

Ombudsman Act Investigation Report
Communication and Expectation:
Fairness, Service Delivery and the Manitoba Human Rights Commission

June 2020

Manitoba  Ombudsman

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Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASES: 2018-0076, 2018-0137, 2018-0356, 2018-0138, 2018-0443, 2018-0281, 2019-0021

MANITOBA HUMAN RIGHTS COMMISSION

CASE SUMMARY

We received complaints from seven individuals who previously filed complaints with the Manitoba Human Rights Commission (the commission). All the complainants were concerned with the length of time it took the commission to investigate their matters.

While the Human Rights Code does not legislate a time frame for completing an investigation, the current time being taken is inconsistent with the principles of fair process and fair service. It is reasonable to expect administering a program within the confines and obligations such as those placed upon the commission requires time. However, it is also reasonable for a complainant to expect communication that is accurate, current and complete. The consequences of administrative delays can be significant, including potentially hindering access to other avenues to address the complaint.

The commission advised it has implemented changes and is working to reduce current total average time to complete the formal review process of a complaint to 12 months in 2020 – a reduction of 58 per cent from 2017.

As a result of our review, we recommend that the commission:

1. Clarify its process and identify key points to routinely track processing times.
2. Ensure public information regarding process and time frames is accurate and current.
3. Develop procedures to standardize:
 - a. when and how complainants are updated throughout the process, and
 - b. when and how complainants are updated if there are changes to the anticipated time frame.

OMBUDSMAN JURISDICTION AND ROLE

Under the Ombudsman Act, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, municipalities, and their officers and employees. Ombudsman investigations assess actions and decisions against a benchmark established by government. The benchmarks in this report are the Human Rights Code (the code), and the policies and procedures implemented by the Manitoba Human Rights Commission (the commission) to give effect to the legislative purpose identified by the code.

Manitoba Ombudsman investigations review complaints to identify areas requiring administrative improvement. Our reviews typically take a broad view that considers the fairness and reasonableness of government actions and decisions.

Improved administrative practices can enhance the relationship between government and the public, and reduce administrative complaints. To help government bodies achieve better administration, where appropriate, our reports include recommendations for administrative improvement.

THE COMPLAINTS

Our office investigated seven complaints from individuals who filed complaints with the commission. All the complainants were concerned with the length of time for the commission to investigate their matters. Some complainants also expressed concern that after a long wait for a decision (in some instances three to four years) their complaint was dismissed. This report considers factors affecting the time required to complete human rights investigations. In addition, each of the complainants received an individual report specific to the issues in their individual complaint.

KEY ISSUES

- 1. Is the time frame for investigating a complaint in accordance with legislation, policies and practices that govern the investigation of such complaints?**
- 2. Did the commission provide fair and reasonable communication about its complaint process time frames?**

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included reviewing the following:

- the Human Rights Code
- policies and procedures of the commission
- operating reports and statistics for the commission, including the annual report and internal operational reports
- specific complainant investigation files
- a sample of other commission complaints

- annual reports for the human rights commissions in other jurisdictions

BACKGROUND

The Commission's Mandate

The Manitoba Human Rights Commission is an agency of the Manitoba government and is governed by the Human Rights Code. The commission is responsible for administering the code, the premise of which is to uphold the principle of, as stated in the code, "the individual worth and dignity of every member of the human family." The code covers actions of employers, service providers and housing providers, including condominium corporations and life lease properties. It allows any person, under Section 22(1), to file... *a complaint alleging that another person has contravened this Code* and sets a time limit, under Section 23(1), requiring a complaint to be filed within one year of the alleged contravention.¹

The commission's mandate includes promoting the principles, rights and responsibilities identified in the code and administering the complaint process which involves investigating allegations of discrimination brought forward by citizens of Manitoba. The significance of the commission's responsibilities is clear in the code's preamble, which states that protections for the human rights of Manitobans "are of such fundamental importance that they merit paramount status over all other laws of the province." It is within this mandate that the commission's complaint process has developed.

The Commission's Complaint Process

INTAKE

When the commission receives a complaint, intake officers work with the complainant to determine if their issue is covered by the code (i.e. meets the commission's criteria of a human rights issue), falls within the commission's jurisdiction, and if the matter can be resolved through pre-registration mediation. If the matter does not move to or is not resolved through mediation, the intake officers write up the complaint based on the information provided by the complainant and prepare a final version for the complainant to sign.

COMPLAINT REGISTERED AND FILED

Once the complaint is signed it is registered by the commission's executive director and deemed filed with the commission. After the complaint is filed, the respondent and the complainant will be provided with a copy of the complaint – this may include an offer for pre-investigation mediation. If mediation is not offered, does not proceed, or does not resolve the matter, the commission requests a formal response from the respondent. This marks the beginning of the formal complaint process.

¹ Authority under Section 23(2) allows the executive director to extend the time for filing in some circumstances.

MEDIATION AND SETTLEMENTS

The commission provides opportunities to use mediation as an alternative resolution for a complaint. Mediators will work with the complainant and the respondent to find a mutually agreeable resolution to the complaint. Mediation may be offered to the parties:

- pre-registration – at intake at the time of the initial filing of the complaint
- post-registration/pre-investigation – after the complaint is filed but prior to commencing an investigation
- board-directed – following a Board of Commissioners (board) decision that there is sufficient evidence to support a contravention, but prior to requesting an adjudicator

The commission's general practice is to allow parties up to 60 days to resolve a complaint through mediation and 90 days for board-directed mediation. The commission advised that previously, mediation often extended beyond the allotted 60 days without resolution. The commission's current practice is to enforce the set time frames to complete the mediation process or to assess the likelihood of a successful resolution through mediation.

