

NOTES FOR REMARKS BY

**CLARE LEWIS, Q.C.
OMBUDSMAN OF ONTARIO, CANADA**

THE VIEW FROM THE OMBUDSMAN'S CHAIR

**SOAR
STRENGTHENING OUR SUPPORTS CONFERENCE
– 2001**

“NEW DIRECTIONS/NEW STEPS”

**APRIL 4, 2001
TORONTO, ONTARIO**

I appreciate very much the opportunity provided to me by your co-chairs Zeynep Onen and Diana Macri to speak with you today about the role of the Ombudsman and my office, our relationship with the Ontario Public Service and in particular with your agencies and how we can work together more effectively to improve the services we provide to the public. As Ombudsman, I am acutely aware of the many challenges you face as decision-makers, advisors and as front-line service providers – challenges that can sometimes be beyond your control and which undoubtedly have a political and systemic dimension to them.

I note the title of your conference is New Directions/Next Steps. It is particularly apt as the massive restructuring of the past several years and ongoing change throughout government, coupled with an ever more diversified populace who have unique and differing needs and demands, have made it exceptionally challenging for the most dedicated of government employees to provide services that are truly optimal from the standpoint of quality and timeliness.

And so today, I note that you will be considering the impact of technology and its innovations on how you work, the manner in which it will assist you, and the potential problems that it might present.

You will be considering how best to position yourselves in the new environment in terms of advancing your career, and to that end will be advised on how to write your way to success.

You will be considering how to cope with the reality of stress in the context of a growing community and a reduced public service.

You will be examining the relationship between you in your positions within agencies and tribunals and your tribunal members, each of whom has been appointed by Cabinet for a fixed term to adjudicate contentious matters and to some degree to administer the tribunal or the agency itself, albeit in consultation with you.

You will be informed of the new integrated approach to service delivery through the creation of access gateways, which may have considerable impact on your individual agencies.

And through your session on Administrative Law for Administrators, you will consider basic principles of administrative justice from the point of view of your work, and in particular, issues such as procedural fairness, accessibility, impartiality and service equity. All of which are dear to the heart and focus of me as Ombudsman and which tend to be at the nub of our interaction.

You have heard something of my varied career path and aside from that informing you of the difficulty which I appear to have in keeping a job, that career has provided me with a unique perspective on justice generally, and administrative justice in particular. And if public service is not about justice then what is a democracy for?

While I have never worked directly within government as do you, nonetheless, I have a long history of working on the periphery of government in appointed positions. As Police Complaints Commissioner and subsequently as Chair of the Alcohol and Gaming Commission and its predecessor agencies the Liquor License Board of Ontario and the

Ontario Gaming Control Commission, I have worked directly with you and your counterparts and on that basis I presume to say that I have some understanding of your day to day reality, and the hard work and dedication you demonstrate.

To illustrate that point, in my first annual report to the Legislature as Ombudsman, delivered in June 2000, I stated in my personal message that:

"My early review of complaints and inquiries from the public and my interaction with officials across a wide spectrum of public service have left one very important first impression. That impression is the necessity of strengthening the relationships between this office and the many publics served by it. Because individual complainants are the core focus of our work, there is a need to reach out to a broad range of constituencies to reinforce our presence and to make the public as a whole aware of our services. It is also necessary for me and my staff to engage positively with public servants at all levels of decision-making to ensure the role and function of the Ombudsman's office is well understood and respected. Essential to that aim is our understanding of and respect for the important and often difficult work of those public servants. Their values, commitment, and efforts warrant our recognition and regard."

To ensure that recognition and regard is understood both by the public service and by my staff, I had the pleasure on February 28th of this year of hosting Ombudsman Ontario's Third Annual Ombudsman Awards to members of the public service. At that time, eleven awards were presented by me to individuals throughout the public service. One award was presented to a tribunal staff member. Nominations for these awards are made by members of my staff arising from their dealings in complaint resolution with members of the broad public service. These nominations are considered by a representative committee of staff which I chair, and the decisions as to who shall receive the awards are made by that committee. The awards are presented to public servants who have made a significant contribution towards resolving complaints brought to the Ombudsman's office by members of the public. Each nomination is measured against four criteria including leadership and informal problem-solving and early resolution of complaints; innovative approaches to promoting alternative dispute resolution; application of systemic and system-wide problem solving; and exceptional responsiveness and co-operative service during our investigation process. I bring these awards to your attention because I believe that it is at the intersection of public service and public complaint that one can best judge the quality of public service and its capacity to correct error or at worst, mal-administration.

You are more than aware that there are many who disparage public servants. I am not among them. While as in any profession there are those who tend to perform poorly, that is not the norm for the Ontario Public Service as a whole. Your presence here today is testament to that.

You are obviously interested in the subtext of this conference which is about you yourself, about how you are developing and about where the opportunities may be opening up in this

changing environment. That interest, properly developed, can only benefit the community you serve.

