and over 120 related to incidents involving fishing vessels. The memo also indicated that it was clear that over 20 files related to foundering or sinking of fishing vessels. However, in the majority of cases the titles of the files did not specify the nature of the incident. The memo went on to state that the provision of more accurate and detailed information for Sea Fisheries Division would require that all the 120 files would need to be reviewed individually but most of them were in one or more storage areas throughout the building. The official concluded the memo by indicating that “*my best guess is that this task would take some time to complete.*” In a hand-written footnote on the memo, dated 22 September 2000, a more senior official in the Marine Safety Division wrote to Mr Joe Ryan of the Sea Fisheries Division indicating that “*the information required is not readily to hand*” and it would take some time to review the casualty files. The note also suggested that it was possible, though unlikely, that there could have been vessels which could have sunk unknown to the Department, particularly if the incident went unreported.

### 5.4 Memo of 10 November 2000

On 10 November 2000 Mr Joe Ryan of Sea Fisheries Division sent a detailed note to Ms Sarah White, Assistant Secretary and the Rúnai Aire (Private Secretary to the Minister). This note was titled “Messrs T. Faherty and P. Mullen -Claim for fishing vessel capacity”. In this note he outlined the Department’s long standing policy of resisting claims for replacement capacity in the cases cited and in other similar cases. He set out the EU context of the policy and how persons placed on the Register on 1 May 1990 had to apply to the Department for registration at the time. He indicated that the policy in place since 1990 was to allow replacement capacity only in respect of fishing vessels duly registered at the time. The note indicated that a concession in these cases would have implications for a court case which was on-going at the time

against the Department involving a fishing vessel called *Kreis An Avel*. The note also stated, *inter alia*, that;

*“Any concession to the owners of lost or sunk vessels could be expected to lead to demands from owners of other fishing vessels which were not for various reasons (inactivity, unseaworthiness, late application etc.) put on the new Register. Such approaches would be difficult to refuse, as these owners could claim to have as good a case as owners of vessels which no longer existed when the new Register came into operation.”*

#### **Memo of 11 November 2000**

In a hand-written footnote to Mr Ryan’s memo dated 11 November 2000 and addressed to Minister Fahey, Ms Sarah White, Assistant Secretary, agreed with Mr Ryan’s stance and stated, *inter alia*;

*“The overriding problem is where would it stop. In addition to the 6 others we know about (& I’m not sure how well supported those cases are) plus the vessel involved in the High Court case, you can safely assume that there will be any number of individuals clamouring for the same treatment.”*

In concluding her note, Ms White suggested that the matter should be discussed before a final decision was made.

In a further hand-written footnote subsequent, to Ms White’s note Minister Fahey indicated to Ms White that;

*“I want to see how we can ringfence the 6 to 8 genuine cases including those before the High Court (if they are in the genuine category) and what the implications are for the \*MAPGs. I want to licence those boats if we can do this.”*  
(\*Multi-Annual Guidance Programme)

In a further hand-written footnote addressed to Joe Ryan and dated 14 November 2000 Ms White instructed Mr Joe Ryan to *“review urgently the scope for ringfencing...”*

#### **5.5 Memo of 12 December 2000**

On 12 December 2000, Mr Joe Ryan sent a memo to the Secretary General entitled Capacity of Lost Fishing Boats. The memo referred at the outset to *“recent discussions”* about the matter. The memo went on to outline the Department’s long standing policy in relation to the matter

but indicated that the matter had been reviewed “*in light of the Minister’s views on the matter.*” The memo went on to express “*serious concerns about possible repercussions*” but suggested how a scheme might be produced based on a number of criteria. The criteria suggested in the memo were as follows;

“(i) The vessel concerned is established, to the satisfaction of the Department, to have been lost at sea after 1st January 1980.

(ii) the vessel is established to the Department’s satisfaction to have been actively engaged in sea fishing until it was lost at sea; and

(iii) the owner of the vessel was unable, for reasons which are accepted by the Department as being bona fide, to acquire a replacement vessel before the inception of the new registration system.”

The memo went on to state, *inter alia*, that;

“*If these criteria are agreed, we can correspond with the owners in respect of known cases on hand.* It was also suggested that there be consultation with the industry/representative organisations so that any others in similar circumstances could put their case to the Department. The memo went on to say that “*We know of around 10 cases of boats which sank between 1980 and 1989.*” It warned however, that “*it is possible that the owners of other lost vessels will present themselves when the policy change becomes known.*”

The memo concluded with a reference to the on-going High Court case involving the *Kreis An Avel* and suggested that the owners might make a case for consideration under the suggested criteria.

## 5.6 Memo of 18 December 2000

In a short covering note dated 18 December 2000 with an attachment, Mr Joe Ryan of Sea Fisheries Division submitted a draft Lost at Sea Scheme to the then Secretary General, Mr Tom Carroll. Referring to the criteria in the draft Scheme he indicated in the covering note, *inter alia*, that; “*These are along the lines discussed last week, and are designed to address any genuine cases of hardship while averting the serious consequences which could follow if lost or inactive boats generally became acceptable as replacement capacity.*”

### 5.7 Memo of 19 December 2000

On 19 December 2000, in a hand-written covering note addressed to Mr Tom Carroll, Secretary General, Mr Joe Ryan referred to a revised document which he attached “*as discussed.*” In a further (undated) hand-written note, the Secretary General referred to suggested amendments to the document. Attached was a draft scheme with a series of hand-written amendments to a number of sections.

### 5.8 Memo of 21 December 2000

On 21 December 2000, Mr Joe Ryan sent a short covering note to Ms Josephine Kelly, Principal Officer (who was moving in to the Division to take over Mr Ryan’s position) with an attached updated draft scheme taking on board Mr Carroll’s amendments. He indicated in his note that the scheme was designed to deal with “*hardship cases*”. He also indicated that papers relating to Mr Faherty and Mr Mullen were forwarded to the Minister’s Office with a submission on the matter.

### 5.9 Amendments to the Draft Scheme

A number of the amendments made to the draft scheme by Mr Carroll served to make it more restrictive while a number of others were relatively minor in nature. Leaving aside the separate issue of the Byrne family’s application being received after the closing date, one of the amendments was particularly relevant to the Department’s consideration of the application subsequently submitted by the family. This was an amendment to Section (c) which was as follows;

#### **Original Draft**

“(c) the boat in question is shown, by reference to logsheet returns or other appropriate records, to have been in active and continuous use by the person concerned for sea fishing until its loss at sea.”

#### **Revised Draft (amendments in bold)**

“(c) the boat in question is shown, by reference to logsheet returns or other appropriate records, to have been in active and continuous use **for a considerable period of years** by the person concerned for sea fishing of a category now covered by the replacement policy rules, until its loss at sea.”

The full final Scheme (as published) is attached as Appendix 1. When

it came to vetting individual applications the Department interpreted “*a considerable period of years*” as meaning a minimum of two years (see paragraph 2.4 above).

### 5.10 Memo entitled “Sunken Boats Capacity”

There is a detailed note on file which is undated and unsigned, but appears to have been drawn up around December 2000/January 2001 and entitled “Sunken Boats Capacity”. This note sets out strong objections to the idea of any concessions to owners of sunken boats who were seeking replacement capacity. The full text of the note is attached as Appendix 3. The note concludes by stating; “*Piecemeal changes in policy in response to special pleadings from individuals where these changes would run totally contrary to policy objective, give large unrequited gains to these individuals and open up equally “meritorious” claims, cannot be recommended.*” In a hand-written footnote to this memo dated 30 January 2001 Minister Fahey states “*Go ahead with Proposals subject to conditions laid down in most recent memo subject to PO’s agreement that there are no further cases in addition to those we are aware.*”

### 5.11 Minister’s Letter of 2 February 2001

On 2 February 2001, Minister Fahey wrote to a number of fishing organisations indicating that he was proposing to introduce a “*limited and fully ringfenced concession*” in relation to the use of capacity of boats lost at sea before the 1989 Register came in to being. In the letter the Minister expressed the view that given the proposed criteria, he anticipated that only a very small number of vessels would qualify under the scheme. He sought the views of the fishing organisations on his proposed scheme.

### 5.12 Memos of 2 February 2001

There were two separate memos on the Department’s files which appear to have been drafted by Mr Paddy Mullen and Mr Tony Faherty setting out the background to their involvement with their fishing boats which were lost at sea. The two boats were the *Spes Nova*, and the *Joan Patricia*. These memos are dated 2 February 2001 and are titled “*Use of capacity as “replacement capacity” for licensing purposes*”. The memos deal with a number of matters relating to the two boats under a number of headings e.g. Owner and Skipper, Loss of Boat Verified, Continuous Use for Fishing in Appropriate Category etc. These headings correspond with the various elements of the Lost at Sea Scheme eligibility criteria which were subsequently published (see Appendix 1).

### 5.13 Note of Meeting of 5 February 2001

There is a further undated and unsigned memo relating to a meeting held in Galway on 5 February 2001, between Mr Paddy Mullen and Mr Tony Faherty and Minister Fahey. The memo is titled “*Questions Needing Clarification Re: Paddy Mullen and Tony Faherty and Replacement Tonnage*” and teases out a number of issues in relation to their possible eligibility under the Lost at Sea Scheme as it was drafted at the time. Examples of the issues contained in the memo are as follows;

*“1. Replacement Capacity Condition*

*Will the Minister and his department object if the replacement capacity for the lost boat is distributed between two boats, both owned by the applicant, or by the applicant and his immediate relation?...”*

*“4. The 10-year condition*

*In relation to the proposed 10-year condition, the possibility of borrowing money from financial institutions using the tonnage and the boat as part mortgage is creating difficulties. The Minister mentioned that, if this turned out to be a problem, there might be other ways of addressing the situation. Could the Minister have documented what these other ways might be?*

In a hand-written footnote to this memo Minister Fahey asks his officials for clarification on the issues raised in the memo.

### 5.14 Memo of 19 April 2001

Ms Josephine Kelly, Sea Fisheries Administration Division, sent a memo dated 19 April 2001 to Ms Sarah White, Assistant Secretary and to the Runai Aire (Private Secretary to the Minister) in relation to the feedback from industry representatives who were asked to comment on the terms of the proposed Lost At Sea Scheme ( see 5.11 above). The memo indicated that there was some resistance among industry representatives to the idea of the Scheme. Two groups indicated that “*the proposal involving giving the free capacity will cause major difficulties and point out that some individuals will get tonnage at no cost while most pay £4,000 per tonne. Some groups supported the proposed scheme.*” The memo indicated that the representative organisations did not indicate the likely number of vessels which would qualify under the Scheme. The memo pointed out that phone calls had been received in the Division from individual fishermen who were interested in the Scheme while others rang to complain “*that this is a back door opportunity targeted at particular individuals while the*

*majority of fishermen are required to pay for tonnage.”* The memo suggested that in the event of a Scheme being implemented, all individuals who had sought credit for vessels lost at sea would have to be written to and asked to formally establish their eligibility. In this regard, the memo indicated that *“At present, the Division has 16 requests from fishermen seeking capacity credit on the basis of vessels lost at sea. On the basis of the information currently available to the Division, some clearly will not meet the conditions of the Scheme.”*

#### **5.15 Memo of 8 May 2001**

In a hand-written footnote to the foregoing memo, dated 8 May 2001 and addressed to the Minister by Ms Sarah White, Assistant Secretary, it was noted that some groups were opposing the proposed Scheme and indicated that *“while designed to ensure against opportunism as opposed to the genuine cases, runs a strong risk of challenge from a variety of interests. You may wish to discuss prior to making a final decision.”*

#### **5.16 Minister’s Approval of Scheme**

A subsequent hand-written note dated 17 May 2001 by Ms Josephine Kelly, Sea Fisheries Administration Division, indicated that the Minister had approved the Scheme subject to amendments. The revisions made by the Minister to the draft Scheme were as follows;

##### **Original Draft**

The capacity of a fishing vessel lost at sea will be accepted as “replacement capacity” for licensing purposes only if it is to be used for the purposes of sustaining or maintaining a family tradition of sea fishing. Any capacity accepted as “replacement capacity” must, therefore, be used as an owner/skipper by the persons who owned the lost vessel or by their immediate relations for the purposes of introducing a replacement for the lost vessel. Any capacity from a lost vessel so used may not be sold or otherwise disposed of for a period of 10 years.

##### **Revised Draft**

The capacity of a fishing vessel lost at sea will be accepted as replacement capacity for licensing purposes only if it is to be used for the purposes of sustaining or maintaining a family tradition of sea fishing. Any capacity accepted as replacement capacity must therefore be used for the purposes of introducing a replacement for the lost vessel which will be owned and skippered by the applicant or by an immediate relation



of the applicant. Any capacity from a lost vessel so used may not be sold or otherwise disposed of.

**New Section (g) Inserted**

(g) the applicant did not receive any financial benefit from the loss.

The full final version of the Lost at Sea Scheme as published is attached as Appendix 1.

**5.17 Memo of 31 May 2001**

On 31 May 2001, Ms Josephine Kelly, Sea Fisheries Administration Division, sent a memo to Ms Sarah White, Assistant Secretary, and to the Runaí Aire, Private Secretary to the Minister, attaching a copy of the updated amended Scheme along with a letter for the Minister's signature to issue to the representative organisations, informing them of the Scheme. A table was attached giving details of 16 owners who had requested replacement capacity, about whom the Division was aware and also giving details about their vessels. Draft letters were also attached for the Minister's signature to issue to Mr Paddy Mullen and Mr Tony Faherty informing them about the launch of the Scheme. A closing date of 31 December 2001 was set down for the Scheme.

**5.18** A subsequent memo on file indicated that following the receipt and vetting of applications there was a total of six successful applications out of a total of 67 received. The vessels which were successful were *MFV Fiddawn*, *MFV Joan Patricia*, *MFV Spes Nova*, *MFV Kreis an Avel* (in respect of one joint owner only), *MFV Sea Hunter II* and *MFV Rising Sea* (one joint owner only).

## 6. Evidence Gathered During Interviews

### 6.1 Interview with the then Secretary General, Mr Brendan Tuohy

The purpose of the meeting with Mr Tuohy (who was Secretary General of the Department at the time my investigation commenced), was to enable my officials to outline the general procedures involved in formal investigations including the steps followed by my Office in ensuring that fair procedures are observed. Mr Tuohy assured my officials of the full cooperation of his Department during the investigation process.

