



FAIRNESS BY DESIGN:

An Administrative Fairness Backgrounder

Manitoba  Ombudsman

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OMBUDSMAN'S MESSAGE

October 8, 2020

This year, Manitoba Ombudsman celebrates its 50th anniversary and its continued commitment to the independent promotion of the principles of fairness, transparency and accountability. To mark this occasion and international Ombuds Day, I am pleased to distribute this Fairness by Design backgrounder and self-assessment guide for discovery and application by public administrators in Manitoba.

In 2020, the public calls to action against discrimination, injustice and inequality spurred some public and private entities to review their systems and services and to develop appropriate avenues of redress that uphold the inherent rights of all citizens. In addition, the global pandemic has ignited a focus on digital government, innovation and the increasing use of technology to guide decision making and delivery of health, education, economic and other public services. Governments have faced new pressures to develop policy to respond to the varying needs of citizens during uncertain times. The choices made by decision makers today will have an impact on individuals and the future of our society. There is no better time than now for administrators to focus their lens on fairness.

In Manitoba and other provinces, ombudsmen are an important pillar of our parliamentary system who help strengthen democracy, advance the rights of citizens and enhance good governance. Through impartial and objective assessment and investigation of complaints about public administrative matters, ombudsmen focus on whether policies, programs and practices are consistent with the law and standards of fairness. Fair processes, fair decisions and fair services are necessary for people to access and benefit from public initiatives and to maintain public trust and confidence in systems.

Ombudsmen are also uniquely positioned to proactively enhance good governance and promote the rights of citizens. *Proactive ombudsmanship* enables a discussion with public entities, informed by citizens, about emerging systemic issues and offers opportunities for future improvements. It also allows ombudsmen to provide information and guidance about administrative fairness to public bodies that support better policy, administration and processes in their service to citizens.

The Fairness by Design backgrounder and self-assessment guide are intended for senior leaders, policy and program development professionals, and service delivery agents within provincial and local public bodies in Manitoba. The Canadian Council of Parliamentary Ombudsman developed the self-assessment guide to help public bodies objectively assess fairness in their decision making, program and policy design and service delivery. My office is promoting the Fairness by Design documents to develop a common understanding of fairness standards and to help prevent unfairness before it happens.

Jill Perron
Manitoba Ombudsman

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Available in alternate formats upon request

FAIRNESS BY DESIGN:

AN ADMINISTRATIVE FAIRNESS BACKGROUNDER

FAIRNESS IN 2020 AND BEYOND

Citizens' expectations of their public bodies include three core principles: openness, transparency and fairness. Fairness by Design highlights fairness specifically because upholding this principle is within the power and control of government employees at every level of every public body. Fairness is not a lofty concept but a deliberate choice that administrators make in small and large decisions every day. Consider how the principles connect and why they matter to citizens.

Openness provides opportunity for citizens to participate in their governance by connecting directly with policy and decision makers. Open governments solicit public input into the conceptual and detailed policy and program development processes. Openness allows participation and supports fairness by inviting the public to have a say in solving the problems that affect them and determining the measures that will be applied to them.

Transparency in government facilitates the accountability of administrators to the public they serve. All decisions and methodologies must withstand public scrutiny. Corruption, conflict of interest and unfair business practices are prevented when administrators respond to public inquiry and show the work and processes that led to their decisions.

Fairness is simply not possible without openness and transparency. What makes a policy, program or service fair is found in how open, transparent, and free from bias the government has been in its creation and administration. A perception of fairness leads to the public's support. Citizens are more comfortable with new directions when they know they are rooted in a fair framework

for decision making and understand the reasons behind the decisions that governments make.

The basic tenets of fairness are understood by everyone. All citizens are entitled to and expect fairness in the administrative practices of governments and other public entities. As our society matures, citizens expect greater engagement in the development of policy, more direct participation in decision-making processes and the ability to access and interact with services in person and via technology.

Administrators also need the public's confidence and trust in their ability to deliver fair treatment under administrative policies or processes where the decision outcome impacts people in their lives. Citizens need to feel they have been treated fairly in their daily interactions with governments – from the police officer who issues a traffic ticket, to the school administrator who determines a grade, to a procurement agent who awards a tendered contract. The systems that support all government officials in their daily work should be designed to reflect the standards of fairness.