As staff of adjudicative or regulatory/adjudicative agencies, you play an extraordinarily important role in providing justice in this province. When I was a judge it was often said of my court, the then Provincial Court Criminal Division, that we were the face of justice in this province. While an important aspect of justice, I disagree. In my view, the administrative justice system as a whole, including its staff members who are the front-line and the access point for members of the public to administrative justice, is the true face of justice in the province, indeed in this country. And so, there is much responsibility placed upon you. How you perform your duties will define to a considerable degree public perception of administrative justice. To be sure, tribunal members who hear cases and issue decisions bear considerable responsibility and also have an enormous impact upon those whose cases they adjudicate. However, you as support for those tribunal members, and as persons who in many cases in the course of your duties make significant administrative decisions affecting public rights, are true partners with those tribunal members in dispensing appropriate administrative justice to those who require your service.

My office has created two sets of standards which are used internally to guide us in the performance of our public responsibilities. With respect, I believe they can be of assistance to civil servants working in ministries and to public servants such as you, employed in agencies as well. These standards are entitled "Standards for Equitable Service Delivery", and "Ombudsman Fairness Standards". I have provided these to your conference co-chairs and you will find them in your materials. I commend these to you for your consideration as having some relevance to how you might appropriately provide your service to members of the public.

The Equitable Service Delivery standards recognize particularly that we live in an increasingly diverse society, one which is divided by culture, by race, by class, by economic, and other social conditions. It is not possible for public servants to perform their duties fully without some recognition of this modern reality. A review of these standards may give you some appreciation of how best to approach individual situations and to recognize how you may be perceived in your dealings with particular members of the public.

The Fairness Standards deal with administrative fairness and are based on the recognition of natural justice or procedural fairness which has evolved through the courts to ensure that decisions of administrative bodies are arrived at fairly. The Fairness Standards are intended to be flexible and their application may vary depending on the nature of the issue and the parties involved. Although you as staff members of tribunals may feel that these standards are more appropriate for the tribunal members who conduct hearing adjudications, nonetheless, your vision must mesh with that of those members to be a seamless whole if you are to operate truly in support of those members. It is most certainly true that decisions made by you have a significant impact on people who require access to the tribunal. You are the gatekeepers and you can determine frequently the ease and timeliness of that access, and the quality of total service provided by the agency.

It would be a rare staff member of a tribunal who does not have the responsibility to exercise discretion on a daily basis in much the same way that the adjudicators themselves do. As

front-line staff you will set the tone for your agency in the public mind and the quality of your decisions in the exercise of your discretion will determine whether your agency is perceived as accessible, fair, efficient and effective, or conversely as obstructive, unduly bureaucratic, hidebound, slow and unresponsive.

You will be aware that this government has brought to the public service an expectation of customer service and Art Daniels will be speaking to you of the steps taken in that regard today at noon. While in a general way I support the goal of quality customer service, I remind you that we are not in the business of selling refrigerators; we are engaged in public service, assisting members of the public to whom we are professionally bound to provide assistance. That is why the proper exercise of your allowable discretion is so important. While you operate within law, regulations, rules and policies, you are not mere automatons, programmed to provide stock responses. You make critical decisions daily, and every decision-maker is provided discretion. I implore you to recognize and apply this authority in a generous way, to give what the Supreme Court of Canada refers to as "a purposive interpretation" to the facts before you so that the broad mandate of your agency can be fulfilled while permitting members of the public to function rationally and responsibly in the field to which your agency relates. Even the most strict regulatory agency is not there to serve itself. Its duty is to provide security for the public while permitting individuals to conduct business responsibly. Your decision, if arbitrarily or capriciously made, can be enormously destructive. If generously made while upholding your agency's mandate, your decisions can be real engines for personal and economic growth.

Now what is the role of the Ombudsman in all this? While I am the Ombudsman and would like to assure you that accordingly I am here to help you, I must say that I confess that I did advise Diana Macri's tribunal, The Ontario Rental Housing Tribunal, during an address to it that the Ombudsman has a role somewhat similar to that of a hectoring parent. Given my age, perhaps more appropriately, grandparent. Simply put, the Ombudsman provides a place of last resort for complaints against administrative unfairness in provincial government. I am independent from public authorities and accountable to the Legislature through the Speaker. I am neither an advocate for the complainant nor an apologist for government. My staff and I are, however, advocates for fairness and are responsible for the investigation of complaints about public administration in all provincial ministries and agencies, boards, commissions and tribunals. The office of the Ombudsman is a vehicle by which power imbalances between the individual and government institutions can be regulated and redressed. The Ombudsman operates by providing preventative conflict resolution. The adaptability of the office of the Ombudsman to diverse circumstances has allowed the institution to serve as an intermediary over the past twenty-five years between society and government. Some seventy percent of our complaints and inquiries are addressed or resolved informally in a period of three weeks. The Ombudsman also provides expert advice to the Legislature regarding preserving the right of complaint in pending legislation, or legislative and administrative changes needed to improve fairness. This role is particularly important in a period of rapid change, restructuring, privatizing and downsizing.