## 6.2 Interview with Mr Joe Ryan, former Principal Officer, Sea Fisheries Administration Division

Mr Ryan worked as Principal Officer in Sea Fisheries Administration Division from November 1997 until December 2000, at which point he handed over responsibility for his work on the Lost at Sea Scheme to Ms Josephine Kelly. It was clear from the Department's files that during the years following the establishment of the Register, pressure was being brought to bear to try and accommodate boat owners whose vessels had been lost at sea, prior to the establishment of the Register. Mr Ryan confirmed that this was the case and a small number of boat owners were taking the lead in this matter, including Mr Paddy Mullen and Mr Tony Faherty. This pressure manifested itself in a number of ways, through contacts from the owners themselves, industry representatives and various politicians making representations on their behalf. On occasion, Mr Ryan had to attend meetings with boat owners and political representatives to explain the Department's policy position. The Department rigidly opposed any concessions.

Mr Ryan indicated that his contact with Marine Safety Division in September 2000 (see paragraph 5.3 above) was an effort to try and quantify the number of likely cases that might arise in the event of a Lost at Sea Scheme being introduced. When that Division indicated that detailed information was not readily at hand, he accepted the position.

As to why a starting date of 1 January 1980 was being mooted in terms of boats sunk after that date being possibly eligible under the proposed Scheme, he could not recall a particular rationale for choosing that date as the cut off point, although it may have been felt that a ten year period (1980-1990) was a reasonable limit and if one went further back this might give rise to administrative difficulties.

Following Mr Ryan's note of 10 November 2000 (see paragraph 5.4 above), he was asked to review the situation following the Minister's instructions. His recollection was that he did not discuss the matter at the time with Ms Sarah White, Assistant Secretary as she was heavily involved in other work in Brussels around that time so most of his dealings about the matter were with the then Secretary General, Mr Tom Carroll. Essentially, as the Scheme evolved, the drafting and revisions were carried out by himself and Mr Carroll.

In relation to the Minister's instruction at the time that he wanted to "*ringfence the 6 to 8 genuine cases*", Mr Ryan said he approached the

design of the Scheme on a “*first principles*” basis and as such, he was not trying to base the Scheme around the cases that the Department was aware of. Some of those cases were ones which had been the subject of lobbying and others were known about for various reasons. He said he did not know what the Minister meant by “*genuine cases*” and he never discussed this matter directly with him. He believed that the Minister meant *bona fide* cases. He said he was not *au fait* with the details of the High Court case which was going on at the time involving the *Kreis an Avel*.

In commencing his work on drafting the Scheme Mr Ryan said his point of departure was the European Commission’s Multi-Annual Guidance Programme (MAGP) in relation to Ireland’s fishing fleet objectives. He worked on a tight and narrow basis and had regard to the first principles which governed overall licensing and did not look at the details of individual cases or examine those files available in his Division. He did not consider seeking more specific details on the files available to Marine Safety Division. He said he originally came up with three eligibility criteria (see paragraph 5.5 above) but Mr Carroll wanted more specific details stitched in. Regarding his notes of 12 December 2000 (see paragraph 5.5 above) and 18 December 2000 (see paragraph 5.6 above) the discussions which are referred to took place were between himself and Mr Carroll.

Mr Ryan confirmed that the series of hand-written amendments to his draft which were encompassed in his revised draft submitted by him on 19 December 2000 (see paragraph 5.7 above) were Mr Carroll’s amendments. Mr Ryan said he had not discussed those particular amendments with Mr Carroll but took them at face value. Mr Ryan said this was his last involvement in the drafting of the proposed Scheme.

### **6.3 Interview with Ms Sarah White, Assistant Secretary**

Ms Sarah White, Assistant Secretary, had responsibility for the Sea Fisheries area from December 1994 up to March 2002. She indicated that there was continuous interest from public representatives with fishing constituents in relation to fishing policy matters. In relation to the proposed replacement capacity scheme, there were differing views on the part of the Fishing Organisations as there could be winners and losers.

In relation to her note of 11 November 2000 (see paragraph 5.4 above) she could not recall if she had any follow up discussions with the Minister at the time. She indicated that there was no note of any such discus-

sion on the file. For the last quarter of 2000 and 2001, she had to spend a lot of time in Brussels on EU business.

Regarding her note to Mr Ryan dated 14 November 2000 (see paragraph 5.4 above), she said she could not recall the details of the High Court case. She said that there were genuine issues in relation to some of the cases which had come to the Department's attention and it was her recollection that the then Minister had his own views on what he saw as being genuine cases at the time. She felt that he had wanted to licence those boats of which he was aware. There was a concern within the Department that there were other cases in the woodwork and there was a profound concern of the risk of setting a precedent.

Ms White indicated that the drafting and revision of the various drafts of the Scheme had been conducted, in the main, by Mr Ryan and Mr Carroll. She could not recall having been briefed in relation to the final stages of the drafting process.

Ms White indicated that she did not believe she was the author of the undated and unsigned memo opposing the proposed Scheme (see paragraph 5.10 and Appendix 3) but she expressed the view that it appeared from its format that it may have been written by Mr Carroll. She took a general approach from the Department's point of view in relation to the proposed Scheme, by making it clear the risks that existed in policy terms.

When the Minister gave his direction on 30 January 2001 (see paragraph 5.10 above), she could not recollect having discussions with him about that particular matter although, as part of her normal work, she would have spoken regularly with the Minister. Ms White interpreted the reference in the Minister's memo to "*PO's agreement*" to being a reference to a Principal Officer and she felt the memo could only have made sense if interpreted that way. She felt that from a practical point of view, once the Scheme was publicly advertised one could not guarantee that other cases, not known to the Department at the time, would arise. There is always the danger that it would be like an iceberg with a lot unseen beneath the surface.

While Ms White suggested in her note of 8 May 2001 to the Minister (see paragraph 5.15 above), that he might wish to discuss the Scheme proposals she could not recall having had follow up discussions with him on the matter at that stage.

In relation to the two late changes to the Scheme (see paragraph 5.16 above), Ms White could not recall when precisely this happened or who was responsible for them.

Ms White was aware that in advertising the Scheme, it was going to be put in the trade papers and details would be disseminated through the industry and she had no difficulty with this approach. She felt there was a certain onus on the fishing organisations to spread the word about the Scheme.

By the time the Scheme was made public, Ms White said she was happy, from an administrative and equity point of view, that the Department had something in place. In relation to the Minister's position on the Scheme Ms White indicated that she could not obviously look into the Minister's heart, but, going on what he expressed and articulated, she knew that he had concerns for "the little guys who were struggling" and that no doubt he knew some of them personally and wanted genuine cases of hardship dealt with. She made the point that over the years a number of politicians, across a range of parties, would have shared the Minister's views and had been pressing for concessions.

#### **6.4 Interview with Mr Tom Carroll, former Secretary General**

Mr Carroll came to the Department in 1988 as an Assistant Secretary with Sea Fisheries as part of his brief. He was appointed Secretary General in 1994 and retired in September 2001. Mr Carroll indicated that when he arrived in the Department, the general situation in relation to fishing policy was somewhat chaotic but by 1990, the Department had succeeded in establishing a clear policy based on the replacement concept. The nature of the Irish fishing industry was that this policy was subject to recurring attack and while it would always be very difficult for the Department to hold the line, the Department would do as much as it could.

Mr Carroll agreed that the officials were negatively disposed towards a change in policy as was envisaged under the Lost at Sea Scheme, but the then Minister was particularly tenacious on the issue. While he himself would not normally have been involved in such detail on the matter, he had to step in during Ms White's absences in Brussels. He was also getting messages indirectly from the Runaí Aire (Private Secretary to the Minister) about the matter.

In relation to the detailed redrafting he had done (see paragraph 5.9 above), he said his aim was to confine the Scheme. In this regard he would probably have had brief discussions with Mr Ryan about the matter. He said Mr Ryan was taking a general overview, they did not have regard to specific cases and it was not a matter of trying to include or exclude anyone in particular other than to try and make the Scheme as restrictive as possible.

Mr Carroll indicated that he could not recall the details of the High Court case involving the *Kreis an Avel* at the time but he was certain that he did not take it specifically into account in drafting the Scheme. He made the point that the Department faced many legal challenges and it was a matter for the people dealing with the court cases to deal with those matters.

In relation to the Minister's reference to "*genuine cases*" (see paragraph 5.4 above) Mr Carroll said that he had no specific knowledge of those cases and had an open mind on them. He made the point that with the advent of FOI, the Ombudsman Act and the use of judicial review there was no longer a tolerance for making *ad hoc* decisions to suit particular people and he welcomed that development. His own approach to the drafting of the Scheme was that he did not seek to acquaint himself with individual cases.

In relation to his amendment to item (c) of the Scheme (see paragraph 5.9 above), which was directly relevant to the case of the Byrne family, Mr Carroll said that as far as he was aware the Byrne case was the only one in which there was a complaint relating to this clause. His intention in re-drafting it was to exclude a case, for example, where someone had fished for two days and their boat had sunk. The matter was really one of interpretation of that condition. He said the Department was drafting a minor exception to an established policy. As far as the Department was concerned the determining factor was that the Scheme was to be restrictive. He made the point that the condition had not been challenged by the industry organisations when they were consulted and it did not cause problems during the application stage, given that the Byrne family submitted a late application. Mr Carroll made the point that the Scheme was an administrative one and he felt that if the Byrne family had applied on time there may have been scope for adopting a flexible interpretation of the condition but by the time the final decisions were being made on individual applications, he was not in the Department.

Regarding the unsigned memo opposing the proposed Scheme (see paragraph 5.10 above and Appendix 3), Mr Carroll could not say for certain if he wrote it and indicated that he may have dictated it to Ms White. However, he indicated that the memo reflected the considered Departmental view at the time.

With regard to the Minister's memo of 30 January 2001 (see paragraph 5.10 above) Mr Carroll was of the view that the reference to "*PO's agreement*" was a reference to the Producers Organisations. He said that at the time the note jarred with him as it could have had no effect in that once the Scheme was out it was out and it was not possible to be certain about the level of applications. He made the point that the responses of the Producers Organisations would have been expected to be varied as there were people in the fishing industry at the time who had paid big money for replacement boats and they would have opposed granting further capacity to others.

As regards the consultations between the Maritime Safety Division and Sea Fisheries Administration Division (see paragraph 5.3 above), Mr Carroll emphasised that Marine Safety was entirely separate within the Department of the Marine and had been set up in 1987 on transfer of the function from another Department. It had an entirely separate administrative and legal function. He would not accept the argument made by the Ombudsman that the files held therein should have been consulted in drawing up the Scheme.

Following the mixed reaction of the industry to the proposed Scheme Mr Carroll could not recall any discussions with the Minister on this point. In Mr Carroll's view, the Minister's mind had been made up that the Scheme should go ahead.

With regard to the suggestion that the scope of the advertising of the scheme was not very wide, Mr Carroll said that the cost of advertising would be important in a small Department. His view was that the fishing community was very tight knit and that the fishing trade papers were the equivalent of the Farmer's Journal. He believed that the scope of the advertising was adequate in the circumstances.

## **6.5 Interview with Mr Frank Fahey, T.D., former Minister for the Marine and Natural Resources**

Deputy Frank Fahey was Minister for the Marine and Natural Resources for the period from January 2000 to June 2002. He said he came into

the job as that government was in mid term. He went around all the fishing ports in order to immerse himself in the job. He believed that the fishing sector was skewed towards a regulatory regime and that precedent was very important in policy terms. He believed that the development approach had been stymied and he formed the view that the regulatory regime introduced in 1990, under which tonnage became an asset, was arbitrary and did lead to an anomalous or unfair situation in some, but not all cases. He felt some cases for concessions were dubious in nature. He was also quite clear that he would not be doing anything regarding those boats which had sunk in the harbour or the docks (implication being that there could be dubious circumstances) as, in principle, this would be completely unfair. He was most anxious to hone in on good genuine cases to make his arguments within his own Department to illustrate the point, and he picked the cases of Mr Faherty and Mr Mullen as examples.

As Minister at the time, he had received representations from all over the country, including from Donegal, Galway, Cork and Kerry. He was already aware from Éamon Ó Cuív TD and others about the issue. He wanted the most convincing case possible and Mr Faherty and Mr Mullen were his test case. He said he had several meetings with his officials and he was required to take account of their views. He cited meetings with officials such as Mr Donegan and Ms White but indicated that these meetings were not documented to any degree.

He presumed that he did discuss the *Kreis an Avel* case with his officials and he indicated that he may have met the owners, as he would have met a lot of people in Killybegs (where the *Kreis an Avel* was based). However, he could not be certain as he could not precisely recall. He believed that at the time there were in all, around 100 cases on the go. While he could not recall the *Kreis an Avel* court case, he would have been aware that the principle, from the Department's point of view, would be that as the Department's 1990 regulatory position was being challenged in the courts, any question of introducing a Lost-at-Sea-style-Scheme should be put on hold for fear it would impact on the Department's court argument.

Following Mr Joe Ryan's memo of 10 November 2000, Ms Sarah White wrote a note dated 11 November 2000 (see paragraph 5. 4 above), expressing sympathy for the cases of Mullen and Faherty but advising against any concession in view of the High Court case and the distinct possibility of further cases emerging. There was a discussion between



him and Ms White at the time. His recollection was that she said that there was a case but that if a change was made, it could open the flood-gates. There was a discussion about genuine cases and he was quite clear what those cases were, namely, those who had lost boats and had made efforts to get back into fishing - families who wanted to have their own boats and were still involved in fishing. He would have been making the point that there was only a limited number of cases. He mentioned a case which he knew of where a fisherman had got back in by buying new capacity so he would have been automatically excluded. He believed that if the Lost at Sea Scheme was advertised, then the genuine cases would come through.

With regard to the then Minister's note in which he indicated he indicated his wish to "*ringfence the 6 to 8 genuine cases*" (see paragraph 5.4 above), he said he got that figure from the information the Department was giving him but in the long run, he was not overly concerned if they ended up with 50 cases as he was working on the principle. He believed that by using the word "ringfence" he was thereby overcoming the Department's argument about opening the flood gates. He was aware of cases which he did not envisage being successful under the Scheme e.g., where a boat had simply been abandoned. The terms of reference for the Scheme was to cover the issues which arose in the discussions with his officials. The aim was to include people who were affected by the 1990 changes and since then, were still in the fishing business. In his view these were people who had been caught by an arbitrary decision, because of the tonnage requirement, they were then still fishing but could not own their own boat.