If, after the executive director has registered a complaint, and a) mediation is not offered, b) mediation is not accepted, c) it appears mediation will not likely be successful, or d) is not successful within 60 days, the commission requests the respondent provide a formal reply. After the reply is received, the file is assessed and enters a queue (based on the due date for the formal reply) to be assigned an investigator or to receive jurisdictional assessment.

JURISDICTIONAL ASSESSMENT

The commission has broad jurisdiction to consider complaints against any business or organization providing a service in the province. Jurisdiction can be complicated if another authority has concurrent jurisdiction to consider a matter, or occasionally may be displaced if another administrative body has exclusive jurisdiction to consider certain matters. The issue of exclusive jurisdiction has a significant impact on whether the commission is able to or should consider investigating a complaint.

The commission stated that if an issue of jurisdiction is raised, the complaint is assigned to the commission's legal counsel to determine if the commission does have jurisdiction:

- If the commission has jurisdiction, the complaint will then proceed to the queue to be assigned to an investigator (based on the date the commission submitted a request to the respondent to provide a formal reply to the complainant).
- If the commission does not have jurisdiction, legal counsel will recommend the Board of Commissioners dismiss the complaint.

Commission staff prepare jurisdictional reports for the Board of Commissioners on complaints raising jurisdictional issues. Before the report is provided to the board, legal counsel provides copies of the jurisdictional report to both the complainant and the respondent who may file

additional information with the commission. The board is then provided with the report and any additional information that has been filed for its consideration.

In 2018, the commission completed 101 jurisdictional assessments. Of the seven complaints we received about the commission, two were eventually dismissed because of jurisdictional issues.

INVESTIGATIONS

Files to be assigned an investigator – including those that have been determined to meet jurisdictional requirements after a jurisdictional review – are placed in a queue based on the date the commission submitted a request to the respondent to provide a formal reply. It is important to note that jurisdictional review does not delay the process of being assigned an investigator as the queue is based on the step prior.

Once assigned, the investigator prepares an investigation plan which includes identifying the scope of the investigation. This plan is reviewed and approved by the director of investigations.

LIMITED INVESTIGATION

Not all complaints will require an extensive investigation. In some cases, the information provided by the complainant suggests that an alleged incident is not a violation as defined by the code (ex: the facts do not support the allegation or there may be insufficient evidence).

The commission considers these complaints to be limited investigations, meaning that extensive evidence collection is not required to analyze the complaint. For example, the investigator may rely on the information already provided by the parties or there may be limited need to interview parties or witnesses. Although a complaint may initially be identified as a limited investigation, it is possible that as evidence is gathered, the complaint may require a more extensive investigation.

INVESTIGATION

For all investigations, limited or otherwise, the investigator completes the investigation and, based on the evidence and the requirements of the code, prepares an investigation report with their findings. The investigation report will also include the investigator's recommendation to the Board of Commissioners to either dismiss the complaint, or refer it to adjudication.

Before the investigation report is provided to the Board of Commissioners, the investigator provides copies of the investigation report to the complainant and the respondent, both of whom may file a submission in response to the report, indicating whether they agree or disagree with its findings and raising any new evidence not considered during the investigation. The Board of Commissioners is provided with the report and any additional information that has been filed.

THE BOARD OF COMMISSIONERS

A Board of Commissioners panel consists of at least three appointed commissioners. These panels are convened approximately six to eight times a year and will consider all investigation reports, including recommendations that have been completed in advance of the meeting (generally 20 to 50 reports at each session). A Board of Commissioners panel conducts a paper hearing, meaning that neither the complainant nor the respondent are present at the meeting. The board panel will only consider the complaint, investigation report and any written submissions made by the parties in order to make its determination. If the panel feels the matter requires further investigation before a decision can be made, it will be referred back to investigation. Otherwise, it will make a decision to dismiss, refer to board-directed meditation, or refer to the Human Rights Adjudication Panel for adjudication.²

The code states that the Board of Commissioners must dismiss a complaint if it is satisfied the complaint is frivolous or vexatious, the acts or omissions described in the complaint do not contravene the code, or there is insufficient evidence in support of the complaint. According to the commission, if an investigation is determined to be limited, there is a high probability it will eventually be dismissed. Of the seven complaints we received, four were limited investigations, two of which were eventually dismissed because there was insufficient evidence to support the complaint – one is ongoing and the fourth has been withdrawn.

Once the Board of Commissioners makes a determination on a complaint, both parties will be notified in writing. If either party is not satisfied with the decision, they can request a review of the decision by the Court of Queen's Bench.