The Ombudsman's primary task is to investigate and resolve complaints about public administration. For that purpose I am granted access to documents and can compel witnesses, including government officials, to provide information. I have recommendation power only. I cannot order a tribunal to change a decision, or an agency to improve its case

handling, to reduce delay, to improve access by the public. Although my authority to investigate is broad and profound, my ultimate authority is at most, persuasive. All classical Ombudsmen operate within this model of independence and recommendation, rather than order and compulsion. The theory behind that model is that it operates to leave government responsible for correcting error or unfairness, and allows accountability to reside where it belongs, in government. We do not operate in isolation. We work closely with government officials and try to maintain effective relationships with the operational front-line as well as with the senior management of ministries and agencies.

Certainly we are called upon frequently by members of the public to review decisions of tribunals when those individuals are dissatisfied. However, our review is limited in nature. I do not act as a court. I am unable to overrule a decision as if on appeal, and I cannot quash any such decision. However, if in my opinion a decision is not based on the evidence led before the tribunal, is wrong in law, or is made without jurisdiction, then I do have the authority to recommend to the tribunal that there be reconsideration of the decision. A recommendation for reconsideration provides the tribunal with the opportunity to determine whether error has occurred and to rectify it if appropriate.

Perhaps the most important element of our oversight of agencies occurs when we discern procedural error or unfairness within the administrative operations of the agency. If clients of agencies are denied access to the tribunal process, if the rules of practice are cumbersome and ineffective, or if front-line staff are otherwise unresponsive to the legitimate needs of those using the agency, then it is opportune for the Ombudsman to review that agency's processes and to make recommendation. A frequent area of Ombudsman concern with certain agencies has arisen because of delay in processing applications, because of ineffective case management within the agency, because dates for hearing are not expeditiously set and matters are not heard within a reasonable time or once heard, decisions are unduly delayed in being released. I must tell you of a recent case in which a decision was not released for almost three years, and I spoke to that matter with some concern.

There are a few ministry branches or agencies whose staffing has been so inadequate that there has been no reasonable possibility of doing their work in a timely fashion. A profoundly disquieting example of that, upon which I reported upon in my last annual report, was the Adoption Disclosure Registry which deals with extremely sensitive matters, that is birth parents seeking access to their adopted child, or adopted children trying to find the identities and whereabouts of their birth parents. When an investigation begins in a birth relative search, the average length of time is about eight months to dispose of the matter with our without success. Given the structure of the legislation, that is not an unreasonable amount of time. However, the staff and financial resources of the Registry were so constrained that no investigation could begin for over seven years. We investigated this sad state of affairs and were ready to make a recommendation to the government when we were thankfully presented with a resolution to the matter just on the eve of doing so. Two million four hundred thousand dollars and twenty-four individuals have been provided and we are now monitoring the promise of elimination of that backlog within 18 months.

Both the Human Rights Commission and the Workers Safety and Insurance Appeals Tribunal are agencies which have attracted the attention of the Ombudsman by reason of the length of time that was taken in the past for cases to work their way through the system. In each

instance, the Ombudsman was able to obtain undertakings from the agency regarding a plan for delay reduction and improved case management. A similar situation had occurred with the Health Professions Appeal and Review Board, and again we have monitored the agency response to our recommendation with, it appears, some satisfactory results.

And so while it is often true that it is the Order-in-Council appointed members of tribunals who create some of the difficulties for members of the public through delay in hearing cases, or in issuing decisions, or in the quality of the decisions rendered, there is no question that you, the staff of those agencies perform utterly essential work which, if not done in a timely, efficient and accurate manner can have profoundly debilitating effects for those involved. There are occasions when delays or error within processing of matters occurs not by fault of staff, but through inadequate technology, and the Ombudsman has on more than a few occasions spoken to such an issue and will again, I anticipate, in the near future. However, there are certainly cases of unnecessary staff error or arbitrary, unreasonable decision making.

And so, from my opportunity to work in diverse fields over my career and from my vantage point as Ombudsman, I have gained a perspective of the delivery of justice in Ontario in its many forms, the courts, the ministries and the administrative agencies and tribunals. I have no hesitation in saying that over the years each of the courts, the ministries and the administrative agencies and tribunals have improved their service delivery immeasurably. Certainly the courts have finally, since the time that I was a member of one, become far more aware of those whom they serve and their diversity, and have taken significant steps to learn about those communities sufficiently that they can offer justice in a manner that can be appreciated by those receiving it. Judges today are better trained in the work which they do than when I served and I believe that government officials, be it within ministries or agencies, are also better trained than they were when I joined them as an appointed official some fifteen years ago.