As regards any difficulty with giving concessions to people while a court case was ongoing, he recollected that he did consult a legal advisor and was told that the introduction of a Scheme would lead to the dropping of the court case.

In terms of further research being carried out in advance of the launch of the Scheme, he said that the normal thing was to advertise a Scheme and give a closing date. Once the policy decision was taken and the terms of reference established, then the Minister was no longer involved. The reason the fishing organisations were contacted, given copies of the draft Scheme, and consulted, was that he wanted to gauge their views and also they would be aware of people who were still fishing and affected by the loss of their boats.

While it was not possible to precisely predict the scale of applications which would be received, he felt this would not have had ramifications for the MAGP (Multi-Annual Guidance Programme). He believed the 1990 restrictions were arbitrary and discriminatory and he had talked on the matter with a few Ministers whom he believed were like-minded. It was his belief that there would not have been too many cases. He was quite clear that he and the Department could see through the cases that were not valid. He said that he did not believe that they ran into the hundreds. His compromise with the Department was to bring in the genuine cases and by definition leave the 1990 restrictions intact. He said he used Faherty and Mullen cases as “guinea pigs” and basically asked them to give him proof i.e. they should prove to him why they should be considered in any proposed Scheme. In this regard he said that he “bounced off them” the types of questions that his officials had put to him in earlier discussions about the draft Scheme.

With regard to the Producers Organisations he could remember that some would have been unhappy if it turned out that under the Lost at Sea Scheme tonnage could be sold (as was allowed under the original draft of the Scheme) as that would be deemed unfair by those who had purchased their tonnage and, of course, it could also affect the market value of existing tonnage.

In relation to his meeting on 5 February 2001 with Mr Paddy Mullen, owner of the sunken vessel *Spes Nova* and Mr Tony Faherty, owner of the sunken vessel *Joan Patricia* (see paragraph 5.13 above), he said they used to come into his clinics. Mr Mullen was also coxswain of the Aran lifeboat and he would have issues relating to that for the Minister. He said they were not given copies of the draft Scheme at the meeting but he would have told them what was in it. Messrs Mullen and Faherty were concerned about the 10 year condition for sale of tonnage under the draft scheme and wanted that deleted so that those who were allowed go back fishing in their own boats would be allowed sell their tonnage as soon as they wished.

He referred to the Sunken Boat Capacity note (see paragraph 5.10 above and Appendix 3), which he believed was written by Ms Josephine Kelly, Sea Fisheries Administration Division, and how he was concerned that the Scheme should not benefit people financially so he inserted two changes following this note i.e. the applicant should not have benefited financially from the loss and there would be no possibility of selling tonnage acquired under the Scheme (see paragraph 5.16 above).

He said this illustrated that he was not going out of his way to grant big financial benefits to his constituents.

He stated that he gave no inkling to Mr Mullen and Mr Faherty at the meeting that they would be successful under the Scheme. He could not recall whether he met them subsequent to the February meeting. He did meet others and members of fishing organisations. He emphasised that in devising the Scheme, he wanted to find the proper formula from a policy point of view. He also recalled that Mr Mullen and Mr Faherty were very disappointed when there was going to be no possibility at all of selling Scheme tonnage. He said he had spoken to Mr. Mullen recently to find how he got on with his Lost at Sea tonnage. He said that Mr. Mullen told him that it proved to be no great advantage after all and did not confer much benefit on account of all the other expenditures he had to incur in order to avail of the tonnage such as buying a boat.

When the drafting of the Scheme was in its final stages he had a substantial amount of discussion with Mr Carroll. He indicated that when he referred to "*PO's agreement*" (see paragraph 5.10 above) he was referring to Producers Organisations. He felt that by alerting the Producers Organisations, they were ensuring that all who were still in fishing would become aware of the Scheme. He pointed out that as a result of a terrible tragedy, the Byrne family got out of fishing in 1983 so to his understanding of the Scheme was that they had no case even if they had they put in an application on time. He was aware that there would be attempts to get obsolete boats into the Scheme and he believed that he would have been personally aware of about 50 cases and they were of varying merits in terms of the Scheme.

In relation to the table of cases submitted to the Minister when the Scheme was being signed off (see paragraph 5.17 above), he indicated that he would have met a number of them as there were files on their cases going back over the years. He made the point that the reason he wrote personally to Mr Mullen and Mr Faherty (who were among those listed on the table), to tell them about the launch of the Scheme was because there was a long established protocol that representations from constituents were answered by the Minister himself, and other representations received a Departmental reply.

He indicated that he had no input into the planning of the advertising campaign following the launch of the Scheme. He also indicated that

he was not consulted in any way in terms of the vetting of applications which were received under the scheme, following its launch.

## **6.6 Interview With the Complainant, Mr Danny Byrne and his Brother Mr Anthony Byrne**

The Byrnes indicated at interview that their father had the boat Loretto since 1975. It was built in Arklow specially for him. He acquired the *Skifjord* in 1981. That boat was 130 foot long and they believed it was in the 200-300 tonne range. Their father was one of a family of 18 and many of his relations were involved in fishing. The family was left in very poor circumstances following the loss of the boat.

They indicated that they first found out about the Lost at Sea Scheme from a friend of a friend. However, this would have been well after the closing date of 31 December 2001 for applications for the Scheme. They submitted an application dated 31 December 2002 with a letter of the same date from their brother Francis Jr. which was attached to the application. This application was submitted at the time by the Minister for Social and Family Affairs, Mary Coughlan T.D., and was received in the Department of Communications, Marine and Natural Resources in January 2003. In the event of a successful application, the intention was to buy or lease a boat and a relation of the Byrnes, together with Anthony Byrne, had hoped to use any tonnage granted.

The Byrnes expressed the view that they should have been granted tonnage under the Lost at Sea Scheme and believed that their circumstances were such that they were on a par with other successful applicants who had been granted tonnage previously.

## **7. Analysis of the Main Issues**

### **7.1 Putting the Complaint in Context**

This investigation relates to one complaint only, which is that of the Byrne family. As with any complaint, whether it is dealt with by way of preliminary examination or formal investigation, there is a number of core issues which I have to consider. A complaint must relate to the administrative actions of a public body subject to my jurisdiction and there must be *prima facie* evidence that the complainant(s) may have been adversely affected by the actions in question.

Notwithstanding the legal position in relation to the accountability of Ministers and their officials (see paragraph 9 below), under the Ombudsman Act, 1980, administrative actions may encompass either the actions of officials in the relevant department or the actions of the officials and those of the relevant Minister. In probing individual complaints I seek to establish whether the actions complained of may have amounted to maladministration and, if I am satisfied that they do, I then consider whether redress for the complainant is warranted in the case. I always seek to ensure that any suggested redress is appropriate, having regard to the scale and nature of the adverse affect suffered. On the wider front, in examining any given case, I am always alert to any lessons that may be learned from the complaint in terms of highlighting procedural or systemic failures and pointing out how they could have been avoided. This can lead to general improvements within the public body itself and public administration generally and thus avoid repeating similar errors in future.

In this present case, the Byrne family alleged that the rejection of their application under the Lost at Sea Scheme was unfair and unreasonable and they claimed that this stemmed from the way the Scheme was drawn up and advertised. This allegation, the arguments put forward by the Byrne family in support of their case (see paragraph 1.2 above), and my Office's Statement of Complaint (see paragraph 3.10 above) formed the parameters for my investigation of this case. Given the nature of the complaint I felt it necessary to carry out a forensic analysis of the Scheme from gestation to birth in order to determine if the complaint was justified.

## **7.2 Scheme or No Scheme?**

It is clear from the evidence gathered from the files and from the interviews with the key people involved that, for their part, the officials were adamantly opposed to any concessions to people who had lost vessels at sea and who were not on the Register. The Department was of the view that any concessions in individual cases would lead to a flurry of further claims and an erosion of the Department's policy of regulation and restriction in relation to the allocation of tonnage and licences, a policy which, in turn, was in line with EU policy on the fishing industry. For instance, Mr. Tom Carroll had indicated in interview that fishing policy in Ireland had been in chaos, but by 1990, the Department had succeeded in establishing a clear policy, based on the replacement concept. The nature of the Irish fishing industry was that this policy was subject

to recurring attack and while it would always be very difficult for the Department to hold the line, it would do as much as it could.

Based on his knowledge of individual cases, the Minister was of the view that there were genuine cases which, in the interests of equity and notwithstanding the wider policy considerations, needed to be accommodated. He believed that there was over-regulation without any regard to the difficult circumstances this gave rise to for individual fishermen. He also felt that a tightly constructed and well focused Scheme could accommodate the genuine cases and, at the same time, withstand claims from those who would be considered less deserving of concessions. The Minister saw the cases of Mr Mullen and Mr Faherty as being in the mould of genuine cases and, in dealing with the opposition from his officials, he used those as good examples of the type of cases that he believed needed to be accommodated. Clearly, there were strongly held and contrasting views as to whether a Lost At Sea Scheme was appropriate or justified.

I should make it clear that, in examining the complaint from the Byrne family, my concern and focus is not on the question of whether a Scheme should have been launched or not. At the core of my consideration of the complaint is the way the Scheme was drawn up and launched following the decision in principle to have such a Scheme. Having said that I do believe that the background to the decision to proceed with a Scheme may well have impinged on the way the Scheme was drawn up and launched.

The scale of the economic benefit to be derived by a successful applicant would depend on the scale of the tonnage made available and the licensing arrangements. A successful applicant would, of course, have to incur initial and on-going expenses in order to draw down the net benefits arising from the Scheme i.e. the cost of buying or leasing a boat to use the tonnage and the costs of the normal overheads such as insurance, cost of equipment and maintenance, as well as the costs of crew. The level of income to be derived would also depend on a number of variables in any given period such as weather conditions, fish stock levels and the quality of the catch. The value of tonnage can vary from time to time but the Department estimated (see paragraph 3.2 above) that the price per tonne of capacity varied between €2,000 and €4,000 but it indicated that it did not have an accurate picture of this. It should be noted that persons who were successful under the Lost at Sea Scheme and were granted tonnage as a result, were not permit-

ted to sell on that tonnage, unlike other fishermen on the Register. However, given the scale of the demand for the introduction of a Lost at Scheme over a long period of time and the level of applications after the Scheme was lodged, it is clear that concessions to be granted under any such Scheme were seen as an attractive economic proposition.

### **7.3 The Drafting of the Scheme**

The proposed Scheme was to be aimed at a particular clearly defined class of individuals i.e. those boat owners who lost boats at sea between 1980 and 1989 and who were not included on the Register. Those persons who would ultimately be successful under the Scheme would derive an economic benefit by being granted tonnage to enable them to return to fishing as an owner/skipper of a vessel. This benefit would be denied those who applied under the Scheme but did not meet the eligibility criteria. In other words, there would clearly be winners and losers at the end of the process.

The Sea Fisheries Administration Division, which was responsible for designing and implementing the Scheme, ultimately had detailed information on approximately 16 cases which had come to its attention over the years, for a variety of reasons.

A separate section in the Department, Marine Safety Division had over 500 files which had been created and over 120 of these related to incidents involving fishing vessels (see paragraph 5.3 above). It was clear to Marine Safety Division that over 20 files related to foundering or sinking of fishing vessels. However, in the majority of cases, the titles of the files did not specify the nature of the incident, so a much higher proportion of the 120 files could have related to vessels sinking at sea during the period in question and may have been relevant for the purposes of the proposed Scheme. As outlined at paragraph 5.3 above, when the Sea Fisheries Administration Division was told that more detailed information on the cases was not readily to hand and would take some time to retrieve, it did not pursue the matter further and went ahead at a later stage with drafting a Scheme without seeking any further information on those cases held in the Marine Safety Division.

The decision to go ahead with a Scheme was made by the Minister. From my examination of the Department's files I found only one very short written instruction from the Minister to his officials conveying his decision. In this short instruction he also attempted to set out the broad



parameters on which the Scheme should be drafted. The instruction stated (see paragraph 5.4 above):

*“I want to see how we can ringfence the 6 to 8 genuine cases including those before the High Court (if they are in the genuine category) and what the implications are for the MAPGs. I want to licence those boats if we can do this.”*

Following further subsequent expressions of concern by officials in relation to the proposed Scheme, the Minister issued one further very short written instruction on 30 January 2001 (see paragraph 5.10 above) stating;

*“Go ahead with Proposals subject to conditions laid down in most recent memo subject to PO’s agreement that there are no further cases in addition to those we are aware.”*

There are a number of references in the Department’s files in the period leading up to the finalisation of the Scheme referring to discussions which had been held or which were proposed, involving the Minister and/or his officials. See for instance paragraphs 5.5, 5.6, 5.7 and 5.15 above. I could find no formal records of any such meetings or discussions. This point was raised with the various parties during their interviews and none of them could recall any of the meetings or discussions being documented at the time, although it was acknowledged that there had been a number of discussions in relation to the drafting of the Scheme.

#### **7.4 The Overall Purpose of the Lost at Sea Scheme**

In order to assess the merits of the Byrne family’s complaint I needed to clarify the precise overall purpose of the Lost at Sea Scheme. In this regard, the Department’s report of 20 December 2005 (see paragraph 3.8 above) to my Office indicated that the purpose of the Lost at Sea Scheme was *“clearly for sustaining or maintaining a family tradition of sea fishing.”* The Scheme as published (see Appendix 1) stated that replacement capacity will only be granted under the Scheme for licensing purposes *“only if it is used for the purposes of sustaining or maintaining a family tradition of sea fishing.”*

When the Minister wrote to the industry organisations on 2 February 2001 (see paragraph 5.11 above) asking for their views on the draft Scheme he described it as *“a limited and fully ringfenced concession.”*



## 7.5 Issues of Concern

### (a) Interaction Between the Minister and his Officials

The Lost at Sea Scheme was an ad hoc non-statutory administrative scheme designed to convey a benefit to eligible boat owners from within a particular category. The officials drafted the eligibility criteria under which applications would be vetted but did so under a process of close and regular consultation with the Minister. On the run-up to the decision to proceed with a scheme, the Department's officials had been vehemently opposed to its introduction and had spelled out in detail in written memos the reasons why they were so opposed. It is also clear from the documentation on file and the investigation interviews that once the decision to proceed with a Scheme was made, the focus was to make the Scheme as narrow and restrictive as possible in order to deal with the concerns about setting precedents and opening the floodgates. Indeed, the Minister was also conscious of this problem and it was clear from his letter to the industry representatives (see paragraph 5.11 above) that he wished to have a very confined Scheme. No doubt, many of the industry organisations, which were also opposed to the idea of the Scheme, would have shared that view.