The Fairness by Design backgrounder and self-assessment guide are being introduced during an extraordinary time for governments. A range of external forces have placed new pressures on governments to innovate and implement critical programs and services needed by the public. These guides are intended to help provincial and local public bodies evaluate existing programs and services or design new systems that support fairness. Careful consideration of fairness elements can result in greater citizen engagement, improvements to service delivery, reduced complaints, better program outcomes and strengthened governance.

FAIRNESS BY DESIGN IS FOR YOU

Fairness by Design is for all people who serve the public. Fairness by Design has two parts:

- » This **backgrounder** developed by Manitoba Ombudsman, which sets out what fairness is and why it matters.
- » A **self-assessment guide** developed by ombuds¹ across Canada, which is a tool with assessment exercises that can be used by public bodies when reviewing existing programs and services or when developing new ones to ensure they are meeting their fairness obligations established by law and best practice. The guide helps identify gaps and risks to fairness through all types of decision making at various stages of program and policy development and delivery.

FAIRNESS DEFINED AND WHY STANDARDS MATTER

Fairness in public administration has three dimensions: fair process, fair decision, and fair service. Within each dimension, ombuds' standards have been developed to guide public bodies in their determination of fairness within their own processes, decisions, and services. The seven standards include:

FAIR PROCESS	>	1. Participation
		2. Integrity and impartiality
FAIR DECISION	>	3. Just and lawful
		4. Equitable
		5. Accessibility
FAIR SERVICE	>	6. People-centered
		7. Accountability and continuous improvement

Refer to **Fairness by Design: An Administrative Fairness Self-Assessment Guide** for more information about the seven fairness standards and checklists to evaluate if they have been met. Also see Fairness at a Glance on page 12 of this backgrounder.

The actions and decisions of public sector employees must be fair and be perceived as such. To help assess systemic and situational fairness, the common definitions of fairness used by ombuds across Canada are shared in this backgrounder to help describe the core concepts of fairness in the government context.

¹ "Ombuds" is a general term used to refer to an ombudsman or ombudsperson.

FAIR PROCESS

FAIRNESS STANDARDS

1. PARTICIPATION

2. INTEGRITY AND IMPARTIALITY

Fair process relates to the procedures public bodies follow when making decisions that directly affect people. It includes the steps that public sector employees take before, during and after making decisions.

Fair process must include opportunities for meaningful participation by the people affected by a decision. Dispute resolution processes and formal complaint mechanisms should include the participation of the individual directly affected by the decision.

Why **participation** matters:

- People affected are informed that things may change, and a decision will be made that could impact and disrupt their lives.
- People affected understand what will be considered when a decision is made.
- People affected may share information, ask questions and express their views (including support and objection) to influence the decision.
- The decision maker can appreciate and consider information and views of people affected. Hearing directly from people reduces the decision maker's own subjectivity and bias.

Fair process is also characterized by integrity and impartiality, exhibiting the highest standards of ethical conduct on the part of employees who deliver programs and services.

Why **integrity and impartiality** matter:

- Making decisions based on facts, evidence and law produces decisions that withstand scrutiny.
- The basis for the decision is clear. People have confidence in decisions when the rationale is understood and is defensible.
- Conflict of interest and the appearance of conflict of interest are avoided. The public has confidence in the decision if there is belief that there is no personal interest or bias involved.

3. JUST AND LAWFUL

4. EQUITABLE

A decision is a result, outcome, action, or response by a public body that affects one or more people or organizations. A decision itself must be fair and to be fair it must meet certain criteria – that it is just (fair, correct and/or reasonable) and it is lawful (permitted and/or legal).

Why **just and lawful** criteria matter:

- The person making the rule or decision must have the authority to do so.
- Decisions or rules must comply with other legislation and bylaws.
- Decisions that are logical, make sense, and reasonable are much less likely to be perceived as unjust or unfair.
- A rule or decision cannot discriminate on any on the prohibited grounds listed in the Manitoba Human Rights Code or the Charter of Human Rights and Freedoms (ex: race, disability, religious belief, sexual orientation).
- The decision cannot be oppressive, meaning that it must avoid creating unnecessary obstacles for the person affected.

Fair decisions must be equitable and based on complete information, reflect an appropriate exercise of discretion, and reasonably consider the specific case and people’s individual circumstances.