Certainly SOAR, which is providing you with this course has been a great asset to the administrative justice system in its efforts to increase the professionalism of both staff of agencies and members of their tribunals. SOAR has recognized that without trained capacity and professionalism shared by support staff and tribunal members, our system of administrative justice will not provide its best and will not be perceived as adequate. So while the administrative justice system has come a very long way in the last fifteen years in terms of its professionalism at both staff and member level, nonetheless, there are the countervailing pressures provided by downsizing in government with each person expected to do better with less.

There is no doubt as it was in the Office of the Ombudsman that improvements can often be effected without adding or even maintaining current staffing. You will understand, however, that there are rational limits to that honing process and one hopes that a balance will be struck as government seeks to find the optimal size for the public service. It must be such that it permits able and willing staff to fulfil the responsibilities of their office in a manner which provides the public with the view that they have been served professionally and well. I believe that it is particularly important that the administrative justice system, which you represent, meet public expectation appropriately. You are truly, as I stated earlier, the face of justice in this province dealing with a considerably broader range of issues than the courts and certainly dealing with far more people who are affected within our communities than the

courts ever do. Administrative justice, of which you are an integral part, is expected to serve its public today with the distinction which was once reserved only for the courts. Meeting and maintaining that standard of excellence in reality and in the public mind is to a large extent your responsibility, because without your focussed and intelligent support your appointed members cannot achieve their best.

While as Ombudsman I receive the complaints about what you do, I am constantly reminded by our investigations and review of your work how very well it is generally performed. It is important that you remember that although agency people tend to feel that they are somewhat separate from government, you are nonetheless perceived to be part of the broad public service. It is vital to the well being of our communities that you continue to approach that service in the fine manner of which you are so clearly professionally capable. Understand your role in administrative justice, recognize the discretionary power which you possess and wield, and use it wisely, and generously.



OMBUDSMAN
ONTARIO

STANDARDS FOR EQUITABLE SERVICE DELIVERY

INTRODUCTION

Ombudsman Ontario has been working within a framework of equitable service delivery both internally and externally for several years. The 1996 document “Serving with Equity: Report of a Journey” states:

The terms “service equity” and “equitable service delivery” are used at Ombudsman Ontario to refer to practices that are designed to ensure that members of diverse groups receive services in ways that are appropriate to their needs.

The standards contained in this document serve to clarify Ombudsman Ontario’s service delivery practices and to lay out more formally the evaluation criteria required to measure our progress toward achieving equitable service delivery.

In September 1996, a committee of the Client Research Group (CRG), comprised of staff from across Ombudsman Ontario, produced a document entitled “Service Equity Standards Backgrounder”. This document was the first step toward establishing organization-wide service equity standards. Staff input to this report clearly indicated the need to establish standards for equitable service delivery as a means of guiding staff in all the components of their work. The development of these standards was therefore identified as a priority for the organization.

The CRG undertook various initiatives between 1994 and 1996 to establish equitable practices for service delivery. The backgrounder report established a framework for barrier identification and removal that set the groundwork for the organization’s development of appropriate and equitable service for the public. The standards included in this document were developed partly from the Barrier Identification Chart in the 1996 report and also through a review of literature and research drawn from a variety of services and programs including the provincial government’s Anti-Racism Secretariat (disbanded in 1996) and the United Way of Greater Toronto.

BACKGROUND AND CONTEXT

Organizations that focus on critically analyzing their values and behaviours in order to more appropriately serve their clients reflect the contributions and interests of diverse communities in their mission, vision, mandate and strategic planning. The United Way of Greater Toronto in its report entitled, *Action Access Diversity* (1991) suggests the following about organizations that strive for service equity:

These organizations are sensitive to the possible violation of interests of all cultural and social groups, whether or not they are represented in the organization...They act to eradicate all forms of discrimination and oppression.

Ombudsman Ontario has made considerable progress since first undertaking its equity journey in the early 1990s. The values of the organization have been discussed and refined through an extensive process of staff training and development and most recently through the implementation of a performance management system that is centrally based on the values of service equity.

One of the critical aspects of establishing equitable service practices is to ensure that the espoused values of the organization are reflected and implemented in all actions of the organization, including external relationships with clients and others, as well as internal operating processes. Organizational standards for policy, decision-making and human resource practices are key to ensuring the success of an organizational change process toward service equity. A range of tools and initiatives have been employed to this end at Ombudsman Ontario, including the Collective Agreement with unionized staff; a Performance Management System with key accountabilities for each position along with technical and behavioural standards; a Human Resource Policy Manual; a Dignity in the Workplace Policy; a Job Evaluation Plan; an Employment Equity Committee; an Organizational Training Plan; and a Complaints Resolution Manual.