THE ADJUDICATION PANEL

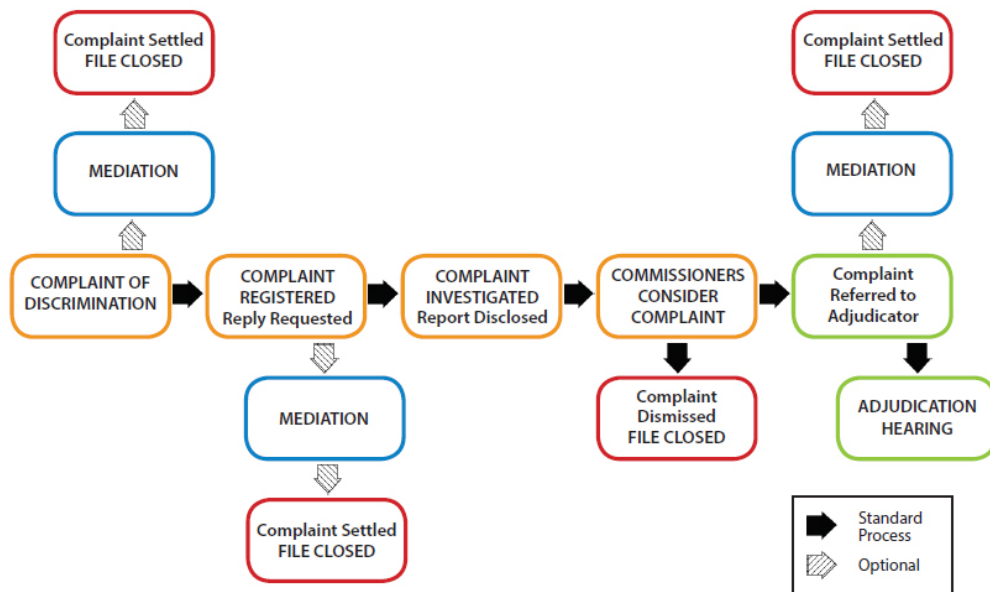
When the board refers a complaint to the Human Rights Adjudication Panel, the adjudicator will hold a public hearing to determine whether there is a contravention of the code. Both the complainant and the respondent are able to present evidence or make submissions at the hearing.

If the adjudicator determines there has been a breach, they will order the respondent to compensate the complainant and may also order the respondent to make changes to prevent a future breach.

COMPLAINT PROCESS FLOWCHART

The following flowchart from the commission's 2015 annual report shows the commission's complaint process. To assist our investigation, Manitoba Ombudsman developed a flowchart with greater detail on this process – see Appendix A.

² Section 29(3)(b) of the code also includes the provision that the panel may recommend that the minister of justice commence a prosecution for an alleged contravention of the code. This has not been done to date.



The commission indicated that its complaint process has evolved in response to various factors, including the requirements and limitations set by the code, and the principles of access to justice considerations. The resulting process includes many steps and many opportunities to provide a decision more quickly. While the commission directs and implements the process, it is helpful to identify the variables that are outside the control of the commission but which may have a significant impact on the time it takes to provide a decision.

LEGISLATION

Section 29(1) of the code requires the Board of Commissioners to dismiss a complaint if: the complaint is frivolous or vexatious (29(1)(a)), if the complaint is not a violation as defined in the code (29(1)(b)), or if there is insufficient evidence to substantiate the complaint (29(1)(c)). As such, 85 per cent of complaints heard by the Board of Commissioners are dismissed under 29(1)(a), (b), or (c).

However, the commission is required to process all complaints that meet the time-based requirements through the entire formal complaint process; the code offers no provisions for staff to refuse to register, discontinue or dismiss complaints, including those that are not within the commission’s jurisdiction, are frivolous and vexatious, or which the complainant has discontinued contact with the commission.

VARIABLES IMPACTING PROGRESS

The commission identified a number of variables that can impact a file’s progress and are outside its control, such as:

- late responses from parties, requests for extensions or for hearing adjournments³
- scheduling issues (ex: including interviews, mediation, public hearing scheduled by adjudicator)
- obtaining agreements (ex: lag times related to offers and settlement proposals)
- file-specific factors (ex: as a jurisdictional review may be required later in the process, or a limited investigation becomes a full investigation)
- resourcing issues (ex: number of investigation staff available)

The commission's 2017 annual report indicates that it received 4171 contacts for information that year, 466 files opened and 317 formal complaints registered. The commission indicated that approximately 40 per cent of complaint files opened are either resolved through mediation prior to an investigation or do not proceed because the complainant chooses to withdraw the complaint. In 2017, investigators completed 123 investigations, of which 109 complaints were dismissed and 14 substantiated.

ANALYSIS AND ASSESSMENT

ISSUE 1: Is the time frame for investigating a complaint in accordance with legislation, policies and practices that govern the investigation of such complaints?

The code does not set a specific time frame for when an investigation must be completed, but does provide some guidance in section 26, which states:

Investigation of complaint

26. As soon as is reasonably possible after a complaint has been filed, the executive director shall cause the complaint to be investigated to the extent the Commission regards as sufficient for fairly and properly disposing of it in accordance with section 24.1 or 29.⁴

The commission's process for reviewing complaints is outlined above under the commission's complaint process. This process is available to the public, including on the commission's website. Although there are no formalized policies for the commission that govern completion time for reviewing a complaint, the commission has established several internal standards to assist in regulating the time frame of its complaint process. These include:

- enforcing the 60-day limit to resolve matters attempting pre-investigation
- expecting investigators to contact parties within two weeks of a complaint file being assigned to arrange interviews
- monthly meetings between the investigator and director of investigations to discuss progress on files and to prioritize or optimize their investigation process

³ The board meets every two months so one adjournment will add two months to the time.

⁴ Sections 24.1 and 29 of the code establish the parameters within which the commission may explore a settlement or adjudication, or must terminate or dismiss a complaint.

The commission's website provides information about its complaint process and includes the steps required for intake (gathering information, reviewing, revising, and signing the complaint) and the following timelines:

- several months for an investigator to be assigned to a complaint
- four to twelve months to complete an investigation (at the time of our review this was four to ten months)

There are no requirements under legislation that govern the completion time for investigating a complaint. The benchmarks established in the commission's policies, practices and standards are currently being met, and overall the commission was meeting these standards as reflected in the averages on Table 3. However, three of our complainants did not meet the standard of a four to ten-month investigation length; complainants A, C and F had investigation lengths of 24, 11 and over 12 months respectively.

The commission's average completion time for investigating a complaint is not contrary to legislation, policies and practices that govern the investigation of such complaints.

ISSUE 2: Did the commission provide fair and reasonable communication about its complaint process time frames?

