

**The Ombudsman's Guide to Fairness**  
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**Introduction**

The objective of this manuscript is to identify the ingredients of fairness according to various ombudsman organizations' websites and a selected review of the literature on this topic. The desired goal is for others to recognize the importance of fairness and use it as part of a blueprint for best practice. A good framework and broad understanding of this sensitive and important issue are the very first steps to take before an ombudsman becomes an effective watchdog of fairness.

The words "fairness" and "equitableness" are used interchangeably throughout this document. The reader should be aware that the citations, examples, and websites about equitableness have a *government ombudsman* orientation. In spite of this, the author strongly believes that fairness characteristics can be universally applied and equally relevant to other ombudsman associations or groups, including organizational ombudsmen.

The concept of universal application was resonated by John Rawls' "Justice as Fairness: A Restatement" in 2001. He revisited the pluralism in society regarding morality, religion, and philosophy. Rawls championed that society should organize a system where its populace would experience fair and just outcomes without prior consideration of race, religion, and philosophy. He argued that if individuals really differ on these things, then how is it that people are able to live together in a democratic society? Rawls, a well-recognized Harvard philosopher, originally presented this idea during a thought experiment in 1971. His research study resulted in a publication entitled, "A Theory of Justice." Maiese (2003) heralded the fact that justice and fairness, in the context of intractable conflict, are mutually inclusive in many instances.

The questions pertaining to fairness affect most, if not all, types of ombudsmen. Who decides what is fair and by what criteria are some of the issues discussed in this profession. In essence, it does not really matter whether work is in a government, organizational, corporate, or educational ombudsman setting. The overarching goal of an ombudsman is problem resolution or addressing the issue(s) at hand. The noticeable variances among ombudsmen are the tools used and the outcome(s) they are trying to achieve. The function, jurisdiction, method, and product are some of the basic traits that differentiate one ombudsman from another.

An experienced ombudsman knows that the subject of fairness lies in the eyes of the beholder. Its implementation, however, is in the hands of the administrator or company employee. What is seemingly an equitable solution to a provider of a service may not be the same to its recipient. Applied in the workplace, this observation was shared by Ken Buch (2010) when he stated, "What each person deems fair...is interpreted differently on the perspective of who is viewing the situation..." In most cases, the etiology of the problem is the gap between what was said in a conversation and how it was applied. This is the basis of contention among aggrieved citizens and dissatisfied customers. Therefore, an ombudsman has a mandate to ensure that the entire process was applied fairly - that is, from the point the referral was received to the moment the issue was resolved.

Fairness is all about the right thing to do and may not always correspond with doing things right. Good organizations balance policy implementation and its impact on others. As harbingers of fair treatment, how will the ombudsman uphold an aura of equitableness between the individual with concerns and the agency that defers to policies and procedures to

justify why certain decisions were made? To answer these questions, action steps based on prudence and sound evidence are needed.

Juries in civil courtrooms resort to settling disputes by awarding successful litigants with a “fair” financial remuneration. This situation has been the bastion of the judicial system in the western world for many decades. Buch (2010) stated that people aim for compensation through litigation in situations where equitable treatment was not present.

In 1988, Sam Zagoria’s “The Ombudsman: How Good Governments Handle Citizens’ Grievances” recognized that some complainants focus more on the fundamental problems connected to the “fairness of the policy itself or its implementation in general” (p. 5). He stressed that the government has ongoing struggles to treat constituents “equitably” and “effectively” to earn their support (p. xiv). Zagoria encouraged that time spent with an ombudsman is a wise investment for many individuals instead of settling differences and grievances in the courtroom. During his academic research, Zagoria observed that ombudsmen are eager to help other people and strongly believe in what they are doing.

The positive psychological effect of perceived fairness is difficult to measure because research about this issue is scarce (Tabibnia, Satpute, and Lieberman, 2008). Guth, Schmittberger, and Schwarse (1982) posited in a study called “the ultimatum game” that people are naturally “sensitive to fairness over and above its consequences for material gain” (Tabibnia et. al 2008 p. 339). Tabibnia and his cohorts argued that individuals are intensely in tune with this topic. These researchers suggest that people naturally seek and expect fair treatment.

Social scientists have concluded that seeking equitableness or justice is a basic human

yearning. To a practitioner, it is a complex issue requiring a middle-of-the road strategy and maturity. In the ombudsman profession, rigidity or inflexibility do not belong to the arena of fairness. The ombudsman has a crucial role to seek, encourage, and facilitate equitableness in a skillful, empathetic, trustworthy, and confident manner.