Staff also participated in workshops on the topics “Ombudsman Ontario Today” and “Performance Effectiveness—Inter-personal Behaviours” where practical approaches were explored toward applying the values of transparency, service equity, relevance, fairness and respect. The workshop exercises were critically important in promoting and clarifying the linking of the organization’s values to every interaction that takes place within it. The Ontario Anti-Racism Secretariat in its document entitled, *Making Equity Work* (1994) stated:

An increasing number of organizations state equity and fairness as important in their value statements. However, despite good intentions and a formal statement of these values, there are also informal values and cultures within organizations based on traditional and customary ways of doing things—which do not take into account the changing nature of Ontario. [In these cases] the values of equity and fairness have not been internalized.

WHAT ARE STANDARDS FOR EQUITABLE SERVICE DELIVERY?

In order to define standards for equitable service, it is important to focus on what is meant by the term “service equity”. The 1996 Serving with Equity report emphasizes the importance of “being conscious of the client’s individual needs and social context, being conscious of one’s own impact on clients and actively working to understand how systems and procedures affect clients.”

A commitment to equitable service challenges organizations to move from providing the same services to all clients in the same way (equality of treatment), to providing services differently according to each client’s needs, circumstances and social location (equity in service). The goal of internalizing service equity values is to achieve equitable service delivery.

To ensure accessible service and equitable treatment for clients/complainants, organizational and individual practices are continually reviewed. Institutionalized policies and practices sometimes have an adverse impact (directly or indirectly) on people who are members of marginalized and vulnerable groups or on individuals who experience discrimination. The lived experience and social reality of these groups in society must be acknowledged and addressed in order to achieve equitable access to service.

ESTABLISHING A FRAMEWORK FOR EQUITABLE SERVICE

Understanding the concept of power and privilege is fundamental to the successful implementation of a service equity framework. Power and privilege refer to the social advantages and associated privileges that accompany membership in certain groups. Some groups in our society can operate with a relative sense of confidence that they will be accepted and respected. Others face barriers and are often disrespected or not treated fairly because of the social groupings they are associated with.

Power and privilege result from membership in certain groups, or may be assigned when particular responsibilities and authority are assigned to certain individuals or institutions in society. For example, in interactions with clients, Investigators and Ombudsman Representatives have assigned power (as delegated by their staff positions) and privilege in that they have access to information, may use their discretion and have the authority to make and/or influence decisions about how to proceed with any given case. The client on the other hand has less power in any such relationship, as he/she may not be aware of issues such as the Ombudsman’s jurisdiction, the authority delegated to staff and the process of investigation.

Based on the respective groups to which the staff person or the client belongs, there must also be consideration of social location, such that relevant group associations are given consideration in the process of ensuring equitable service delivery. In virtually every interaction, the realities of power and privilege intersect; and the dynamics that flow as a result must be reflected on, acknowledged and accommodated if equitable delivery of service is to be achieved.

Accessibility and inclusivity are critically important components of removing barriers to service and achieving equitable service delivery. The particular needs and circumstances of individuals must be seen and accommodated and the deliberate reaching to marginalized groups must occur if everyone in the population is to be represented in the design and delivery of services and programs.

Ombudsman Ontario's Standards for Equitable Service have been incorporated into overall organizational evaluation and form a part of the performance management system. The following is the list of standards:

1. Value difference and demonstrate respect
2. Listen actively to enable meaningful participation
3. Promote and ensure full access to service
4. Practice attitudinal openness
5. Proactive implement inclusivity
6. Recognize power and privilege
7. Communicate appropriately and effectively
8. Foster participation
9. Recognize personal and professional responsibility and accountability
10. Identify systemic issues

ACHIEVING EQUITABLE SERVICE DELIVERY

These standards focus on internal practice and external service delivery and provide Ombudsman Ontario with a means to measure organizational effectiveness and progress in achieving equitable service delivery.

1. Value difference and demonstrate respect

- Be open and receptive to communications styles that differ from your own.
- Demonstrate sensitivity to issues being presented, regardless of behaviour being exhibited.
- Identify and challenge your own assumptions, as these will affect your interactions.
- Be aware that non-visible identities (such as hidden disabilities) may exist and impact interactions.
- Educate yourself on the various non-visible identities that exist and the systemic issues faced by people in those groups.
- Do not make assumptions about any groups an individual “may” belong to.
- Ask open-ended/clarifying questions to gain more information.
- Challenge others on their assumptions and commentary about any groups, particularly when these are disparaging, disrespectful or uninformed.

2. Listen actively to enable meaningful participation

- Seek to connect with others by identifying and challenging any discomfort you may experience within yourself.
- Move beyond assumptions about behaviour and demonstrate empathy and respect.
- Make an effort to listen for what may be behind the words—particularly to others who experience difficulty expressing themselves.
- Expand your own perspective by taking the time to understand that of others.
- Take the time to listen without interrupting.