In relation to the specific eligibility criteria which were put in to the Scheme, there are no records indicating the precise reasons why those particular criteria were selected and no written analysis of the potential pros and cons of including or excluding particular criteria. There are no records of any meetings where the criteria were discussed or analysed. It is clear from the redrafting that was carried out that the main thrust was to make the Scheme as confined as possible. This lack of written records contrasts sharply with the extent to which the reasons for opposing the proposed Scheme were spelled out in detail in a number of written submissions.

At interview, the officials were at pains to point out that they did not take particular known cases as their reference point in devising the Scheme. I take this to mean, in the words of Mr Tom Carroll, former Secretary General, that "*it was not a matter of trying to include or exclude anyone*" (see paragraph 6.4 above). The officials say the Scheme was drafted from their general knowledge of the industry and Departmental and EU policy and a desire to make the Scheme quite confined. I return to this issue in Paragraph 9 of my Report.

For his part, the Minister wanted a Scheme which would "*ringfence the*

*6 to 8 genuine cases including those before the High Court*". In relation to this instruction he indicated at interview (see 6.5 above) that the reference to "6 to 8 cases" was based on information given to him by the Department.

In my Draft Investigation Report I had expressed the view that it was clear to me from his interview and the documentation on file that the Minister would have been anxious to ringfence the cases of the *MFV Joan Patricia* and the *MFV Spes Nova* and that of the *Kreis An Avel*, which was the subject of the High Court case. These cases were ultimately successful under the Scheme. In his response to my Draft Investigation Report the former Minister took issue with my suggestion that he wished to ring-fence the *MFV Joan Patricia*, the *MFV Spes Nova* and the *Kreis An Avel* cases or that he had a particular number of cases in mind when he mentioned the desire to ring-fence. He said he was anxious to ring-fence genuine cases and if this meant 50 cases ending up being eligible then he would not have been concerned as long as they were genuine. He stated that his reference to "6 to 8 genuine cases" was simply a reiteration of what he had been told by his officials and these were indicative numbers only. He also stated that he had looked at the case of the *MFV Joan Patricia* and the *MFV Spes Nova* (both ships sank in the same accident) to assist him in deciding whether a change in policy was merited. I return to this particular issue in my Concluding Remarks (see paragraph 9 below).

It is not entirely clear from the documentation on file precisely which other cases the Minister had in mind - the Minister claims he had no particular cases in mind - as the Department appeared to have detailed knowledge of different numbers of cases at different stages. For instance, in the memo of 19 July 2000 (see paragraph 5.2 above) a departmental official, Mr Donegan, listed details of 9 vessels (including the three cases which were ultimately successful) which were lost at sea between 1980 and 1989. Two other cases were also mentioned but those boats sank outside the time frame of the Scheme. Ms White's memo of 11 November 2000 (see paragraph 5.4 above), in relation to the three cases which were ultimately successful, referred to "6 others we know about...". Mr Ryan's memo of 12 December 2000 (see paragraph 5.5 above) indicated that "We know of around 10 cases of boats which sank between 1980 and 1989". When the final draft Scheme was presented to the Minister a table was attached which listed details of 16 vessels.

While the Minister had referred to "genuine cases" the officials who were

interviewed indicated that they did not have a clear understanding of what precisely the Minister meant by this. There is no written evidence on file of any attempts to clarify this during the drafting of the Scheme. I note that in his memo of 18 December 2000 (see paragraph 5.6 above) Mr Ryan indicated that the draft Scheme being submitted at the time to the Secretary General was “*designed to address any genuine cases of hardship...*”.

In its response to the Draft Investigation Report (see item (5) of Appendix 4) the Department pointed out that there is now a statutory regime in place since the enactment of the Fisheries (Amendment) Act 2003. The Department pointed out that the Act was introduced to set up an independent licensing authority to decide on individual applications for the licensing and registration of sea-fishing boats. The Department indicated that it was set up so that decisions could be made in a transparent way and removed from political influence.

**(b) Research or the Lack of it**

The Sea Fisheries Administration Division was responsible for drafting the Lost at Sea Scheme. As I have indicated, it was a Scheme aimed at a particular class of individuals. Immediately prior to the launch of the Scheme, the Division itself only had detailed background knowledge of about 16 cases but it was clear that the Marine Safety Division would have had records on most, if not all, incidents of fishing vessels which sank at sea between 1980 and 1989. When the Marine Safety Division indicated that the detailed information on the contents of its files was not readily available, the Sea Fisheries Administration Division did not pursue the matter further.

It is worth noting in this context that the officials drafting the Scheme were certain that other cases would emerge about which they did not have detailed knowledge, once the Scheme was launched. So for instance, the submission dated 19 July 2000 (see paragraph 5.2 above) warned that if a Scheme was published it would “*open the floodgates to other claims.*”

In his memo of 10 November 2000, Mr Joe Ryan (see paragraph 5.4 above), stated, *inter alia*, that;

*“Any concession to the owners of lost or sunk vessels could be expected to lead to demands from owners of other fishing vessels which were not for various reasons (inactivity, unseaworthiness, late application etc.) put on the new Register. Such*

*approaches would be difficult to refuse, as these owners could claim to have as good a case as owners of vessels which no longer existed when the new Register came into operation.”*

Ms Sarah White, Assistant Secretary, agreed with Mr Ryan’s views and stated, *inter alia*;

*“The overriding problem is where would it stop. In addition to the 6 others we know about) & I’m not sure how well supported those cases are) plus the vessel involved in the High Court case, you can safely assume that there will be any number of individuals clamouring for the same treatment.”*

In a further memo dated 12 December 2000 (see paragraph 5.5 above), Mr Joe Ryan warned , that *“it is possible that the owners of other lost vessels will present themselves when the policy change becomes known.”*

In the note attached as Appendix 3 to this Report (see paragraph 5.10 above), the writer states that *“Piecemeal changes in policy in response to special pleadings from individuals where these changes would run totally contrary to policy objective, give large unrequited gains to these individuals and open up equally “meritorious” claims, cannot be recommended.”*

The proposed Scheme was to be a once-off opportunity for a segment of a clearly defined class of people to benefit once they met the stated criteria. It was absolutely clear that cases would emerge other than those 16 which had become known to the Sea Fisheries Administration Division.

As it happens, 67 applications were eventually received and a total of 6 were successful. The officials stated that they were designing a Scheme on the basis of their knowledge of the industry and with a desire to keep it as tight and focused as possible. They knew they did not have the full picture in terms of the precise type and nature of all the applications that were likely to emerge but it was entirely predictable that further cases would emerge other than those they knew about in detail. The Department knew there was more detailed information available on other cases in a separate Division (Marine Safety).

In framing the qualifying conditions, I believe it was incumbent upon the Department to carry out extensive research in order to fully inform themselves to the greatest extent possible about the type and nature of the applications that were likely to be received and to design the Scheme with that full knowledge in mind. This would have provided

material which would have enabled a more considered analysis of the likely impact of the Scheme and to weigh up the pros and cons of the various eligibility criteria which were to be inserted. In my view, given the backdrop as outlined here, it would have been particularly important, and in the interests of equity, to stitch in some form of discretionary element in to the Scheme so that the Department could give due consideration to any applications which would emerge which might not meet all the criteria set down but which, nonetheless, would be seen as falling within the confines of the overall purpose of the Scheme.

I want to make it clear that my comments about the absence of a discretionary element in the Scheme are not made with the benefit of hindsight, based on what we now know about the Byrne family case, or as some sort of attempt to now accommodate the Byrne case within the parameters of the published Scheme. Rather, my comments relate to a shortcoming in the Scheme in that it fails to properly meet fundamental principles of good administration.

As described in my Office's Annual Report for 1995, the Principles of Good Administration to which I refer were set out as far back as the 1980s in a series of recommendations from the Committee of Ministers of the Council of Europe which were endorsed by the individual member states. In exercising their powers, including those of decision making, whether discretionary or otherwise, public bodies should ensure that they adhere to these Principles which include, among other things, the need to ensure objectivity and impartiality, the avoidance of unfair discrimination, the need for proportionality in the application of penalties, the avoidance of unfair discrimination and the exercise of discretionary powers in a reasonable manner. The principle relating to the exercise of discretionary powers reads as follows:

*"...where discretionary powers are involved, public bodies must ensure that they are exercised in a reasonable manner having regard to the foregoing principles, all the circumstances of the particular case and without any undue fettering of their actual discretion e.g., by exclusion of classes of persons from eligibility for services or otherwise."* (My emphasis).

Based on these Principles, my Office developed the Ombudsman's Guide to Standards of Best Practice for Public Servants which was first published in 1997 and updated and republished in 2003 (See my Office's website [www.ombudsman.gov.ie](http://www.ombudsman.gov.ie)). The following extract from that Guide is relevant to the present case.

*“Dealing “fairly” with people means -*

- *treating similar people in similar circumstances in like manner;*
- *accepting that rules and regulations, while important in ensuring fairness, should not be applied so rigidly or inflexibly as to create inequity;*
- *avoiding penalties which are out of proportion to what is necessary to ensure compliance with the rules;*
- *being prepared to review rules and procedures and change them if necessary;.....”*

While it may have been administratively convenient and in line with the stated intention of publishing a ring-fenced and narrow scheme, it was not fair and was not in line with best administrative practice to allow no discretion under the Scheme at the vetting stage. In this regard it is important to note that the Scheme was self-limiting from the outset in that only persons who owned boats which sank at sea within the specified time frame could apply in the first instance so it could not be argued that an element of discretion built in to the Scheme would have had the potential to greatly expand the cohort of people who would be eligible for consideration. Furthermore, it was inevitable that further applications would have emerged other than the 16 cases which were known about in detail by Sea Fisheries Administration Division and it would not have been possible to predict how deserving those other cases were likely to be in the absence of more thorough research of the Marine Safety files before the Scheme was launched. This strengthens the case for introducing some form of discretionary element in to the Scheme. Such discretion could have been attached to individual eligibility criteria within Scheme or a general clause on discretion could have been inserted allowing for special consideration of exceptional cases at the vetting stage.

Because of the contrasting views of the Minister and his officials about the decision whether or not to have a Scheme my overriding impression is that once the decision was taken by the Minister to proceed, all those involved (officials and the Minister) lost sight of the broader need to bring principles of equity to bear in framing the Scheme criteria.

I should make the point here that, in my view, a number of the published Scheme’s criteria were fair and reasonable, given that the Scheme

was a departure from normal policy and had to have limits and conditions. The Minister made the point at interview that his decision to amend the provision in relation to the subsequent sale of tonnage by successful applicants (see paragraph 5.16 above), was a response to particular concerns expressed by his officials. However, as stated above, in terms of its overall purpose, the Scheme lacked equity.

**(c) The Way the Scheme was Advertised**

The Scheme was advertised in the *Fishing News* of 22 June 2001, the *Irish Skipper* of July 2001 and the August 2001 issue of *The Marine Times*. This was in addition to the notifications which were sent on 8 June 2001 to the Producer Organisations. The Department also wrote directly to the people involved in 16 cases the details of which were held in the Sea Fisheries Administration Section of the Department, notifying them of the launch of the Scheme.

The officials who were interviewed said they were satisfied with the scale and type of advertising which was undertaken at the time. The view was expressed that there was an onus on the Fishing Organisations to spread the news. It was indicated that the fishing community was very tight knit and that the fishing trade papers were the equivalent of *The Farmer's Journal* for the farming community.

Clearly, the advertising campaign worked to a considerable extent in that 67 applications ultimately came before the Department but, of course, the campaign did not succeed in alerting the Byrne family. In addition, I note from the Department's records that two other requests for inclusion in the Scheme were received after the closing date. The Department also received an estimated further 5 phone calls from other potential applicants after the closing date, seeking to be considered under the Scheme.

It is quite apparent that a number of the Producer Organisations objected to the idea of the proposed Scheme and it is clear from the Minister's note of 30 January 2001 (see paragraph 5.10 above), that if a Scheme was to go ahead at all, they wished it to be as restrictive as possible. In addition, during the consultation process, these organisations were asked to give their views on the suggestion that only a limited number of vessels would be likely to qualify under the proposed Scheme, but it seems that they provided no feedback on this point. All in all, I think it is reasonable to conclude that following the launch of the Scheme, it is unlikely that the Producers Organisations would have



actively promoted the Scheme or would have sought to bring it to the attention of prospective applicants. It was individuals rather than representative organisations who had lobbied over the years for the introduction of a scheme, whereas the role of the Producers Organisations was to protect the interests of those boat owners who were on the Register and already had fishing capacity in their own right. For their part, the Department's officials were of the view that the Scheme had the potential to undermine a long established policy to restrict fishing capacity and as such any published scheme should be as restrictive as possible.

Clearly, by writing directly to the people involved in the 16 cases (see above), the Department was putting them in a more advantageous position than other prospective applicants to the extent that they were made fully aware of the Scheme from the outset and could decide whether or not they wished to apply.

I also see a connection between the issue of Department's lack of research (see section 7.5 (b) above), and the adequacy of the advertising campaigns. An analysis of the files in the Marine Safety Division would have yielded more information which could have assisted in a more targeted information campaign. For instance, files may have yielded names and contact details or simply the names of particular vessels and where and when they sank. Such information could have been used in the advertising campaign or through direct correspondence from the Department to alert a wider group of prospective applicants. The need for a comprehensive advertising campaign together with a well-researched and directly targeted information campaign would have been all the more important in this case in view of the fact that it was a once-off finite Scheme with a limited time-bound window of opportunity for the submission of applications.