### **Traditions of Fairness**

Individually and collectively, society has gained knowledge about the concept of fairness by learning from wise men and scholars. Such wisdom germinated in the form of parables, anecdotes, and stories that have withstood the test of time. Just like The Bhagavad Gita and The Ramayana, Confucius, Aristotle, and King Solomon have taught countless men and women from varied backgrounds how to lead life from birth to death justly and fairly.

The Golden Rule is a globally respected practice dating back thousands of years. Doing unto others what you would have others do unto you is encouraged by many cultures, religions, and philosophies. It is found in the bible (Matthew 7:12), Buddhism, and Ancient China where Confucius (551 B.C.) was attributed with popularizing this idea. (Constitutional Rights Foundation, 2008). The Golden Rule is a great example of how fairness could be embodied in everyday life.

Allesandra and O'Connor (1996) co-wrote a book and coined an idea they called "The Platinum Rule." Treating other people in a manner that they want to be treated is the backbone of their seminal work. According to these authors, this practice is preferable and an alternative to The Golden Rule because it factors in the feelings of other individuals.

It is rather difficult to talk about equitableness without mentioning ethics and justice. These principles are closely interconnected. Aristotle's (334 B.C.) Nicomachean Ethics on law

and morality guided men on how they should live in a civil society and assist them to become outstanding citizens (Anastaplo, 1983). He stressed that moral virtues in their truest form are practical through the deeds of men. Aristotle explained that morality is dependent on the law to institute justice and fairness.

During biblical times, the wisdom of King Solomon exemplified justice when he settled a dispute between two women both claiming to be the mother of an infant (The Book of Kings, Melachim 1 3:12). His decision to cut the baby in two and give one half to each woman was extreme and appeared heartless. Nevertheless, it was also fairness in its literal and symbolic forms. King Solomon did not take much time to figure out the real parent of the child. The resolution of the problem and the essence of the story is a lesson that permeates many social settings. Confucius, Aristotle, and King Solomon demonstrated equitableness during various eras. They proved that fairness is not something temporal or exclusive to a specific period of time or civilization.

### **Fairness in Negotiations and Justice**

Heslin [1988] of the Australian Graduate School of Management listed four types of fairness issues during negotiations (Journal of St. James Ethics Society, 1988). They include structural fairness, process fairness, procedural fairness, and outcome fairness. He emphasized that equitableness “entails judgments about whether principles of ethical justice” was taken into consideration (p. 1).

Structural fairness is all about the physical, social, and issue constraints where negotiations are happening. Physical constraints include the location of the meeting, access to information, technical support, and public probing or scrutiny in regards to the Freedom of

Information Act. Heslin included parties' representation, setting the agenda, communication between vested individuals and the outside world, and deadlines or time limits as structural impediments.

Process fairness imposes honestly implementing agreements without resorting to deception or coercion. Helsin posited that it is fair to misrepresent one's interest and offer alternatives. This is contingent upon sufficient stakeholders' notification along with implicit as well as explicit understanding from them that the rules are being modified. In this context, "misrepresenting one's interest" really implies introduction of a different solution compared with what the client originally want as an outcome.

According to Heslin, procedural fairness dictates that integrative (differentiating interests and positions) and distributive procedures (allocation of the disputed resource) are active components (p.4). If procedural unfairness is perceived, it has the capacity to dismantle the process and undermine the outcome. If implemented properly, the principles of equity (proportional), equality (impartial or comparable), and need or redistributive justice (the least fortunate gets the most share) lead to outcome fairness.

Velasquez, Andre, Shanks, and Meyer (Issues in Ethics, 1990) suggested three kinds of justice as it relates to fairness. They are:

1. Distributive Justice - Ensuring that benefits and burdens are distributed among society in a just and fair way.
2. Retributive or Corrective Justice - The extent to which punishments are fair and just.
3. Compensatory Justice - The extent to which people are fairly compensated for injuries suffered.

## Ombudsman Fairness Checklist

The Forum of Canadian Ombudsman first annual conference in April 2003 was held in Ottawa, Ontario. Howard Kushner, the former Ombudsman of British Columbia, was the speaker for a session called “Ombudsman Fairness Checklist.” He enumerated these criteria to determine if equitableness has transpired:

### *1. Communication*

Information is available and understandable, forms are in plain language, clients are provided with information they need, and clients are treated with courtesy.