3. Promote and ensure full access to service

- Make adjustments in work hours and locations to accommodate groups that cannot easily access service.
- Recognize and offer options for service to meet the needs of groups that may require assistance in order to access service.
- Select locations that are barrier-free and centrally accessible for people.

4. Practise attitudinal openness

- Provide options without making assumptions about an individual’s choices for service delivery and/or access.
- Do not label people by characteristic unless it is explicitly relevant.
- Use appropriate language to characterize people when relevant (e.g. person with disability as opposed to disabled person) by putting the individual in the picture first, followed by any relevant description.
- Speak in plain language and explain process and procedure openly and clearly.
- Be aware of your own social location and its relationship to that of others.
- Be sensitive at all times to potential or real systemic barriers to institutional access.

- Provide practical and useful referrals and service options to clients and colleagues when programs or procedures do not meet their needs.

5. Proactively implement inclusivity

- Seek out the input and participation of as many diverse groups as possible in all organizational initiatives.
- Identify and discuss systemic issues that may exist or occur due to organizational change.
- Be open to explaining details that others may require to engage fully in the process you are following (e.g. always provide context in the following situations: complaint intake, committee work, administrative fairness, team discussions, triage).
- Seek out learning opportunities to educate colleagues on particular equity issues
- Identify opportunities to reach groups that have historically experienced barriers to accessing services.

6. Recognize power and privilege

- Acknowledge your own power and privilege in each interaction or process you are engaged in.
- Be open to hearing the impact of your actions and assumptions and take responsibility for them.
- Name mistreatment when you observe it happening and work in a constructive way to address it.
- Continuously educate yourself and learn from your experiences about the impact of discrimination and mistreatment.

7. Communicate appropriately and effectively

- Be open and flexible in the methods and vehicles used to communicate with others, both internally and externally.
- Ensure that publicity for programs reaches targeted constituencies.
- Be responsive to the need for translation and interpretation in every interaction and undertaking.
- Assess and adjust all materials for bias, prejudice and systemic impact.
- Share your knowledge and experience concerning appropriate referrals for clients who need particular services in the community.
- Consult with community resources on an ongoing basis to ensure appropriate referrals and to maintain relevance with community trends.
- Ensure that all communication materials reflect in illustration and text, the diversity of the population.

8. Foster participation

- Be explicit about the elements of administrative fairness that are built into the complaint resolution process.
- Present your knowledge, skills and perspectives fully and appropriately with clients and colleagues.
- Use communication and public education strategies that ensure that useful information is reaching all potential complainants, including non-traditional and alternative networks and media within diverse communities.
- Volunteer information about the complaint resolution process and keep clients and other staff informed appropriately on a regular basis.
- Maintain regular contact with clients on the progress of any investigation.

9. Recognize personal and professional responsibility and accountability

- Participate fully in training and education provided on the issues of service equity and accountability.
- Take responsibility when you make mistakes and when something you do or say is hurtful to others.
- Adopt the service equity framework in all aspects of your work and bring forward questions or issues that require clarification.
- Be direct about your own conflicts or struggles and respectfully address differences with others.
- Adopt the behaviours outlined in the Checklist for Organizational Effectiveness.

10. Identify systemic issues

- Ask clarifying questions to better understand an individual's complaint of systemic discrimination.
- Seek out opportunities to discuss the visible/obvious and hidden/invisible impacts of systemic discrimination.
- Proactively identify trends and opportunities to undertake systemic and system-wide investigations.
- Be clear on the groups in society that experience systemic discrimination.
- Continue to seek out learning opportunities to examine and understand the nature of systemic discrimination.



OMBUDSMAN
ONTARIO

OMBUDSMAN FAIRNESS STANDARDS

INTRODUCTION

The Ombudsman investigates complaints relating to the administrative decisions, recommendations, acts and omissions of Ontario's governmental organizations. He may investigate complaints made by a Member of Provincial Parliament or by any individual or group of people directly affected by the conduct in question. The Ombudsman may also investigate conduct which affects a person or group of people on his "own motion" where he considers it to be appropriate and in the public interest.

The Ombudsman is impartial and independent of government. He has been empowered by the provisions of the *Ombudsman Act* to conduct thorough investigations and to recommend remedies for resolution of complaints.

The Ombudsman has developed fairness standards which he uses in evaluating the decisions and actions or omissions of governmental organizations. These standards serve as a reference guide for reviewing complaints and are also used to govern internal procedures used by Ombudsman staff.

The concept of administrative fairness is based on the recognition of "natural justice" or "procedural fairness" which has evolved through the courts to ensure that decisions of administrative bodies are arrived at fairly. The fairness standards are intended to be flexible and their application may vary depending on the nature of the complaint and the parties involved.