Applying the principle of equity does not mean simply applying the principle of equality. Decision makers need to understand the rules that apply to the decision, but may have ability to exercise discretion to account for the differences in need, capacities and circumstances of those impacted.

Why being **equitable** matters:

- Decision makers should focus on outcomes and the achievement of desired policy objectives of the law. They should ask if the decision is fair given the circumstances for the group, individual or organization.
- The concepts of fairness and justice can be shaped by individual worldview and experiences. Systemic policies and procedures that establish boundaries for discretion and impose equity considerations will assist public employees in delivering services to meet the needs of people they are serving.

5. ACCESSIBILITY

6. PEOPLE-CENTERED

7. ACCOUNTABILITY AND CONTINUOUS IMPROVEMENT

Fair service refers to how public bodies treat people when they access programs and services. First and foremost, programs and services must be accessible.

Why **accessibility** matters:

- Programs and services are intended to help the public. The effort required to access them should not prevent application or use.
- A diverse range of people access programs and services and they have unique needs. It is unfair when people cannot gain access due to barriers caused by administrative policy and procedure.

Fair service is people-centered. Public bodies must ensure employees are trained and supported by processes that ensure respectful treatment and fair consideration of people's needs and circumstances when services and programs are delivered.

Why being **people-centered** matters:

- People's individual needs should be respected, and privacy must always be protected.
- Reasonable service standards and timely response is a fair expectation from the public. Slow or delayed service may result in hardship for some people.
- Showing courtesy and respect reflects the core values of public service.
- People who experience poor client service are more likely to perceive unfair treatment and submit a complaint (even when the decision or action was 'fair').

Finally, in providing fair service, public bodies must incorporate accountability and continuous improvement. It is every public body's responsibility to ensure that they have a robust and accessible complaints process. A public body is also responsible to engage in ongoing quality review and implement service improvements where needed.

Why **accountability and continuous improvement** matter:

- An outlet for complaints and a rapid and meaningful process for dealing with them empowers the public when their expectations are not met.
- An accessible process ensures the people most at risk of unfair treatment have a simple path to complaint and remedy.
- When mistakes happen or a lapse of judgment occurs, the public body owns the responsibility and measures are taken to prevent an event from happening again.
- It is reasonable for the public to expect that public bodies will improve policies, programs and processes that do not function properly or meet their intended objectives.

FAIRNESS 101: RISK AND REWARD

Manitoba Ombudsman promotes Fairness by Design as a proactive practice leading to decisions, policies, programs and services that are built with fairness in mind. Public bodies should routinely consider the reputational and legal risks that exist if fair processes, fair decisions and fair services are not systemically addressed and achieved. These documents represent best practice and when applied, the rewards are numerous.

REWARDS OF FAIRNESS

- » Public trust:
 - Decisions have a clear rationale that people respect.
 - Decisions prompt citizens to act quickly when government must react to a crisis.
- » Confidence in new ideas:
 - Public has confidence in new initiatives/directions knowing they are rooted in a fair framework for decision making.
- » Reduced complaints:
 - Access to decision processes and communications satisfies public need for information.
 - Opportunities for participation lead to a sense of public ownership and buy-in.
- » Consistent and efficient administration:
 - Equitable allocations are achieved.
 - No backtracking in policy and program development because fairness was addressed from the start.
- » Better information:
 - Structured feedback/engagement produces valuable intelligence on public opinion. This information can be used to adjust programming or develop new initiatives.
- » Perceived lack of bias or conflict:
 - The decision-making process is clearly outlined and can be easily referenced, reducing speculation and mystery about motive.