Here again, the Ombudsman's Guide to Standards of Best Practice for Public Servants is relevant as the following extract demonstrates:

*"Dealing "openly" with people means -*

- *making available and keeping up to date, comprehensive information on the rules and practices which govern public schemes and programmes;*
- *ensuring people know what information is available, where to get it and know of their right to access it in accordance with the Freedom of Information Act, 1997 and otherwise;....."*



In its response to the Draft Investigation Report (see Appendix 4) the Department said it was its explicit view that the scheme, as with most schemes, correctly reflected a definite closing date or deadline. It went on to say that the Draft Report appeared to suggest that the scheme should have been launched on an infinite or immeasurable basis. It added that the application from the Byrne family was received over 12 months after the closing date, and did not, in any event, meet all the qualifying conditions of the scheme and the Department's clear view was that it was correctly refused.

I accept that the Byrne's application did not meet all the qualifying conditions of the scheme. I also accept that the criteria applying to schemes generally should be precisely drawn. This helps to ensure fairness and consistency in how individual applications are assessed. But, as I have already said, it is also important to ensure that the rules and regulations applying to schemes are not applied so rigidly or inflexibly as to create inequity.

Turning specifically to the Lost at Sea Scheme, the point I would emphasise again is that as this was a once-off time bound Scheme which would convey benefits to persons among a narrowly defined class of potential applicants, then the importance of a very thorough and targeted advertising campaign became all the more crucial. Furthermore, it would have been administratively prudent and it would have been more equitable, in the context of this particular Scheme, to build in an element of discretion in relation to the assessment of applications received. There is a strong argument to suggest that the Byrne application was one that was deserving of benefit under the Scheme but the way the Scheme was advertised and the lack of discretion in the Scheme criteria prevented their application from being approved.

**(d) Record-keeping Practices**

My investigation of this complaint would have been greatly facilitated if the Department had prepared contemporaneous written records of the various discussions that took place between the Minister and his officials, between the officials themselves and written comments relating to the analysis of the various drafts of the Scheme. Good record-keeping goes hand-in-hand with good administration and on many occasions I have drawn attention to the importance of good record-keeping in ensuring proper accountability of public bodies. Record-keeping is particularly important at the political-administrative interface - a key consideration in this case and, indeed, in some other cases which gave

rise to public controversy in recent years (see also my comments on this matter in paragraph 7.6 below). Fortunately, the records that were created on file and the level of cooperation I received from the Minister and the departmental officials has, nevertheless, enabled me to come to firm findings and recommendations in relation to this particular complaint.

In its response to the Draft Investigation Report (see Appendix 4), the Department said it disagreed with my finding (Number 4) in relation to record-keeping and commented as follows:

*“The Department is strongly of the view that there is clear and unambiguous record keeping with regard to the required objective of the scheme, the clear decision of the Minister to launch the scheme, the clear rules and conditions of the scheme, the equitable administration of the scheme and the outcome of the scheme”.*

I do not fundamentally disagree with the Department’s statement. However I do not accept that it is either an accurate or complete refutation of my finding. As is clear from my comments above, my criticism of the Department in finding no. 4 relates principally to its failure to prepare records of discussions/meetings between the Minister and his officials and between the officials themselves.

## **7.6 The Scheme Preparation Process and Broader Issues of Public Administration**

Looking at this case from the broader perspective of public administration generally, I was prompted to revisit the Report entitled *“Certain Issues of Management and Administration in the Department of Health and Children associated with the Practice of charges for Persons in Long-Stay Care in Health Board Institutions and Related Matters”* (known as the Travers Report), which was published in March 2005. It occurred to me that the Report covered ground and issues of relevance to this present case. In the aftermath to the publication of the Travers Report the then Tánaiste and Minister for Health and Children, Mary Harney, TD, issued a statement which expressed the view that the report *“has wider relevance for all involved in the administration of health services and for the civil service...”*

While the Travers Report related to the Department of Health and Children and was published after the events in this case, it has a clear resonance when looked at in the context of this current case and some of the points raised in that Report bear repeating here. In Chapter 6

(page 79) Mr Travers looked at the administrative lessons which should be learned from the nursing homes controversy. In this regard, he recommended certain changes to the practices and procedures of the Department. Among these were the following:

*“(2) Analytical Capability: Ensure that the analytical input into important decisions taken at the level of the Department, Minister and Government is commensurate with the policy and operational importance of the decisions being taken.*

*(3) Transparency: Ensure that briefings for Ministers on important issues of policy or operations are comprehensive, fully inclusive of **all** (emphasis in report) relevant facts and adequately recorded.*

*(4) Records: Ensure at least a de minimus recording of decisions at official level and Ministerial level within the Department.*

*(6) Decision Making: Ensure that decisions are taken and recorded in a clear, transparent and timely way.... Bring reviews of policy and operational issues to a clear conclusion and record decisions taken and their rationale.*

*(8) Issues of Political Sensitivity: Be aware of issues of political sensitivity. Be responsive in dealing with them but do not allow issues of political sensitivity to compromise the integrity of the analysis undertaken and brought forward, the options for any associated decisions that require to be taken or the full articulation of the likely consequences of alternative decisions.”*

The application of the foregoing guidelines in this present case would have yielded the following outcomes:

- A comprehensive analysis of all relevant files available in the Department;
- A detailed written analysis of the aims, purpose and pros and cons of the Scheme and its individual criteria;
- Adequate written records of all major interactions, including meetings and discussions, between officials and between officials and the Minister.

In terms of this present case, I also take the view that in formulating schemes, public servants should have regard to the principles of equity and proportionality and should seek to provide the necessary scope for discretion to allow for due consideration of cases which might not fit

neatly within the confines of eligibility criteria but may, nonetheless, have merit having regard to their particular circumstances. Of specific relevance here, and as mentioned earlier, are the Principles of Good Administration and the Ombudsman’s Guide to Standards of Best Practice for Public Servants

## 8. The Byrne Family and the Lost at Sea Scheme

As already stated, this investigation involves the examination of one complaint only, that of the Byrne family. In carrying out my investigation I did not examine or consider the merits of any other applicants who applied under the Lost at Sea Scheme but were not successful. I should make the point that the present complaint stands or falls on its own merits, having regard to the rationale behind the Scheme and the way it was formulated and advertised. It should not be assumed that the outcome of this complaint would necessarily imply a similar outcome to a complaint to my Office in future by other unsuccessful applicants. In this regard, it should be noted that, with the exception of my comments about the absence of a discretionary element, many of the criteria in the Scheme, as published, appeared to me to be fair and reasonable and consistent with the purpose behind the Scheme. I should point out that, in addition to the complaint made by the Byrne family, my Office has dealt with five separate complaints from persons claiming that they should have been entitled to benefit under the Lost at Sea Scheme. When I examined those complaints I concluded that their particular circumstances were such that they did not have a reasonable case to suggest that they were entitled to be granted replacement capacity under the terms of the Scheme, as published, and I informed them accordingly. These complaints differed substantially from that of the Byrne family.

In its response to the Draft Investigation Report the Department stated that it was scrupulous in administering the Scheme in that each applicant was treated fairly under the Scheme within specific terms, rules and conditions. I have no evidence to suggest that this was not the case and I accept the Department’s assurances on this particular point.

In drafting the Scheme, even if further background research had been carried out (see paragraph 7.5(b) above), it would not have been possible for the Department to fully anticipate the scale and precise nature of the applications that were likely to be received. The rationale behind the Scheme, as outlined to me by the Department, was that *“the purpose of the Scheme was clearly for sustaining or maintaining a family tradition of sea-fishing”*. I have concluded that the circumstances of the Byrne family

were such that they might reasonably be deemed to fall within a category of cases that would be deserving of assistance under the terms of the Scheme, having regard to its overall purpose.

The apparent reasons why the Department decided the Byrne family's application could not succeed was a) that it was not submitted by the due date of 31 December 2001 and b) because the application, even if received on time, would not have met condition (c) of the Scheme which requires that *"the boat in question is shown, by reference to logsheet returns or other appropriate records, to have been in active and continuous use for a considerable period of years by the person concerned for sea fishing of a category now covered by the replacement policy rules, until its loss at sea"*. For the purposes of vetting applications under the Scheme a *'considerable period of time'* was interpreted by the Department as being a two year period but Mr Byrne only purchased the *Skifford* in 1981 and it sank in October of that year. On the face of it, these grounds for rejections were in accordance with the terms of the Scheme as advertised.

However, my view is that due to the way the Scheme was researched and advertised and brought directly to the attention of some potential applicants and not to others (see paragraph 7.5(c) above), rendered it likely that other potential applicants who submitted late applications (including the Byrne family) would be unfairly denied eligibility under the Scheme. I am also of the view, given the stated rationale behind the Scheme and the circumstances of the Byrne family's case that condition (c), which allowed no discretion, was unduly restrictive and was unfair. The Department itself told me that the overall purpose of the Scheme was to *"sustain or maintain a family tradition of sea-fishing."* The fact that the Byrne family, and possibly others, had used a number of boats sequentially to secure livelihood through sea-fishing should not have prompted an automatic exclusion from the Scheme. The timing of the acquisition of the second boat - four months before it sank - did not dilute the family's involvement in and commitment to sea-fishing. Yet this arbitrary fact, and the non-discretionary rules of the Scheme would have excluded them from it, even if they had met the closing date.

To my mind, the Scheme design was faulty and inequitable as it allowed no leeway to the Department (leaving aside the issue of the late application) to look further at the merits of the Byrne's application, once it was decided that condition (c) was not met. Given the background to the formulation of the Scheme, good administrative practice would have suggested that an element of discretion should have formed part of the

published Scheme so that all applications could have been given due consideration on their individual merits.

While I accept that the advertising campaign did yield 67 applications and the Sea Fisheries Administration Division was only aware in detail of 16 cases initially, I have concluded that the way the Scheme was advertised (see paragraph 7(c) above), was too restrictive and could have been more comprehensive and targeted. It is clear that, apart from the Byrne family, up to seven others sought to be considered after the closing date and there may be others of whom I am not aware and who never made contact with the Department once they realised the Scheme was closed.

At interview, and again in his comments on the Draft Investigation Report, the former Minister claimed that he did not view the Scheme as being intended to apply to potential applicants such as the Byrne family because as far as he was aware they had left the industry in 1983. Furthermore, in its response to the Draft Investigation Report (see item 3 of Appendix 4) the Department stated that the advertising campaign was aimed at *“notifying potential applicants engaged in the sea-fishing industry and who are continuing a family tradition of sea-fishing.”* The reality is that, subject to the other criteria, the overall class of persons who could apply, as defined by the published Scheme criteria, were former skippers and owners (but concessions were granted to immediate family member also) who had lost their boats at sea after 1 January 1980 and the Byrne family clearly fell within this class.

## 9. Findings

### **Concluding Remarks**

This is an unusual case in many respects. When I receive a complaint from a person who has been denied a benefit under a scheme (for example, a medical card or unemployment benefit), my examination of that complaint is usually, but not always, limited to a consideration of the terms and conditions of that scheme and an analysis of whether the complainant did or did not meet the relevant criteria.

In this case, I have had to consider, not just the Department’s decision to refuse the Byrne family’s application under the Lost at Sea Scheme, but also questions pertaining to the purpose, design and publication of the Scheme. The latter questions are relevant in this particular case because of the nature of the Scheme. It was a non-statutory, once-off

scheme, designed to benefit a specific class of persons and, most importantly, was time-bound. Applicants had a once-only opportunity of qualifying for, and benefiting from the terms of the Scheme. In essence, my approach to this case was to consider first whether the Byrne family actually met the eligibility conditions of the Scheme - and it is clear from this report that they did not meet at least two of the stated conditions - and second, given the circumstances of the family's tragic loss and the stated purpose of the Scheme, to consider whether from the outset, it was properly designed and later, adequately published. In other words, my investigation considered not just the question of whether the Byrne family met the conditions of the Scheme, but also whether the design of the Scheme and the publication arrangements were factors in their not qualifying under the Scheme in the first place.

The case is also unusual in that it embraces the actions both of a Minister and those of his officials. Most of the complaints I examine, relate solely to the actions of officials. This is hardly surprising. One only has to think of the myriad decisions made by civil and public servants as they go about the daily business of delivering services to the public. In terms of the overall number of transactions, the actual number involving Ministers, and, in turn, the potential number of complaints relating to their actions, will always be relatively low. Of course, in law, insofar as civil servants are concerned, all acts of a Department and of its officials are the acts of the Minister by virtue of the legal status of a Minister as a corporation sole. This remains the position despite the changes to the accountability of Secretaries General and senior civil servants provided for in the Public Service Management Act, 1997.

The Ombudsman Act, 1980, also recognises the legal position of Ministers *vis-à-vis* their Departments but specifically states that references in that Act to any Department - for example, where a complaint is made about the actions of a Department - include references to the Minister, the Minister(s) of State and the officials of the Department. This allows the Ombudsman the freedom to scrutinise the administrative actions of officials separately from those of the Minister or Minister of State and thus recognises the reality that many actions, in practice, are carried out by officials rather than by Ministers. But, of course, the Act does not limit the Ombudsman to scrutiny of the actions of officials only.

The usual dynamic between officials and Ministers is that the officials provide policy advice, Ministers make policy decisions and policy implementation is a matter for the officials. In contrast to most cases that



I examine, the present case demonstrates clear evidence of the active participation of both the Minister and his officials throughout the Scheme formulation process. He and his officials were deeply involved in defining the objectives of the Lost at Sea Scheme, in designing it, (for example, the Minister amended certain elements of the Scheme criteria which restricted its overall scope and protected it from being abused (see 5.16 above)), developing the eligibility criteria and bringing the Scheme to the attention of some prospective applicants.

It is also clear that the Minister and his officials held opposing views about the desirability of introducing such a scheme in the first place. While the Minister was clearly determined to introduce a scheme and saw it as desirable, based on his first-hand knowledge of a number of hardship cases which had come to his attention. By contrast, the officials were concerned that it would be difficult to limit the Scheme to the genuinely deserving cases, that this would open the floodgates to other claims and, in turn, erode the Department's policy on regulation and the allocation of tonnage and licences.

There is nothing intrinsically wrong with this approach to designing a scheme. In essence, the approach encapsulates how government works. Considerations ranging from political imperatives, known hardship cases, a desire to address an injustice, protection of the regulatory process in relation to the allocation of tonnage and licences and the public interest, all coalesce and the task of balancing these competing interests results in compromise. Nonetheless any compromise cannot lose sight of the principle of equity in relation to everyone potentially affected by that compromise.