In this investigation, all seven complainants with our office were concerned with the length of time taken for the commission to investigate their matters. Having established that there are no legislated requirements regarding the commission's time frames, the second section of this report addresses our complainants' concerns by focusing on the whether the time taken to complete the investigations was fair and reasonable. Our review focused on two windows of time which make up the bulk of the commission's formal complaint process: the time spent waiting for an investigator to be assigned (the first stage), and the length of time it takes to investigate a complaint (the second stage).⁵

Evidence

We note that while the formal process begins when the commission requests the respondent to provide a formal response, a complainant likely experiences the process as beginning at the original point of contact with the commission. From this perspective, the total length of time for the commission to process a complaint will include this additional time before the complaint is formally filed. However, for the purposes of evaluating time frames, this report looks at two stages of the formal complaint process which are measurable with the commission's data: investigator wait time and length of time it takes to investigate a complaint.

⁵ The beginning of the formal complaint process is when the commission requests the respondent to provide a formal response. The end of the formal complaint process is the completion of an investigation report or jurisdictional assessment report. From here, the file moves into the hands of the Board of Commissioners.

FIRST STAGE: INVESTIGATOR WAIT TIME

Once a complaint has been registered, the commission requests a formal reply from the respondent(s). The reply is received and the file enters a queue based on the deadline date for the reply.⁶ This window of time is considered the *investigator wait time*.

From 2012 to 2017, *investigator wait time* increased by a factor of almost six. The commission identified that interruptions in resources was a significant contributing factor to the backlog and the resulting increased times to complete investigations. Between 2017 and August 2019 this time was decreased by almost half:

Table 1 – Annual average *Investigator Wait Time*

Year	Investigator Wait Time
2012*	4 months
2013*	8 months
2014*	10 months
2015*	12 months
2016*	18 months
2017*	23 months
August 2019**	12 months

* From the commission's December 2018 report, *Reducing Wait Times*.

** Most recent statistics from the commission January 22, 2020.

SECOND STAGE: LENGTH OF INVESTIGATION

After an investigator is assigned, the investigator completes the investigation, and prepares and submits an investigation report for the Board of Commissioners. This window of time is considered the *investigation length*. Since 2014, average *investigation length* has decreased by half:

Table 2 – Annual average *Investigation Length*

Year	Investigation Length
2014 ⁺	11 months
2015 ⁺	9 months
2016 ⁺	6 months
2017 ⁺	6 months
December 2018 ⁺⁺	5.5 months

⁺ From the commission's 2017 annual report.

⁺⁺ Most recent statistics from the commission January 22, 2020.

⁶ It may also be sent to the jurisdictional assessment queue. All files enter the investigator queue based on date the request for responses was sent by the commission.

TIME FRAMES: MANITOBA OMBUDSMAN COMPLAINANTS

Table 3 summarizes the progression of our complainants from registration to conclusion. The complaints cover issues in all areas of the code, including services, housing and employment.

Table 3 – Time Frame Summary for Manitoba Ombudsman Complainants

LEGEND									
Complaint filed – Signed written complaint submitted to the executive director									
Respondent reply due date – Date by which the respondent must submit their formal written reply									
Investigator assigned – Date investigator is assigned									
Stage 1 - investigator wait time – Time from formal respondent reply deadline to investigator assignment									
Investigation report completed – Date investigation report is completed for the Board of Commissioners									
Stage 2 - investigation length – Time from an investigator being assigned to investigation report completion									
Total complaint processing time – Time from complaint registration to completion									
Complaint decision – Decision made by the Board of Commissioners panel									

Complainant	Complaint filed	Respondent reply due date	Investigator assigned	Stage 1 investigator wait time	Investigation report completed	Stage 2 investigation length	Total complaint processing time	Complaint decision	Complaint classification
A	February 27, 2015	June 12, 2015	January 25, 2017	18 months	January 9, 2019	24 months	3 years + 6 months	Dismiss 29(1)(c) insufficient evidence	Limited investigation
B	May 15, 2015 <i>7 months pre-investigation mediation</i>	April 15, 2016	December 18, 2017	19 months	June 13, 2018	6 months	2 years + 1 month	Dismiss 29(1)(a) frivolous and vexatious	Jurisdictional issue
C	June 12, 2015	July 17, 2015	July 20, 2017	24 months	June 1, 2018	11 months	2 years + 11 months	Settled board-directed mediation	Full investigation
D	March 14, 2017	April 14, 2017	March 21, 2018	12 months	June 11, 2018	3 months	1 year + 3 months	Dismiss 29(1)(a) frivolous and vexatious	Jurisdictional issue
E	May 25, 2017	June 30, 2017	January 23, 2019	20 months	July 11, 2019	5 months	2 years + 1 month	Dismiss 29(1)(c) insufficient evidence	Limited investigation
F	April 28, 2017	June 2, 2017	April 9, 2019	24 months	N/A	12 months+ matter is ongoing	3 years + matter is ongoing	ongoing	Limited investigation
G	June 6, 2017	July 14, 2017	January 23, 2019	19 months	N/A <i>withdrawn</i>	7 months when file withdrawn	2 years + 2 months when file withdrawn	Withdrawn September 2019	Limited investigation

Manitoba Ombudsman complainants filed with the commission between 2015 and 2017. As the data in Table 1 show, *investigator wait times* rose steadily from 2012 (4 months) and peaked in 2017 (23 months). Between 2015 and 2017, *investigator wait times* increased by 48 per cent. This means that our complainants became involved with the commission at the crest of this backlog.