RISKS OF UNFAIRNESS

- » Unreasonable decisions or actions that:
 - are inconsistent with other decisions made in similar circumstances
 - are inconsistent with the weight of the evidence
 - have an effect contrary to what was intended
 - cannot be explained rationally when challenged

- » Unjust decisions or actions that:
 - are inappropriately punitive
 - impose excessive and unnecessary obligations
 - have consequences beyond what is appropriate in the circumstances

- » Oppressive decisions or actions that:
 - overburden a person participating in a program
 - impose penalties or burdens that are hard to comply with
 - impose penalties that are disproportionate with the circumstances

- » Improperly discriminatory decisions or actions that:
 - do not meet the objectives of a government program
 - fail to treat similarly situated people equally when there is no justification for differentiating

- » Wrong decisions or actions that:
 - do not follow the public body's own policies or process
 - would appear as obvious poor judgment by a neutral or impartial person
 - are based on criteria that the official is not permitted to apply or on evidence that is not relevant

- » Biased decisions or actions that:
 - are decided without hearing evidence or information
 - are based on personal predisposition, opinions or beliefs

- » Damage to reputation:
 - caused by the perception that decisions are influenced by bias
 - when personal interests conflict with public interest or one's duty as a public official

FAIRNESS AT A GLANCE



FAIR PROCESS

STANDARD 1: PARTICIPATION

- Notice
- Process information
- Opportunity to be heard
- Opportunity to appeal
- Reasons for decisions
- Communication
- Timeliness

STANDARD 2: INTEGRITY AND IMPARTIALITY

- Decision free from personal interest, preference, or prejudice
- Review by independent decision maker
- Conflict of interest protections
- High ethical and professional standards
- Code of conduct policies

FAIR DECISION

STANDARD 3: JUST AND LAWFUL

- Consistent with law and policy
- Not arbitrary, but logical and understandable
- Not oppressive or unreasonable
- Not improperly discriminatory
- No unreasonable impediments to access

STANDARD 4: EQUITABLE

- Decisions based on complete and relevant information
- Consider specific circumstances
- Each case decided on its merits
- Appropriate exercise of discretion

FAIR SERVICE

STANDARD 5: ACCESSIBILITY

- Accurate information, publicly available
- Online and printed formats
- Use plain language
- Incorporate accommodation standards
- Make access to your organization easy to a diverse range of people
- Culturally safe and inclusive spaces

STANDARD 6: PEOPLE-CENTERED

- Timely, accurate and respectful service
- Fair consideration of people's needs and circumstances
- Appropriate privacy protection

STANDARD 7: ACCOUNTABILITY AND CONTINUOUS IMPROVEMENT

- Robust, accessible complaints process
- Know who is responsible for handling and responding to complaints
- Culture of quality review
- Continuous service improvement

EVALUATING FAIRNESS



Use the guidance and checklists in **Fairness by Design: An Administrative Fairness Self-Assessment Guide** to evaluate the fairness of existing or new systems, policies and practices. The self-assessment guide was developed by ombuds across Canada and represents our expectations of administrative fairness in public service delivery.

When creating laws, ensure the following standards are met:

- 1.1 Ensure your rules and regulations, policies and procedures comply with the principles of administrative law, including procedural fairness and the Charter of Rights and Freedoms.
- 1.2 The process and procedure for decision-making processes must be consistent with the principles of procedural fairness as outlined in the previous section of this guide.
- 1.3 Policy or legislative criteria set out in policy must not be inconsistent or contradictory with the governing legislative scheme.
- 1.4 Ensure there are no unreasonable presumptions or requirements that unduly burden a person seeking justice to your service or organization in a legal proceeding.
- 1.5 Ensure that policies and procedures are designed to be flexible and equitable. Policies must not create barriers that prevent people from fully accessing services and programs. Public should have some flexibility for staff to consider individual circumstances making decisions that impact a person's rights, interests or wellbeing.

Ensure your program, service and decision-making process complies with all federal, provincial and territorial legislation in use in your system:

- 1.1 Determine what legislation applies to your program or service and ensure your program's policies and procedures comply with these laws, including constitutional law, human rights legislation and the Charter of Rights and Freedoms. If necessary, seek legal advice.
- 1.2 Ensure policies and procedures reference and explain the primary framework that your program is using to operate under. The authority for decision-making should be clearly defined and stated in legislative authority.
- 1.3 Make sure your policies and procedures identify who has legal authority to make specific decisions or take certain actions within your organization. This includes ensuring there is a process in place for the prompt delegation of statutory decision-making power and making clear the roles and responsibilities of all authority.

ACKNOWLEDGMENT

We gratefully acknowledge the Canadian Council of Parliamentary Ombudsman's initiative to raise awareness of the importance of fairness in public services delivered to citizens. The development of this fairness backgrounder benefited from the expertise of council members.

NOTES

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Lined area for notes with horizontal ruling lines.