As I have outlined in this report, there is very clear documentary evidence from the Department's files in relation to the Minister's determination to proceed with a scheme. There is also clear evidence, again outlined in my report, of the reasons why the officials were opposed to the introduction of a scheme. However, the Department's files contain little or no evidence as to how the Minister and his officials reconciled these opposing views and arrived at a compromise and the specific criteria which became the basis for the published scheme. What is clear is that the actions of both the Minister and his officials resulted in a scheme which was too focused on known cases and which wrongly excluded some deserving cases. Its overall design was faulty, it left no scope for the exercise of discretion in the event of further deserving cases coming to light following the receipt of applications and paid in-



sufficient attention to the basic Principles of Good Administration and the Ombudsman's Guide to Standards of Best Practice for Public Servants.

In its response to the Draft Investigation Report (see Appendix 4), the Department objected to my contention that the actions of the Minister and his officials resulted in a scheme which was *"too focused on known cases and which wrongly excluded some deserving cases"*. It added that the Department and the officials interviewed had indicated that the Scheme was not drafted by reference to those known cases, but was, rather, designed from first principles, in the context of overall licensing policy. For his part, the Minister stated (see 7.5(a) above) that while he made references to ring-fencing 6-8 cases under the Scheme he did not have particular cases in mind and these were indicative figures provided to him by the Department.

With regard to the comment that the Scheme was not drafted by reference to known cases, as I have already said (see paragraph 7.5(a) above), I take this to mean, in the words of Mr Tom Carroll, former Secretary General, that *"it was not a matter of trying to include or exclude anyone"* (see paragraph 6.4 above). The officials say the Scheme was drafted from their general knowledge of the industry and Departmental and EU policy and a desire to make the Scheme quite confined. While I can accept that this was the case, it is clear from my examination of the files that the officials were aware of the details of several individual cases which might potentially benefit from any scheme that was introduced. I would be surprised if knowledge of these cases did not, at some level, inform the design of the scheme. After all, there is nothing improper with using real cases to test the purpose and intent of a proposed scheme - indeed, it is usually desirable to do so from a good administration point of view - provided the final version of the scheme allows for all similar cases to be treated in like manner. In this particular case, it seems to me that the officials set about designing a scheme which was fair and equitable and which potentially would allow for other cases to qualify above and beyond those cases which had already come to their attention. The Minister, too, seemed to be of similar intent; he is on record as stating that he was anxious to ring-fence genuine cases and if this meant that 50 cases ended up being eligible then he would not be concerned as long as they were genuine. However, my fundamental point is that the Scheme as implemented did not, in fact, properly reflect its purpose and intent. More thorough research on lost at sea cases should have been carried out, throughout the Department, for the reasons I have

set out at 7.5(b) and 7.6 above. As a result, the criteria did not capture every deserving case and there was no room to exercise discretion in relation to those small number of cases with unforeseen circumstances which did not meet the criteria but which, nevertheless, fell into the category of cases that the Scheme was intended to cover. I believe it would have been possible to administer the Scheme on this basis while at the same time confining it to those cases that it was intended to cover.

In its comments on the Draft Report (see Appendix 4), the Department said my Report appeared to suggest that the Scheme should have been launched on an infinite or immeasurable basis. It should be clear from my comments above that the Department is mistaken in this view.

Having regard to my remarks above, my findings below apply to both the Minister and his officials.

In commenting on the Draft Investigation Report, the former Minister said it was unfair and inequitable to apply my findings to both the Minister and his officials. Among the arguments which he put forward was that the Public Service Management Act, 1997 provides a distinction between the responsibilities of the Secretary General of a Department and the Minister and in particular, provides that the Secretary General of the Department “shall, subject to determination of matters of policy by the Minister of the Government, ... have the authority, responsibility and accountability for carrying out” a number of duties, including “*implementing Government policies*” (emphasis added by the former Minister). He said he had at all times acknowledged that the introduction of the Scheme was a policy decision of his as then Minister, but its implementation and administration was carried out by his officials within the Department.

With regard to the Public Service Management Act, I have already set out the legal position in the preceding paragraphs. While the Act does, indeed, set out the responsibilities of the Secretary General of a Department these are not in law mutually exclusive from those of the Minister. In law, despite the changes in accountability provided for in the Act, all acts of a Department and its officials are acts of the Minister by virtue of the legal status of a Minister as a corporation sole. However, while that is the strict legal position it should be clear from my Report that there was clear evidence of active participation by both the Minister and his officials throughout the scheme formulation process.

**I find that:**

- 1 The Byrne family application did not meet at least two of the conditions of the Lost at Sea Scheme, as published. The family was adversely affected by the decision to refuse Ms Winifred Byrne's application under the Scheme.
- 2 The way the Lost at Sea Scheme was designed was contrary to fair and sound administration. The specific weaknesses in the design process included, lack of adequate research, lack of thorough documented analysis of the pros and cons of the various criteria and a failure to include provision for discretion in the vetting of applications.
- 3 Given that this was a finite, once-off Scheme, aimed at a specific class of individuals the Scheme was not advertised adequately. The advertising process should have been more thorough, comprehensive and targeted. In addition some prospective applicants were put in a more advantageous position than others as they were written to directly by the Department and the Minister to inform them about the Scheme when it was launched. Overall, the manner in which the Scheme was advertised was contrary to fair and sound administration.
- 4 There is clear evidence of poor record-keeping practices leading up to the sign-off of the Scheme, including a paucity of records, lack of written records of meetings and deliberations, a lack of written analysis of the various drafts of the Lost at Sea Scheme and limited records of the interactions/directions between the Minister and his officials.

With regard to finding number 3 the former Minister, in responding to the Draft Investigation Report, objected, *inter alia*, to the suggestion that he was responsible for the advertising campaign. He said that this was a matter for the civil servants in the Department. Having said that, he also expressed the view that the advertising campaign was reasonable and satisfactory. While I accept that the media campaign was planned and executed by the Department's officials I note that the Minister wrote to some prospective applicants (see paragraph 5.17 above) at the time of the launch of the Scheme in order to alert them to it. To that extent, finding number 3 applies to the Minister as well as the officials. Let me add that I am not calling into question the long-established protocol whereby Ministers communicate directly with their constituents. What I am concerned about is the advantage conferred on some prospective applicants who were notified of the Scheme by the Minister and the Department as compared to others who were not so notified.

In relation to other comments made by the former Minister, (see Appendix 5), where appropriate, I have amended my Report or included his comments in the body of the Report.

For its part, the Department also made a number of comments in relation to my findings (see Appendix 4). Where appropriate, I have amended my Report or included these comments in the body of the Report.

## 10. Recommendations:

### **The Byrne Family**

In my concluding remarks in the findings section of this Report I outlined the approach I had taken to the Byrne family's complaint. As I have stated, my approach to this case was to consider first whether the Byrne family actually met the eligibility conditions of the Scheme and second, given the circumstances of the family's tragic loss and the stated purpose of the Scheme, to consider whether from the outset, it was properly designed and later, adequately published. In other words, my investigation considered not just the question of whether the Byrne family met the conditions of the Scheme, but also whether the design of the Scheme and the publication arrangements were factors in their not qualifying under the Scheme in the first place.

I have found that the Byrne family application did not meet at least two of the conditions of the Scheme, as published and that the family was adversely affected by the decision to refuse their application under the Scheme. I have also found that the design of the Scheme and the manner in which it was advertised was contrary to fair and sound administration. Based on my analysis of all the evidence available to me I am satisfied that these shortcomings were factors in the Byrne family not qualifying for assistance under the Scheme and that they should be granted a remedy for the adverse affect they have suffered as a result of these shortcomings in the Scheme.

Because the Scheme has long since expired and because of subsequent developments in relation to Ireland's sea-fishing capacity it would be inappropriate to attempt to apply the terms of the Scheme by way of a remedy - even though this is precisely what the Byrne family is seeking. Besides, I could not recommend that the Department apply the terms of the Scheme to the Byrne family in circumstances where their application did not meet at least two of the qualifying conditions. However, as

I have said, I am satisfied that the Byrne family's circumstances were of a type which ought to have benefited under the Scheme and indeed, probably would have, had the Scheme been broader in scope with an appropriate discretionary provision and had it been more widely advertised.

In the circumstances, I consider that the appropriate remedy for the adverse affect suffered is monetary compensation. However, I recognise that were I to recommend a specific figure at this stage this might be seen as arbitrary by either the Department or the complainant, or indeed, both.

Accordingly as a first step and with a view to devising a rational and reasoned approach to the calculation of compensation I recommend that the Department of Agriculture, Fisheries and Food use the calculation methods set out in the 2008 Decommissioning Scheme, as applicable to others who were successful under the Lost at Sea Scheme. The calculated sum should be submitted to my Office for consideration with an explanation as to the methodology used in arriving at the proposed amount. On receipt of the Department's calculations I will then proceed to recommend a specific compensation figure.

#### **Record Keeping Practices**

I recommend that the Department carefully consider my comments and findings about record-keeping practices in this particular case with a view to putting in place improved arrangements to ensure better accountability for decision making, particularly in relation to interactions between Ministers and officials.



# APPENDICES

## Appendix 1

### FISHING VESSELS LOST AT SEA - CRITERIA FOR CONSIDERING APPLICATIONS FOR REPLACEMENT CAPACITY

The capacity of a vessel which was lost at sea before the coming into operation of the Register set up by the 1989 Regulations will, as an entirely exceptional measure, be accepted as replacement capacity provided that the Department is fully satisfied, by reference to appropriate documentary evidence that:

- (a) the applicant was the owner and skipper of a registered Irish sea fishing boat which was lost at sea
- (b) the boat in question was lost at sea after 1 January 1980 as a result of an accident, and as such loss has been verified by the emergency services or another independent source acceptable to the Department
- (c) the boat in question is shown, by reference to logsheet returns or other appropriate records, to have been in active and continuous use for a considerable period of years by the person concerned for sea fishing of a category now covered by the replacement policy rules, until its loss at sea
- (d) the lost vessel was the sole means (i.e. the only vessel) of the applicant for engaging in sea fishing
- (e) the applicant was unable, for verified financial or related reasons, to acquire a replacement vessel, or any other registered vessel before the introduction of the new register pursuant to the 1989 regulations
- (f) the applicant has been unable also, for verified or related reasons, since the inception of the new registered system, to acquire a fishing vessel to engage in sea fishing of the same class or description as was carried out by the vessel lost at sea, or any other sea fishing vessel which is subject to the replacement policy regime
- (g) the applicant did not receive any financial benefit from the loss

The capacity of a fishing vessel lost at sea will be accepted as replacement capacity for licensing purposes only if it is to be used for the purposes of sustaining or maintaining a family tradition of sea fishing. Any capacity

accepted as replacement capacity must therefore be used for the purposes of introducing a replacement for the lost vessel which will be owned and skippered by the applicant or by an immediate relation of the applicant. Any capacity from a lost vessel so used may not be sold or otherwise disposed of.

Applications under the scheme must be received by 31 December 2001.



## Appendix 2

### RESPONSE OF THE DEPARTMENT OF COMMUNICATIONS, MARINE AND NATURAL RESOURCES TO THE STATEMENT OF COMPLAINT

31 July 2006

Mr. Pat Whelan  
Director General  
Office of the Ombudsman  
18 Lower Leeson Street  
Dublin 2.

Dear Mr. Whelan,

I refer to your letter of 13 July 2006 enclosing a statement of complaint in relation to a complaint received by the Ombudsman from Mr. Danny Byrne regarding the Lost at Sea Scheme. As you know this Department has responded previously to points made by your office in relation to this complaint. I would like to add the following further comments on points made in the statement of complaint.

#### **Design of Scheme**

The statement of complaint states that the complainant alleged that the special circumstances of the family's case were not properly considered by the Department in drafting the Lost at Sea Scheme". It also states that the Division concerned "proceeded to draft the scheme based on the detailed information it had on 16 cases available within the Division." It also states that "the manner in which the Department went about devising and publishing the Scheme appears to have militated against the desired intention of the Scheme in the Byrnes' case".

These statements appear to be based on the concept that the level of knowledge of individual cases had a significant impact on the scope of the scheme as eventually drawn up. This is incorrect. The purpose of the request to the Maritime Safety Division in September 2000 for information regarding lost fishing vessels was to ascertain an estimate of the number of lost fishing vessels there might have been rather than to analyse the cases concerned for the purposes of devising a replacement capacity scheme. (Examination of the papers shows that at that stage the Sea Fisheries Division were not drawing up a proposed scheme.) The nature of the Scheme was simple in concept and did not require such analysis. It was simply to

accept as replacement capacity proven cases of active fishing vessels lost at sea within the specified period where the owners were unable for bona fide reasons to acquire a replacement vessel before or after the introduction of the new Register in 1990. The detailed conditions of the scheme were put in place to reflect this objective. This is set out in the submissions of November and December 2000. These submissions also show that, in order to avoid difficulties with Ireland's MGP fleet objectives, the Department was concerned to ensure that the scheme did not result in other types of cases qualifying for replacement capacity.

The statement of complaint quotes the Department's letter of 20 December 2005 which stated that "the purpose of the scheme was clearly for sustaining or maintaining a family tradition of seafaring". This purpose was not open-ended. It only applied to those who met the qualifying criteria. Restrictions relating to the use of any capacity awarded were imposed for the purpose of achieving that purpose. To conclude in relation to design of the scheme, the Department does not consider that specific knowledge of the Byrne family case or other cases at that time would have affected the scope of the Scheme as eventually drawn up. As indicated in our response of 20 December 2005, the Department does not accept your conclusion that there was a lack of equity in the design of the scheme. Furthermore the Department does not share the view expressed in the statement of complaint that the design of the scheme militated against the Byrne family.

#### **Advertisement of Scheme**

The Department has addressed the points made in relation to advertisement of the scheme in its letter of 20 December 2005. For the reasons set out in that letter the Department does not share the view expressed in the statement of complaint that the manner in which the Department went about publishing the scheme appears to have militated against the desired intention of the Scheme being achieved in the Byrne's case.

#### **Records relating to Establishment of Scheme and Qualifying Criteria**

The statement of complaint states that there are no records available as to why exactly it was decided that a scheme should go ahead or the precise grounds on which the seven qualifying criteria were drawn up. The Department has provided all of the documents available and the Department considers that they are quite clear in relation to these matters.