The tables below demonstrate that the complainants who filed in 2015 were particularly affected by this; their average *investigator wait times* were twice the anticipated time frame from the average for that year, and two of the three experienced longer *investigation length* from the average for that year. In contrast, our complainants who filed in 2017 experienced shorter than average *investigator wait time* for that year, and generally fell within the commission’s average *investigation length* for that year.

INVESTIGATOR WAIT TIME COMPARISONS

The table below compares our complainants’ actual *investigator wait time* with the annual average *investigator wait time* for the year in which the complaint was filed.

Table 4 – *Investigator Wait Time Comparison*

Complainant	Year complaint filed	Annual average <i>investigator wait time</i> for year complaint filed	Complainant’s actual <i>investigator wait time</i>	Complaint’s deviation from average
A	2015	12 months	18 months	+6 months
B	2015	12 months	19 months	+7 months
C	2015	12 months	24 months	+12 months
D	2017	23 months	12 months	-11 months
E	2017	23 months	20 months	- 1 month
F	2017	23 months	24 months	+1 month
G	2017	23 months	19 months	-4 months

INVESTIGATION LENGTH COMPARISONS

Investigation length is the time frame from when the investigator is assigned to when the investigation is completed. The table below compares our complainants’ actual *investigation length* with the annual average *investigation length* for the year in which the complaint was assigned an investigator.

Table 5 – *Investigation Length Comparison*

Complainant	Annual average <i>investigation length</i> (year when complainant assigned investigator)	Complainant’s actual <i>investigation length</i>	Complaint’s deviation from average in months
A	7 months (2017)	24 months	+17 months
B	7 months (2017)	6 months	-1 month
C	7 months (2017)	11 months	+4 months
D	5.5 months (2018)	3 months	-1.5 months
E	5.5 months (2019)	5 months	-0.5 months
F	5.5 months (2019)	7+ months <i>ongoing</i>	+1.5 months <i>ongoing</i>
G	5.5 months (2019)	7 months <i>withdrawn</i>	+1.5 months <i>withdrawn</i>

Table 6 – Complainants total *investigator wait time + investigation length*

Complainant	Complaint’s deviation from average <i>investigator wait time</i>	Complaint’s deviation from average <i>investigation length</i>	Total deviation from average
A	+6 months	+17 months	+ 23 months
B	+7 months	-1 month	+6 months
C	+12 months	+4 months	+16 months
D	-11 months	-1.5 months	-12.5 months
E	- 1 month	-0.5 months	-1.5 months
F	+1 month	+1.5 months <i>ongoing</i>	+2.5 months
G	-4 months	+1.5 months <i>withdrawn</i>	-2.5 months

COMMISSION’S RESPONSE TO TIME FRAME DELAYS AND BACKLOG

Between 2014 and 2017, *investigator wait times* rose from 4 to 23 months – an increase of 82 per cent. The commission indicated it was aware of the problem, was not satisfied with the time frames within which it was working, and was aware of the reasons for the backlog and resulting delay.

According to the commission, interruptions in resources were a significant contributing factor to the backlog and the resulting increased times to complete investigations as seen in Table 1 and Table 2. The commission advised that for a long period it did not have authority to permanently fill its vacant investigator positions. A number of staffing resource issues arose from this: vacancies in the investigator positions, positions filled on a casual basis, and significant staff turnover as the casual staff left for full time employment opportunities elsewhere. Because of these factors, staff spent considerable time training new staff and transitioning files from investigator to investigator. This contributed to delays in completion of investigations, and these delays meant that new complaints could not be assigned. This led to an increased backlog and also made it difficult to control.

As of March 2018, the approved staffing complement for the commission was 17.0 full-time equivalent staff, consisting of an executive director, supporting directors, legal counsel, mediators, administrative support staff, 4.5 intake officers and five investigators. Investigators carry approximately 15 to 25 active cases at any time and are expected to complete between 28 and 35 cases per year. The commission indicated there have been several staffing transitions within the commission throughout 2019 that have impacted efforts to reduce the backlog; the executive director resigned, and since August 2019, the commission's investigators have been reduced to two.

The commission indicated that in response to the delays, it adjusted the complaint management process to reduce the total time to complete the formal investigation process – one example was enhancing enforcement of the 60-day limit to resolve matters attempting pre-investigation. The commission's data outlined in Tables 1 and 2 show reductions in wait times as follows:

- An 11 month (48 per cent) reduction in *investigator wait times* from 2017 to August 2019.
- A 5.5 month (50 per cent) reduction in *investigation length* from 2014 to 2018.
- An 11.5 month (40 per cent) reduction in overall formal complaint processing time frame from 2017⁷ to the present.

The commission indicated its efforts remain ongoing; its target of a 12-month overall formal complaint process time would be a 17-month (58 per cent) reduction in overall formal complaint processing time frame from 2017.

Manitoba Ombudsman assesses complaints with a broad view that considers the fairness and reasonableness of government actions and decisions. Public bodies are responsible for ensuring fairness throughout the delivery of public services. Also called “administrative fairness,” this includes fair processes, decisions and service. For example, public bodies apply administrative fairness when they respond to increasing delays in processing times or through providing information that is clear, adequate, and timely.

While delays in the provision of public service may at times be unavoidable, delays should not be burdensome or infringe on rights or entitlements.⁸ The commission is aware of the potential implications of delays in its complaint processes. For example, such delays may impact the complainant on an individual level or possibly create other consequences. Long delays in obtaining a determination from the Board of Commissioners may mean complainants do not take other avenues that may be available to resolve their concern (for example the Manitoba Labour Board or the courts). In some cases, a delay may result in complainants missing a deadline to file a complaint with another body. This becomes especially significant if the commission dismisses the complaint or determines that the complaint is outside its jurisdiction.

⁷ By 2017, investigation length was down to 6 months, from 11 months in 2014.