Each complaint is considered on its merits. In some cases certain criteria will not be relevant, while in others overlapping criteria may be used to evaluate a decision or decision making process. The test of fairness may include the requirement for such safeguards as a formal hearing process, or simply ensuring each party receives notice of the relevant facts and an opportunity to provide input.

The Ombudsman reviews complaints to determine whether individuals have received fair and equitable treatment and whether there are broader systemic issues which must be addressed. If concerns are identified in the course of an investigation, recommendations may be made that go beyond the specific issues raised by the complaint.

When investigating complaints, the Ombudsman considers time, staff and funding constraints in addition to issues of fairness and equity. Appropriate respect for the independence and expertise of decision-makers is shown to agencies, boards, commissions and tribunals, including consideration of all relevant legislation, policy, procedure and practice.

FAIRNESS STANDARDS FOR DECISION MAKING

Anyone personally affected by a decision should be given adequate, proper and timely notice in plain language by the decision-maker:

- that a decision is going to be made
- why a decision is necessary
- how the decision will affect him/her
- what information will be considered and any criteria to be used in making the decision
- what current rules, procedures or requirements exist that will be used in receiving submissions and in arriving at the decision.

Anyone personally affected by the decision who wishes to do so should be able to present his/her point of view, and to respond to facts presented by others which will be considered by the decision-maker.

An adequate and proper review should be conducted and/or all important facts should be obtained, documented and considered before the decision is made.

Decisions should be reached objectively, with due respect for relevant facts, and without bias. Care should be taken to require and use only that information which is relevant to the decision.

The governmental organization should apply its processes consistently. All persons should be treated equitably, with due respect for differences, circumstances and needs. Existing policies, guidelines, procedures and rules should be followed consistently. Any inconsistency should be justified and explained.

The decision should be provided to anyone personally affected.

Adequate reasons to explain how and why the decision was made should be given to anyone personally affected.

Anyone personally affected should be appropriately notified of any appeal/objection which can be made against the decision and of any limits to the appeal.

A proper record of the process used and decisions reached should be kept for a reasonable period of time.

The process should be completed in a timely fashion. Information concerning the amount of time the process is expected to take should be provided at the outset. Any delays should be explained and the governmental organization should accept responsibility for any unnecessary delay which it has caused and for dealing with any adverse consequences.

Accommodation should be made for new or changed circumstances during a period of delay, including where appropriate, an opportunity for the individual to provide further information. The decision should be given in a timely fashion.

In order to be proper, some notices must be in writing or communicated in a manner appropriate to the individual's requirements. Any relevant limits on an individual's ability to present his/her position should be highlighted.

Governmental organizations should be sensitive to the economic reality that people with limited financial or personal resources may be at a disadvantage in presenting their cases. Efforts should be taken to redress any imbalance created by such disadvantage.

All decisions and relevant documents should be written in plain language. To ensure effective and accessible communication, information should be provided:

- in the language preferred by affected persons whenever possible or as required by law
- in a courteous, sensitive manner and respectful of the persons to whom it is addressed
- in a manner designed to ensure maximum understanding by the persons involved, taking into account any special requirements
- in clear and plain language, avoiding jargon and technical terms
- in a timely manner and any delays should be explained.

DEFINING THE *OMBUDSMAN ACT* TERMS

The *Ombudsman Act* establishes the legal framework for the Ombudsman's opinions and recommendations. The Ombudsman has developed working definitions for the terms used in the legislation as a guide for staff when reviewing complaints and applying the fairness standards.

According to section 21, the Ombudsman may make recommendations if he is of the opinion that the decision, recommendation, act or omission which was the subject matter of the investigation:

- appears to have been contrary to law
- was unreasonable, unjust, oppressive or improperly discriminatory or was in accordance with a rule of law or a provision of any Act or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory
- was based wholly or partly on a mistake of law or fact
- was wrong
- resulted from the exercise of a discretionary power for an improper purpose or on irrelevant grounds or taking into account irrelevant considerations
- was made in the exercise of a discretionary power without giving reasons.

Contrary to Law

An act, recommendation, decision or omission may be "contrary to law" if it appears to be:

- contrary to any relevant legislation (breach of a legal standard or an error of jurisdiction or ignoring a change in the law)
- not authorized, or beyond the authority granted by law where such authority is required
- a violation of the principles of fairness or other legal principles developed by the courts
- a failure to comply with the findings or order of a court or tribunal
- illegal or punishable under any law applicable in the Province of Ontario.

Unreasonable

A decision, recommendation, act or omission can be defined as "unreasonable" if it:

- is inconsistent with other decisions, etc., which involve similar facts or circumstances
- has been made without an obvious relationship to the facts or evidence
- has a contrary effect to that which was intended or permissible
- results from a refusal to use discretion where the facts or evidence call for its exercise
- cannot be rationally and fairly explained.