Yours sincerely,

Brendan Tuohy  
Secretary General

## Appendix 3

*(UNDATED AND UNSIGNED FILE MEMO)*  
**“SUNKEN BOATS” CAPACITY**

Concessions of any kind on the “sunken boats” issue would have the following negative impacts:-

- (a) to increase further effort on Irish sea stocks would run contrary to policy objectives and the overall interests of the sector. Existing effort is already excessive and will have to be reduced further.
- (b) additional fishing capacity will undermine the livelihood of existing fishermen.
- (c) these cases have been around for 15/20 years and have not been entertained by successive Ministers. There is no good objective policy reason to reopen these cases, especially after such a long period.
- (d) acceptance of these boats as replacement capacity amounts in effect to the writing of a gratuitous cheque for **£500,000** (assuming 200 tonnes @ £2,500 per tonne) to be allocated to a number of individuals and with a negative return to the State and the economy.
- (e) as the State/taxpayer will inevitably have to buy out equivalent fleet capacity, the gain of £500,000 to a number of individuals will have in effect to be financed by the general taxpayer.
- (f) any concession will inevitably lead to demands for further concessions. Long experience shows that once a grip on a policy is released, progressive further erosion is difficult to resist. Any such erosion would be a disaster from a policy perspective and further accelerate the trend towards rundown of fish stocks.

Piecemeal changes in policy in response to special pleadings from individuals where these changes would run totally contrary to policy objective, give large unrequited gains to these individuals and open up equally “meritorious” claims, cannot be recommended.

## Appendix 4

### SUBMISSION OF THE DEPARTMENT OF AGRICULTURE, FISHERIES AND FOOD IN RESPONSE TO THE DRAFT INVESTIGATION REPORT

3 July 2008

Mr Pat Whelan,  
Director or General,  
Office of the Ombudsman,  
18 Lower Leeson Street,  
Dublin 2

#### **Representations from the Department of Agriculture Fisheries & Food Concerning the Ombudsman's Report on the Lost at Sea Scheme**

Dear Mr. Whelan,

I refer to your draft investigation report relating to a complaint received from Mr. Danny Byrne regarding the Lost at Sea Scheme administered by the then Department of Communications, Marine and Natural Resources. Firstly, I wish to state that the Department of Agriculture, Fisheries and Food welcomes the opportunity from the Ombudsman to make its representations in relation to the content and findings of the Draft Report resulting from her formal investigation into the Lost at Sea Scheme. It has always been the Department's view that its schemes, as with any scheme, must reflect a true, transparent, factual purpose or objective, achieved equitably by clearly stated terms rules and conditions within a definite timeframe.

As outlined in previous correspondence with the Office of the Ombudsman, the Lost at Sea Scheme was introduced in June 2001 following consultation with the fishing industry representative organisations. The scheme, therefore, was well known to the fishing industry representative organisations in advance of it being launched.

#### **(1) Objective/Purpose of the Lost at Sea Scheme**

The sole objective and purpose of the scheme was to enable qualifying applicants, who were otherwise unable to do so for financial or related reasons, to provide replacement capacity for the purposes of introducing a replacement fishing vessel in respect of fishing boats lost at sea

between 1980 and the establishment of the new fishing boat register in 1990, *to continue a family tradition of sea-fishing in situations where immediate family members were engaged in the sea-fishing industry*. The objective and purpose of the scheme was clear, transparent and unambiguous.

### **(2) Cost of the Scheme**

The scheme did not provide financial support for the acquisition of a fishing vessel itself and the capacity (i.e. gross tonnage and engine power) given under the strict terms of the scheme could not be sold on or otherwise traded or realised as a financial asset in the tonnage market.

### **(3) Launch and Administration of the Scheme Within Strict, Terms Rules and Conditions**

The Ombudsman's Report rehearses the debate which took place between Civil Servants and the Minister when consideration was being given by the Minister whether or not to have the scheme. The following comments do not consider the merits or otherwise of having the scheme but focus on the administration of the scheme following the Minister's decision to have the scheme. Minister Fahey decided to launch the scheme in June 2001, with a specified closing date for applications of 31 December 2001. The extent of advertising in this case was in line with normal custom and practice in that it was advertised in the fishing trade papers with a view to notifying potential applicants engaged in the sea-fishing industry and who are continuing a family tradition of sea-fishing. The fishing trade papers are the equivalent of the Farmer's Journal for the farming sector and it could reasonably be assumed that anybody seeking to continue a family tradition of commercial fishing (the purpose of the scheme) would be aware of the contents of the fishing trade papers, which were and are the most focused media outlets for all matters related to the fishing industry and the communities dependent on fishing. As previously stated, the scheme was well known to the fishing industry representative organisations in advance of it being launched.

The Department was scrupulous in administering the scheme in that each applicant was treated fairly under the scheme within specific terms, rules and conditions. As previously stated, the scheme allowed qualifying applicants who wished to engage commercially in the fishing industry, and who were otherwise unable to do so for financial or related reasons to provide replacement capacity for the purposes of introducing a replacement fishing vessel in respect of fishing boats lost at sea between 1980 and the establishment of the new fishing boat register in

1990, to continue a family tradition in sea-fishing. Any non-tradable (i.e. could not be sold) capacity granted under the scheme must have been used for the purposes of introducing a replacement boat for the lost vessel which is owned and skippered by the applicant or by an immediate relation of the applicant.

The Department holds the explicit view that the scheme, as with most schemes, correctly reflected a definite closing date or deadline. The Draft Report appears to suggest that scheme should have been launched on an infinite or immeasurable basis. The application from the Byrne Family was received by the Department in January 2003, over 12 months after the closing date of the scheme. Notwithstanding the late application, it did not meet all the qualifying conditions of the scheme and the Department's clear view is that it was correctly refused.

#### **(4) Outcome of the Scheme**

In all, there were 68 applicants under the scheme, only 6 of whom qualified under the terms of the scheme. Of the 6 qualifying applicants, 5 or their immediate family members are commercially engaged in the fishing industry and have utilised the non-tradable capacity (i.e. gross tonnage and engine power) by introducing a replacement boat, privately financed, for the lost vessel in order to continue a family tradition in sea-fishing. The remaining 1 applicant, while awarded capacity under the scheme, has not been in a position to introduce a replacement boat for the lost vessel as neither she nor any member of her immediate family is engaged in the fishing industry. The capacity granted under the terms of the scheme cannot be used in such a situation as the replacement vessel must be owned and skippered by the applicant or by an immediate relation of the applicant.. The capacity in her case has expired under the 2 year rule introduced by Ministerial Policy Directive 2/2003.

#### **(5) Fisheries (Amendment) Act 2003**

The 2003 Act was introduced to set up an independent licensing authority to decide on individual applications for the licensing and registration of sea-fishing boats. It was set up so that decisions would be made in a transparent way and removed from political influence.

### **THE DEPARTMENT WISHES TO MAKE THE FOLLOWING SPECIFIC COMMENTS AND OBSERVATIONS ON THE OMBUDSMAN'S DRAFT REPORT**

- (1) The Department disagrees with the Ombudsman's findings at number 2 of the Draft Report and the "analysis" leading up to them. The Depart-

ment cannot comprehend how, on the second last page of the draft document, it is asserted that the scheme was too focused on known cases. It was specifically indicated to the Office of the Ombudsman that the scheme was not, in fact, drafted by reference to known cases, but was, rather, designed from first principles, in the context of overall licensing policy. In those circumstances, the view/finding that there was a lack of adequate research (by which is meant in relation to individual cases) does not appear to be well-founded. Civil servants were scrupulous in administering the scheme in ensuring that each applicant was treated fairly and nothing in the Report indicates otherwise.

Irrespective of the consideration on the merits or otherwise of having a scheme, the Department's view is that when it was decided by the Minister to proceed with a scheme, the scheme was well designed, adequately researched and equitable in its objective/purpose, administration and outcome. It allowed genuine applicants, in situations where the applicant or his or her immediate family members were commercially engaged in the fishing industry, to continue a family tradition in sea-fishing. The scheme did not provide financial support for the acquisition of a fishing vessel itself and the capacity (i.e. gross tonnage and engine power) given under the strict terms of the scheme could not be sold on or otherwise traded and could not be realised as a financial asset in the tonnage market.

There seems to be an implication in the Draft Report that a scheme can never have hard and fast and strictly binding criteria, and that some degree of leeway is always necessary. This could have ramifications for the design of a wide variety of schemes. The Department holds the explicit view that this scheme, as with other schemes, must have a closing date or deadline and was, quite correctly, not launched on an infinite or immeasurable basis. The Department's view is that the scheme clearly did not provide for discretion in the area of late applications and in situations where all of the strict conditions were not met by an applicant.

- (2) The Department disagrees with the Ombudsman's findings at number 3 of the Draft Report and the "analysis" leading up to them. As stated previously, the Department cannot comprehend how, on the second last page of the draft document, it is asserted that the scheme was too focused on known cases. It was specifically indicated to the Office of the Ombudsman that the scheme was not, in fact, drafted by reference to known cases, but was, rather, designed from first principles, in the context of overall licensing policy. The scheme was adequately advertised in line with normal custom and practice in that it was advertised

in the fishing trade papers with a view to notifying qualifying applicants still engaged in the fishing industry and continuing a family tradition of commercial fishing. The fishing trade papers are the equivalent of the Farmer's Journal for the farming sector and it could be reasonably assumed that anybody seeking to continue a family tradition of commercial fishing (the purpose of the scheme) would be aware of the contents of the fishing trade papers. The fishing trade papers are the most targeted media outlets for promulgating anything in relation to commercial sea fishing or any related matter relevant to fishing communities. As previously stated, the scheme was well known to the fishing industry representative organisations in advance of it being launched.

- (3) The Department disagrees with the Ombudsman's findings at number 4 of the Draft Report and the "analysis" leading up to them. The Department is strongly of the view that there is clear and unambiguous record keeping with regard to the required objective of the scheme, the clear decision of the Minister to launch the scheme, the clear rules and conditions of the scheme, the equitable administration of the scheme and the outcome of the scheme.
- (4) The Department absolutely refutes the finding of "maladministration" at number 5 of the Draft Report. In relation to the dialogue with the Minister prior to his instruction to proceed with the scheme, the Civil Servants involved set out clearly, as is on the record, their views in relation to the merits or otherwise of proceeding with such a scheme. In these circumstances the Civil Servants can only advise the Minister and that is what occurred in this instance.

If the finding is intended to relate to the administration of the scheme from the point at which the Minister had given his intention to implement the scheme, the Department, based on all the foregoing, considers the finding of maladministration a very serious charge. The Department cannot comprehend how this conclusion has been reached in relation to the implementation of the scheme. The Department is strongly of the view that the conclusion is excessive and unbalanced and not sustained by the body of the Report.

- (5) The Department is strongly of the view that, in the interest of equity, its formal reply to the Statement of Complaint is appended in full to the Report. (It is quoted widely but should be readable in its entirety)
- (6) Mr. Thomas Carroll, former Secretary General has requested the



amendments shown below (Appendix 1) in red to Section 6.4 of the draft report be conveyed to the Ombudsman's office so as to reflect more accurately his recollections in this matter.

Yours sincerely,

Mr. Tom Moran  
Secretary General  
Department of Agriculture, Fisheries and Food

## Appendix 5

### SUBMISSIONS OF FORMER MINISTER FAHEY IN RESPONSE TO THE DRAFT INVESTIGATION REPORT

19 June 2008

Ms Emily O'Reilly  
Ombudsman  
Office of the Ombudsman  
18 Lower Leeson Lane  
Dublin 2

**Re: Mr Danny Byrne — Lost at Sea Scheme**

Dear Ombudsman

Thank you for your letter dated 9 June 2008.

My letter dated 14 May 2008 comprised my submissions on your draft report, as opposed to 'representations', as stated in your recent letter. I reiterate the contents of my letter of 14 May.

I believe that your draft report includes unfair and unwarranted findings and criticisms adverse to me. I am of the view that I am prejudiced by the manner in which the complaint has been dealt with and the manner in which I have been dealt with in this matter.

Furthermore, I refer again to the hugely detrimental effect and consequences suffered by me as a result of your Office's previous description of the Scheme as "seriously deficient and flawed". By way of example, I attach copy extracts from some newspaper articles in which serious and incorrect allegations have been made against me and my character as a result of your Office's previous description of the Scheme.

This serves to demonstrate the weight and reliance placed on statements issued by your Office and, consequently, the vital importance that any such statements be fair, balanced and employ appropriate language. Accordingly, in any final report that issues I would urge your Office to bear this in mind (particularly the serious adverse consequences that can flow from the use of

unfair and inappropriate language in statements from your Office) and to give due care and consideration to the contents of, and language contained in, any such report.

Finally, as previously advised, I would welcome the opportunity to meet with you and await hearing from you further in that regard.

Yours sincerely  
FRANK FAHEY, T.D.

14 May 2008

Ms Emily O'Reilly  
Ombudsman  
Office of the Ombudsman  
18 Lower Leeson Lane  
Dublin 2

Dear Ombudsman

I refer to your draft Investigation Report on the complaint made by Mr. Danny Byrne to your office in November 2004 against a decision of the then Department of Communications, Marine and Natural Resources to refuse his mother's application under the Lost at Sea Scheme (the "Scheme").

By letter dated 22 April 2008, you invited me to consider your draft report and, if I wished, to make submissions thereon. I have now had the opportunity of considering same and set out my submissions below.

Nothing herein should be taken as in any way seeking to detract from the tragic circumstances giving rise to this complaint and the terrible loss suffered by the Byrne family, which I sincerely acknowledge.

#### **Submissions**

Having considered your draft report, I am of the view that it includes unfair and unwarranted findings and criticisms adverse to me.

I believe it is important to trace the history of this complaint to your Office and my involvement in same.

### **Preliminary Examination**

Your Office appears to have received a complaint from Mr Byrne in November 2004. This was almost two years after his mother's application under the Scheme was refused. At that time, I was not informed by your Office that a complaint had been made nor was I advised of the nature of the complaint. I was not furnished with a copy of the complaint. Further, your Office did not inform me that it had, notwithstanding Section 5(i) (f) of the Ombudsman Act, 1980, decided to deal with the complaint. Without any notification to me, your Office proceeded to carry out a preliminary examination of the complaint. I was not informed by your Office of the issues, the subject of the examination, or whether any such issues involved an examination of a claim or allegation of any sort against me (either personally, or in my role as then Minister at the time when the Scheme was designed and adopted).