⁸ *Code of Administrative Justice*, 2003, BC Ombudsman, p.19.

The commission indicated that it self-evaluates time frames in light of Supreme Court of Canada decisions that speak to the repercussions of administrative delays. While these decisions do not provide definitive measures of what timeliness means, they do provide direction around critical issues to consider.⁹

The information gathered for this investigation indicates that the commission's response to the delays and backlog included that:

- the commission was aware of the situation
- identified the situation as problematic
- tracked data
- self-evaluated
- made changes
- and saw notable improvements by successfully reducing *investigator wait times*, *investigation length* and the resulting backlog

These steps reflect the commission's efforts towards administrative improvement around delays in processing times, and reflects an effort towards enhanced administrative fairness.

Having established that the commission was aware of delays around complaint process times, we return to the question of whether or not the commission provided fair and reasonable communication about its complaint process time frames.

Factors that could be applied to assess what constitutes fair and reasonable regarding time frames include looking at how a public body:

- sets reasonable time frames for responding to an enquiry or concern
- ensures these time frames are clearly communicated to staff and the public
- provides service explanations around delays

The data demonstrate that there was an increase in the commission's time frames, that our complainants were in excess of the average time frames, and that these time frames were experienced by our complainants as unfair.

All seven complainants with our office were concerned that the actual time frames for processing their complaints were not consistent with their expectations, which included information that was conveyed to them by the commission.

⁹ The Supreme Court of Canada noted in *Blencoe v. British Columbia (Human Rights Commission)* that if administrative delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to challenge the validity of the administrative proceedings. In *Blencoe* the Supreme Court also recognized that in exceptional circumstances, clearly unacceptable administrative delay may also amount to an abuse of process even where the fairness of the hearing was not compromised.

We are concerned that the commission has not been providing complainants with accurate information regarding time frames.

At the time of our investigation, the commission's website stated that an investigation usually takes four to 10 months to complete, depending on the complexity of the complaint and the availability of evidence. This number was an accurate reflection of the *investigation length*. However, from the perspective of the complainant, it may be unclear that *investigation length* is one component of the formal complaint process. For example, Complainant E's *investigation length* was five months, well within the four to 10-month range. However, combined with the *investigator wait time* of 20 months, Complainant E experienced a total wait of 25 months for the investigation to be processed.

As of January 2020, the commission's website states that the time to complete most investigations is between four to 12 months of the investigator contacting the parties. This number is an accurate reflection, as of August 2019, of the commission's measurement of *investigation length*. While the website does indicate that the time for an investigation will depend on the complexity of the complaint and the availability of evidence, it is not clear that the *investigation length* is one component of the entire process and life of the file.

ACCOUNTABILITY AND COMMUNICATION

With respect to our seven complainants, the commission initially advised them that their complaints had been registered and that an investigator would be assigned, generally within 10 months. In some cases, the complainant received an update letter that extended the time to assignment for another number of months. Once the original commitment date had passed, the commission did not always provide an update to the complainant and in some cases only responded when the complainant contacted the commission. In all our complainants' cases, the commission did not meet the original committed time frame, and when the complainant was advised of a new commitment date, the commission did not meet the extended commitment date either.

We are concerned that the commission was setting targets to complete investigations that were not realistic given the volume of complaints and the availability of resources which impacted the commission's ability to maintain ongoing communication with complainants. Administrative fairness includes ensuring that information about an organization's services is current, accurate, complete, accessible, and available without unreasonable effort.¹⁰

Understanding that a number of variables beyond the control of the commission contributed to the backlog of complainants and related delays, there remains an obligation on the part of the commission to ensure that information be current, accurate, complete, accessible, and available without unreasonable effort. This can include providing timely responses to requests for updates, providing information proactively to complainants, and ensuring publicly available

¹⁰ *Fairness by Design: An Administrative Fairness Self-Assessment Guide*, p. 13.

information is current, accurate and complete. When such information is available and accessible, complainants can to make educated and realistic decisions based on this information. For example, if the commission says it will take two years, complainant might decide they do not want to wait that long.

CONCLUSION AND RECOMMENDATIONS

While there is no legislated time frame for completing the investigation of a human rights complaint, there remains a matter of unfairness which pivots on the differences between complainant expectations and the realities of the process.

There are many factors and variables effecting the ability of public bodies to provide fair delivery of public services, including the availability of staffing resources. High vacancies and staff turnover can compound the inherent challenges in providing timely service, and the implications include both the actual time frames for completion as well as the ability to communicate to users around time frames. Access to sufficient and consistent resources may help alleviate some of the challenges to providing fair service delivery.

Since identifying the problems regarding the delays and the backlog, the commission has made changes to address this matter. We encourage the commission to continue identifying opportunities to strengthen administrative practices, particularly around provision of clear, adequate and timely information to the public and complainants.

If the commission chooses to set public target time frames or commit to time frames with specific complainants and respondents, the time frames should be attainable, and accurate updates should be provided to the interested parties when target time frames are exceeded.

Moving forward, we recommend that the commission ensure the website information reflects the comprehensive nature of the process, and consider how it communicates accurate and realistic time frames to complainants and respondents. Clarifying this information may help manage expectations of the public and complainants.

We acknowledge that some complaints may take longer for the commission to address given their complexity. This clearly makes it difficult to set a standard completion time to identify specifically what may be considered a reasonable time to complete an investigation. For those complaints, we encourage the commission to keep the complainants and respondents updated about the commission's expected time frames for completion.

We note that the commission has demonstrated an awareness of its limitations in these areas and it has both taken initiative to address and improve them, and seen success in these efforts.