A process used to reach a decision can be described as "unreasonable" if:

- there is delay in taking any required action
- there is a lack of common courtesy
- no reasons are given
- the governmental organization has not communicated appropriately with the complainant
- the decision made is inappropriately punitive or needlessly reaches beyond the circumstances of the case
- there is an unfair, irrational, illogical, or untenable interpretation of criteria, standards, or legislation
- any inconsistent treatment is not explained
- procedures, alternatives, and available appeals are not adequately explained
- any other matter is raised which, in the context of the case, cannot be rationally and fairly explained.

Unjust

A decision, recommendation, act or omission is "unjust" if it:

- is contrary to the principles of equity, fairness or equality or is characterized by arbitrary behaviour
- violates well established, known and accepted policies or procedures
- demonstrates negligence, or the absence of proper care or attention, where no compensation or acknowledgment of the negligence has been provided

This term is generally regarded as stronger than "unreasonable", and may amount to a moral wrong and be seen to be unconscionable in some circumstances. It may also involve a basic principle of fairness where there is no such consideration of fault.

Oppressive

An act, omission, decision or recommendation can be "oppressive" if:

- it involves excessive use of authority
- authority is used to intimidate or to subject someone to cruel or unjust hardship, or to impose unreasonable conditions
- it inflicts harm or injury
- it overburdens a person seeking relief or access to any process
- it imposes requirements on a person which are out of proportion to the effect of the act or decision required
- it has an effect which is punitive, harsh, or harassing
- it is characterized by behaviour of officials which is heavy-handed or offensive

In determining when the term "oppressive" might be applied, it is most often the effect, not the intent, which counts. Actions such as unreasonably delaying the progress of a matter or pursuing unnecessary appeals may be characterized as being for an improper purpose rather than oppressive.

Improperly Discriminatory

An act, omission, decision or recommendation can be described as "improperly discriminatory" when:

- there is a failure to treat similarly-situated persons equally when there is no suitable, justifiable, or appropriate reason not to do so
- a distinction is applied which is not authorized by law or there is a failure to make a distinction which is authorized or required by law
- there is apparent violation of a basic right protected by legislation
- an otherwise reasonable decision or act adversely impacts on an individual or group of individuals for no good reason.

This term may also be used to describe situations where an act, omission, decision or recommendation is based on a rule of law, legislative provision or practice which is equally and uniformly applied, but which has the effect of discriminating against a specific group.

Systemic discrimination is usually characterized as "improperly discriminatory". However, depending on the circumstances, it may also be described under another category, such as "unreasonable" or "unjust".

Mistake of Fact

A "mistake of fact" occurs when an act, decision or recommendation is based on information that is factually in error, or which has been misinterpreted, leading to a decision which is inappropriate or wrong. It can also occur when important facts have been omitted or ignored.

Mistake of Law

A "mistake of law" applies to situations where a governmental organization has full and correct knowledge of the facts, but incorrectly applies or interprets a statutory provision, regulation, or common law rule or principle resulting in an improper decision or action.

This term overlaps with the term "contrary to law" but may be more appropriately used where the law has been misinterpreted.

Wrong

An act, omission, decision or recommendation can be found to be "wrong" if:

- it clearly departs from a policy, process, or procedure which sets out the "right" way which should be followed
- the investigation turns out new facts which were unavailable or unknown previously which cast doubt on the correctness of the original act, omission, decision or recommendation
- it is based on an incorrect interpretation of the facts
- it is the result of carelessness on the part of employees or the governmental organization itself.

The term "wrong" can also be applied to fit unique circumstances. A situation may develop in which no specific individual actions in a complex set of circumstances can be pointed to as unjust or unreasonable, but the net result just isn't "right"; that is to say, it is "wrong".

Persons often use the term colloquially in exactly this same kind of situation by saying "something's wrong" even though they may find it difficult to explain specifically what is not right.

"Wrong" may also overlap with "contrary to law" or with "mistake of fact". It may include "morally wrong" but such a finding may be more appropriately termed "unjust".

Improper Purpose

"Improper purpose" can be applied when a decision, recommendation, action or omission is based on otherwise proper policies and procedures but is used to achieve an improper purpose. This can occur when the intent of the policy or procedure is ignored or disregarded in order to affect a particular outcome, or when there is an improper exercise of discretion. Such a finding will focus on the outcome not the process; for example, an unauthorized purpose leading to personal gain, influence or bias. It may be necessary to establish intent in order to support a finding of improper purpose.

Reasons Should Have Been Given for a Decision

According to the *Ombudsman Act*, an adverse finding can be given where, "in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision".

The purpose of this section is to limit arbitrary decision-making, either actual or perceived. Decisions can be made orally or in writing but must be consistent with the evidence. Reasons should be adequate, that is, sufficient to allow the person concerned to understand why the decision was reached and whether it was an appropriate decision. Decisions made without reasons or adequate reasons may also be considered "unreasonable".