Indeed, your Office first informed me of the complaint, its scope and your Office's decision to investigate same after your Office had conducted and completed its preliminary examination. By then, your Office had already written to Mr Byrne by letter dated 11 May 2005, in which it had expressed the view that the Scheme may be "*seriously deficient and flawed*". As I understand it, the complaint was still at preliminary examination stage when that communication issued from your Office to Mr Byrne. In my view, it was wholly inappropriate and premature for your Office to so describe the Scheme and to communicate same to the complainant at that time, without a full examination having first been conducted and completed by your Office and submissions received and heard from all parties.

Moreover, your Office's description of the Scheme in those terms, at a time when, as I understand it, it had not yet completed its preliminary examination or sought the submissions of all parties (including myself) represented, in my view, a pre-judgment by your Office of the complaint in the absence of a full and fair examination and investigation.

As you are aware, the view of your Office on the Scheme (as set out in your letter to Mr Byrne dated 11 May 2005) was, through unknown means, disclosed to the media. There followed a highly charged political and media campaign, which sought to use your Office's description of the Scheme as a means to undermine my character and good name and which led to a series of articles and allegations about me, which were untrue and inaccurate. I requested your Office to correct or clarify those statements, but to no avail. Whilst I accept that your Office was not directly responsible for the media publications that followed, the fact remains that your Office's premature publication of its view to the complainant and the language employed by

your Office in so doing, directly resulted in the adverse media campaign that followed against me. In fact, prior to your Office's publication, I was not aware (nor was I made aware by your Office) that my dealings with the Scheme were under examination and could lead to findings or criticisms adverse to me.

It is beyond doubt that the publication of your Office's view gave rise to unfounded allegations against me and my character with serious adverse effects. In the circumstances, I was (and remain) greatly surprised that before reaching its view and completing its preliminary examination, your Office failed to contact me to seek my opinion or recollection of events leading up to the establishment of the Scheme and that no invitation was extended to me by your Office to make submissions or to be heard on the matter.

Your Office's failure to inform me of the nature of the complaint and the scope of your Office's examination denied me the opportunity to make representations in respect thereof. I was not afforded the opportunity to make submissions on the complaint in circumstances where the preliminary examination of that complaint could (and did) have significant adverse consequences for me (including the considerable damage done to my good name and character as a result of your office's description, and preliminary examination, of the Scheme).

I refer to the provisions of the Ombudsman Act, 1980 (Section 6(6)) wherein it is stated, that you shall not make a finding or criticism adverse to a person in a statement, recommendation or report without having afforded to the person an opportunity to consider the finding or criticism and to make representations in relation to it to you. Regrettably, it is a matter of fact that your Office's description of the Scheme has been interpreted by a number of parties (including sections of the media, as borne out coverage generated) as a criticism adverse to me - yet I was given no opportunity to make representations to your Office in advance of same.

In addition, as you no doubt know, there is a requirement under the Ombudsman Act, 1980 for an investigation to be conducted "*otherwise than in public*". The legislative requirement for an investigation to be conducted in private is no doubt to protect the rights of all parties to a fair hearing. The publication of your Office's preliminary view of the Scheme (and its failure to seek and obtain my submissions in advance) has, in my view, deprived me of this right and prejudiced my entitlement to a fair hearing.

Until I was contacted by your Office in July 2007 and requested to attend for

interview, I was not furnished by your Office with a copy of the complaint made by the Byrne family nor was I informed by your Office that the complaint may give rise to adverse findings against me (as former Minister) as opposed to the Department. This is particularly surprisingly (and, moreover, disappointing), where your Office's examination of the complaint appears to have resulted in an adverse finding sufficient to warrant a formal investigation, which has in turn resulted in your draft report, with its adverse findings against me.

It is also notable that your Office's first notification to me in July 2007 took place in excess of 6 years after the Scheme was originally designed and implemented; 4 1/2 years after the Byrne family's application was refused and over 21/2 years after your Office first received the complaint. No satisfactory explanation has been offered for this delay, which has only led to prejudice me further.

### **Investigation**

Following its preliminary examination, your Office decided to proceed to formal investigation of the complaint. As I understand it, a Statement of Complaint issued to the Department, but again I did not receive same at the time.

During the investigative process, your Office contacted me for the first time in July 2007 when it invited me to attend for interview. It was at that time that your Office first furnished me a Statement of Complaint (as of the date hereof, I have not received a copy of the original complaint of the Byrne family). I immediately made myself available and met with your officials on 30 July 2007. As acknowledged by you in your draft report, I co-operated fully with your investigation into this matter.

### **Draft Report**

I note from your draft report that you accept the Byrne family did not meet at least two of the eligibility conditions of the Scheme. Your draft report then goes on to consider the design and implementation of the Scheme. As then Minister, I made a policy decision that a Lost at Sea Scheme should be drawn up. I was aware of the previous policy and the Department's general opposition to such a scheme, as well as the reason for its opposition. Having considered all matters, I decided to change the policy and to introduce a scheme to cater for genuine cases. I recall discussions between my Department officials and myself at the time regarding the pros and cons of introducing such a scheme. If introduced, I was aware that the Department wanted to restrict the qualifying criteria of any such scheme so as to restrict

the number of cases that would qualify, as they feared a floodgates of successful applicants. The only restriction however that I wanted was for the qualifying criteria of any scheme to be restricted to genuine cases (and drafted so that it would not be open to abuse by spurious applicants/claims). I did not wish to restrict it for any other reason.

Your draft report appears to place emphasis on my note to “*ring fence six to eight genuine cases*”. My use of the word “ring fence” was intended to convey, and should be interpreted as, my wish to “ring fence” (in the sense of “restrict”) the scope of any scheme to only genuine *bona fide* cases. Further, my use of the word “ring fence” was in response to a note from Ms Sarah White, Assistant Secretary, of 11 November 2000 in which she expressed concern regarding where any such scheme/claims thereunder would stop? Whilst I was aware of my officials’ concerns that a scheme could open up a floodgate of applicants and their wish to limit the numbers, this did not unduly concern me. My overriding concern (and my intention in changing the policy) was to introduce a scheme which would allow genuine cases to be covered - regardless of how many cases that might mean.

My reference to “*six to eight*” was simply a reiteration of what I had been told at the time by my officials - they were indicative numbers only - no more than that - and had no influence on my input into the formulation of the eligibility criteria of the Scheme.

I believe that it is also important for you to appreciate the timing/date context in which these communications took place. These discussions regarding “ring fencing” took place at a time when a decision had not yet been made on whether the policy should be changed to introduce a scheme. They were part of a discursive exchange with my Department regarding the pros and cons of changing the policy and introducing such a scheme *before* I had yet decided whether a change in policy should happen - demonstrating evidence of my full, proper and careful consideration of all matters before deciding on a policy change. Accordingly, to suggest that I might have wished to “ring fence” and allow only “6 to 8” cases to qualify under a scheme at a time when I had not yet decided on whether a scheme should be introduced at all, beggars belief and misrepresents my position.

The purported findings in your draft report which seek to detail my alleged involvement or interest in the number of cases are simply incorrect. It is also incorrect for your draft report to state that from my interview with your Office and from documentation that I was anxious to “*ring fence the cases of MFV Joan Patricia, WFV Spes Nova and Kris an Avel*”. I was anxious to “ring fence”

genuine cases - I was not concerned if that meant 50 cases (as mentioned at interview) of “6 to 8”. Prior to deciding upon a change in policy, I had looked at the case of the MFV Joan Patricia and WFV Spes Nova (It is important to remember that this was one case - these two boats sank in the same accident) to assist me in determining whether a change in policy was merited.

I note that your draft report states that there was evidence of “hands on” activity by me and my officials in designing the scheme. In support thereof, your draft report then goes on to accept that I, as then Minister, quite properly included some detailed amendments to the scheme with the express purpose of restricting the scope of it (to cover genuine cases only; not to restrict the number of claims) and protecting it from being abused and that I worked closely with my then Department officials in defining the objectives and developing the eligibility criteria of the Scheme.

Given the serious adverse consequences for me that followed your Office’s description of the Scheme as “*seriously deficient and flawed*” and the interpretation that was placed on that language, lest a misinterpretation be placed on the word “hands-on” (so as to import some “improper” involvement by me in the design of Scheme) I must ask that the word “hands-on” be substituted by some other similar word(s) in your report, with such substituted wording not leaving open an alternative secondary (and negative) interpretation being placed upon it (e.g. “active participation”).

Once I had decided upon the policy of introducing the Scheme and had agreed with my then officials the terms of reference and eligibility criteria of the Scheme, then the implementation and administration of the Scheme became that of my Department. Contrary to what is stated in your draft report, I was not “*deeply involved in advertising and publishing*” the Scheme. It is not for the Minister to advertise the Scheme, but rather for the civil servants within the Department to arrange for same.

Whilst I had no involvement in the advertising of the Scheme, I am aware that the only precedent at the time that existed in the Department for advertising schemes was via the trade papers and the Producers Organisations. The advertisement of the Scheme was conducted in the same manner as the advertisements of other schemes and was, in my view, entirely reasonable and satisfactory.

I am disappointed and do not accept the purported findings in your draft report.



1. I note that whilst I, as former Minister, was
  - (a) not informed by your Office of its receipt of the Byrne complaint;
  - (b) not invited to make submissions or representations thereon in advance of your Office's view that the Scheme may be "*seriously deficient and flawed*";
  - (c) not given an opportunity to make submissions during the preliminary examination;
  - (d) not furnished with a copy of the Statement of Complaint until July 2007;
  - (e) prejudiced by the media campaign that followed your Office's statement to Mr Byrne that the Scheme was "*seriously deficient and flawed*";

and in circumstances where in your Office's handling of the complaint, it entered into correspondence with, and invited submissions from, the Department only (and not me, as former Minister), your draft report nevertheless provides that your findings "*apply to both the Minister and his officials*". [own emphasis added]

To expressly apply your purported findings to me in the foregoing circumstances is unfair and inequitable. Furthermore, the Public Service Management Act, 1997 provides a distinction between the responsibilities of the Secretary General of a Department and the Minister and in particular, provides that the Secretary General of the Department "*shall, subject to the determination of matters of policy by the Minister of the Government,....have the authority, responsibility and accountability for carrying out*" a number of duties, including "*implementing Government policies*" [own emphasis added].

I have at all times acknowledged and accepted that the introduction of the Scheme was a policy decision of mine as then Minister, but its implementation and administration was carried out by my officials within the Department. In the circumstances, I request that the draft report be amended so that any findings made by you are made applicable to the Department and not to the Minister.

2. I cannot and do not accept your finding that the way the Scheme was designed was contrary to fair and sound administration. Having decided upon a policy change to introduce the Scheme, appropriate research was carried out by the Department on the proposed Terms of Reference and eligibility criteria. Indeed, because of the difference of opinion between me (as then Minister) and the Department in relation to the introduction of the proposed scheme, a robust discussion on the Terms of Reference and eligibility criteria (in which the pros and cons of the proposed Scheme were considered in advance of its introduction) took place. Having regard to same, the Scheme as adopted struck a fair balance between my wish to allow genuine cases falling within its criteria to be covered by the Scheme and the Department's wish to restrict same.

Your draft report appears to take issue with the finite closing date of the Scheme and the absence of discretion to extend it. I had no involvement in the closing date or in the administration of the Scheme once its terms had been set, I was not involved in the vetting or assessment of applications received.

I was not the Minister at the date of receipt of the Byrne family's application. I note that the application of the Byrne family was not received until January 2003 - over 12 months after the closing date of 31 December 2001. Whilst I do not feel it is appropriate for me to comment further, I do not see how discretion could be exercised to extend a finite closing date for a period in excess of 12 months beyond its stated closing date. In my experience in five different Departments over 15 years as Minister and Minister for State there was a closing date for applications in all schemes in which I was involved, which of necessity had to be finite. The purported finding in your draft report that the Scheme's closing date "*left no scope for the exercise of discretion in the event of further deserving cases coming to light*" cannot be accepted as it would place a disproportionate burden on the Department.

3. I do not accept that the Scheme was not advertised adequately. As you correctly point out, the Scheme was aimed at a specific class of individuals and so advertisement in the trade papers and through the representative organisations of that specific class was considered sufficient. As set out above, the sole precedent that existed in the Department for advertising schemes was via the trade papers and the Producers Organisations. It is unreasonable to expect the Department to write to every potential applicant to notify him/her of the existence of the Scheme and would give rise to a disproportional administrative burden. Would there be an onus on the Department to track down potential applicants

where they were no longer at their last known address on file? Furthermore, as set out above, as the then Minister I was not involved in the advertising or publication of the Scheme. Once adopted, implementation of the Scheme (including its advertisement) was a matter for the Department.

4. I cannot accept or deny your purported finding in your draft report that there were poor record-keeping practices leading up to the sign-off of the Scheme in circumstances where I have not had the opportunity to review and consider the files/records which you/your office has reviewed in advance of reaching this finding. From my experience, it is however the practice, policy and responsibility of the Department to maintain adequate records.
5. I entirely reject your purported finding that the way the Scheme was designed and advertised amounted to “*maladministration*” leading to an adverse effect on the Byrne family. Indeed, even if one were to accept your remaining purported findings (which I do not), this would not justify a finding of “*maladministration*” with the serious prejudicial connotations which that term gives rise to. There was (and is) no question of incompetence, impropriety or dishonesty in the design or advertisement of the Scheme and to describe it as “*maladministration*” misrepresents and mischaracterises any shortcomings which your Office might find with the scheme (which are denied). In addition, I refer to the provisions of the Ombudsman Act, 1980 and, in particular, the “actions” as set out in Section 4(2)(b)(i)-(vii). Any finding of the Ombudsman in respect of an action must fall within that legislative provision. There is no legislative provision for a finding of “*maladministration*”. The word “*maladministration*” must be removed from your report and the purported findings therein.

I would welcome the opportunity to meet with you to discuss the foregoing and to address any other issues that you may have. To that end, I will make myself available, at any mutually convenient time to meet with you and I look forward to hearing from you shortly in that respect.

Finally, please note that the foregoing issues are my submissions on your report at this time, but may not be exhaustive. I fully reserve my rights in connection with same.

Yours sincerely  
FRANK FAHEY TD