We recommend that the commission:

1. Identify key points to routinely track processing times.
2. Ensure public information regarding process and time frames is accurate and current.
3. Develop procedures to standardize:
 - a. when and how complainants are updated throughout the process, and
 - b. when and how complainants are updated if there are changes to the anticipated time frame.

HUMAN RIGHTS COMMISSION RESPONSE TO RECOMMENDATIONS

The commission was provided an advance copy of our report in order to respond to our recommendations. On May 28, 2020, the commission provided our office with a written response indicating it will be adopting our recommendations. Their letter states the following:

Improving the timeliness of our compliance system has been the Commission's highest operational priority since we first observed the upward trend in investigation wait times in 2015. While our staffing resources have decreased since this time, we have adopted a number of innovative approaches to help reduce the amount of time it takes for the Commission to commence an investigation of a human rights complaint, namely through the standardization of investigative tools, implementation of a complaint triaging system, as well as by expanding responsibilities associated with the investigation of complaints across Commission staff. Since the implementation of these approaches, we have realized improvements in the overall time it takes to investigate a complaint and are confident that these strategies will reduce the time parties are waiting for an investigation to commence.

We value your investigation findings and recommendations, which outline practical improvements that the Commission can make to improve the fairness of our compliance system. We accept your findings and are committed to implementing your recommendations by September 30, 2020. In particular, we will improve the manner by which we communicate complaint processing timelines to the public. We will do so by enhancing the information provided on our website and making the public aware of how they can receive timely file status updates.

We are also exploring the effective use of our database to assist us in better tracking complaint processing times. This will help us communicate wait times more accurately, clearly and efficiently to parties upon registration of a complaint.

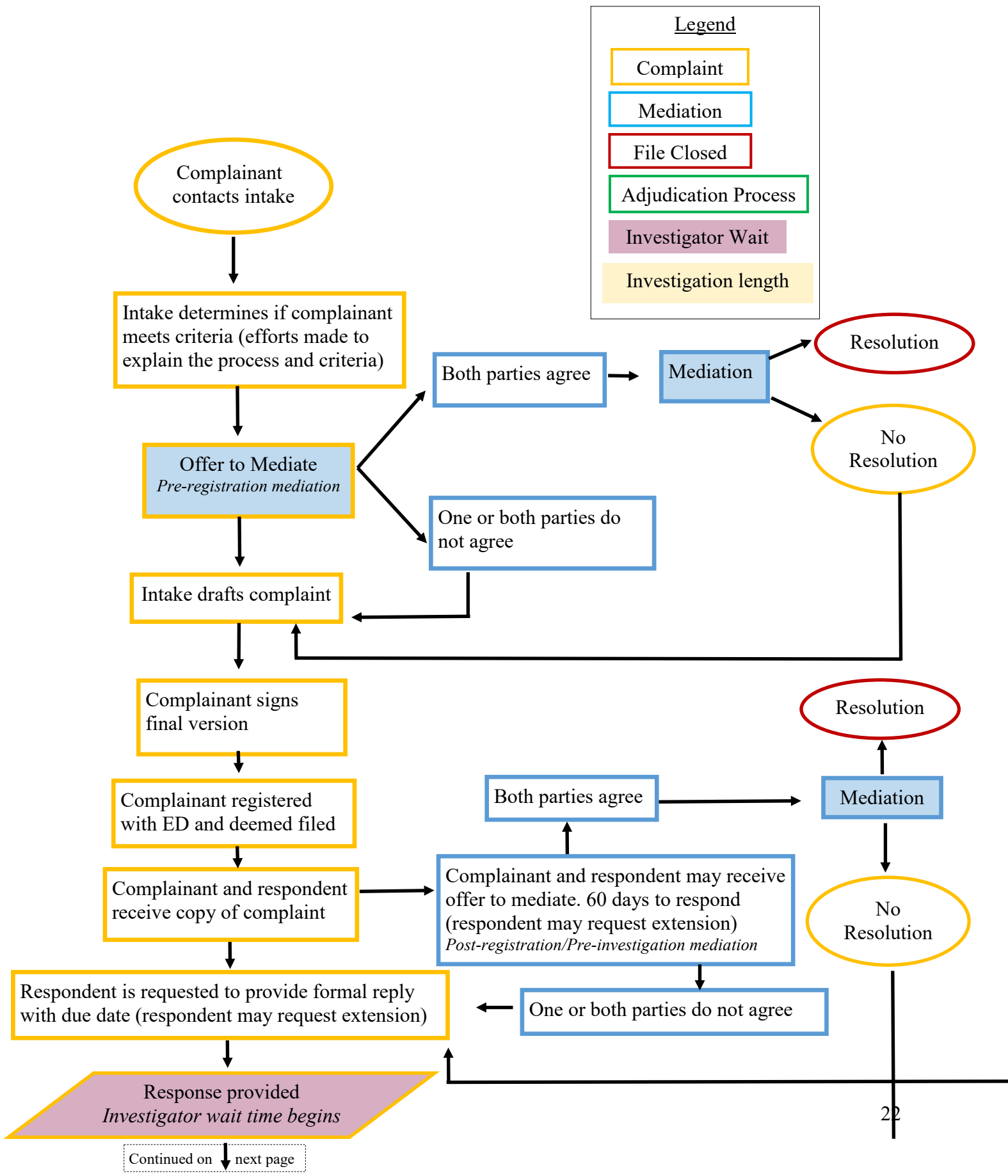
We are also committed to proactively assessing the overall fairness of our compliance system, through the use of the *Fairness by Design: An Administrative Fairness Self-Assessment Guide*. We believe that by reviewing our overall compliance system through

the lens of fairness we will be able to enhance the overall effectiveness of our policies and processes, and improve public confidence in Manitoba's human rights system.

Finally, we note that recently the Government of Manitoba introduced Bill 31 – *The Human Rights Code Amendment Act* which, if passed into law, will change the manner by which the Commission administers the compliance process. It is our understanding that these legislative amendments are aimed at creating greater efficiencies in the human rights system, and therefore, may also address the timeliness of the investigation of the human rights complaints.

Our office is pleased the commission is adopting our recommendations. We believe these steps will allow the commission provide more transparent and timely service.

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Response assessed

Complaint is ready for investigation

Complaint requires jurisdictional assessment (JA)

Enters queue based on due date for respondents reply.

Enters queue for JA (processed on a first come/first out basis)

Investigator assigned
*Investigator wait time ends
investigation wait time begins*

JA completed by legal council

Determines complaint meets jurisdictional

Investigator reviews file, determines if it will be a limited or non-limited investigation, and prepares investigation plan (IP)

IP reviewed by Director

Based on legal council's JA, staff prepare jurisdictional assessment report (JAR) including recommendations to the board that the complaint be dismissed due to:
1. No jurisdiction
2. HRC decline jurisdiction

Investigator contacts parties

JAR sent to complainant and respondent

Full Investigation
• Gathering evidence
• Interviewing

Limited Investigation
• Limited need for additional information
• Limited interviewing required

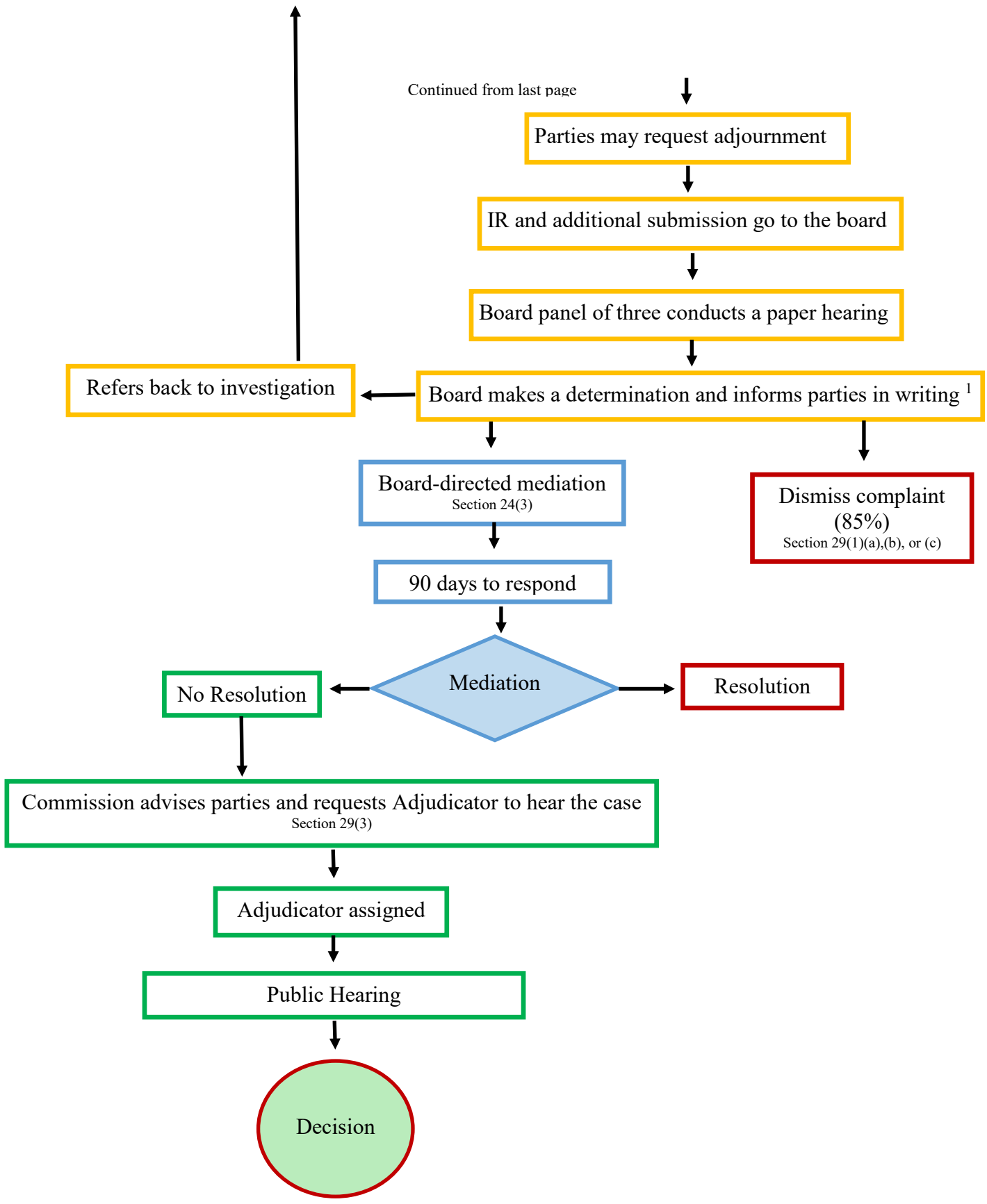
Investigator prepares Investigation Report (IR) including recommendations to the board
Investigation wait time ends

IR sent to complainant and respondent

Parties may submit a response to the report, indicating whether they agree or disagree with its findings and raising any new evidence not considered during the investigation.

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¹ Section 29 (3)(b) of the code also includes the provision that the board may recommend that the minister of justice commence a prosecution for an alleged contravention of the code. This has not been done to date.