### *2. Facilities and Services*

Telephones are answered timely, other means of communication are available, the office is easily accessible, environment is safe and healthy, and client’s privacy is observed.

### *3. Decision Procedures*

Decision makers have a chance to give information and evidence to support their stance, decisions are done within a reasonable amount of time, and reasons for the decisions are explained.

### *4. Appeal, Review, and Complaint Procedures*

People are told immediately of any existing appeal or review, complaints procedures are clearly defined, and solicitation of ideas from the public to improve services.

### *5. Organizational Issues*

Staff are given clear titles for the role that they assume in the organization, agencies consider if reorganization would amplify the quality of service, and inter-agency cooperation is nurtured.

## *6. Agency Review and Planning*

Public participation in program planning is encouraged, explanation is provided from the beginning about how decision-making process is reached, and provision of data needed to evaluate and improve performance is archived.

Unlike organizational ombudsmen who function as designated neutrals, public sector ombudsman offices advocate for their constituency and make the autonomous decision about the complaints presented to their attention. The web page of the ombudsman office of the Northern Territory Government in Australia delineated clear commitments that focus on fairness. When complaints are received, the ombudsman complies with the following practices:

1. You will be treated fairly and with respect.
2. You will be given the right to be heard during the complaint process.
3. Our decisions will be balanced, taking into account all available evidence and points of view.
4. We will explain our decision and reasons to you.
5. You can request a review of any decision or conclusion we have reached about your complaint.

### **Promoting Fairness by the Saskatchewan Provincial Ombudsman**

This section is most beneficial to government ombudsmen who plan to herald fairness by using as a model the Office of the Provincial Ombudsman in Saskatchewan, Canada. A few years ago, the office released a 21-page booklet entitled, "Fairness: A Brief Explanation." It identified specific items that will help the ombudsman assess if the government acted fairly in accordance with Section 24 of "The Ombudsman and Children's Advocate Act." The list includes



“unreasonable, contrary to law, unjust, oppressive, improperly discriminatory, and based on a mistake of law or fact; or wrong.”

Unreasonable describes inconsistency in decisions made in similar cases, inconsistency with the significance of the evidence, decisions that cannot be explained, and unintended effect or consequences. The booklet recognized that having outcomes contrary to law is one of the most complicated subject matters to resolve because legislation is involved. Inappropriate punitiveness is a criterion for being unjust. The consequence of decisions might exceed the circumstance surrounding a case. Oppression happens when expectations have overwhelmed or overburdened an individual to the point that compliance becomes impossible. Discrimination occurs when a government adds requirements that are unnecessary to meet the goals. In a reverse circumstance, it also transpires when the government fails to treat individuals with the same situation equally. Here, the contrast between mistakes of fact and law are important but they do not have much influence on the ombudsman when fairness is being considered.

The Saskatchewan Ombudsman Office has produced a 62-page workbook called, “The Fine Art of Fairness: A Guide for Fair Practice.” It can be downloaded via their website at: <http://www.ombudsman.sk.ca/uploads/document/files/fair-practices-workbook-3e-en.pdf>. The website exists to encourage its users to freely access information about fairness and to apply them in their respective offices. Another intended product of the website is to foster public awareness how equitableness is applied.

### **USOA, IOA, and IOI**

When it comes to supporting fairness expressed in core standards, there are tenets common among the United States Ombudsman Association (USOA), International Ombudsman

Association (IOA), and International Ombudsman Institute (IOI). The USOA (North America's oldest public sector ombudsman organization), IOA (corporate, educational, government agency, international, and non-government organization), and IOI (international group of government ombudsmen) have similar missions but each group operates differently. Hence, the daily function and ultimate goal for ombudsmen in these organizations also varies. They were selected by the author as examples because of their jurisdiction, prominence in the community, and shared features.

This observation was reflected in Frank Fowlie's 2008 thesis where he indicated that the standards of both USOA (United States Ombudsman Association) and IOA (International Ombudsman Association) are similar. Autonomy, neutrality, and confidentiality are guiding principles of both organizations. He documented that USOA and IOA agree on three of four basic standards (p. 103). The point of divergence transpires with the fourth standard (credible review process). Fowlie explained that USOA has a classical ombudsman outlook and the IOA has an organizational persona. While the former is heavily reliant on formal investigation, the latter uses an informal approach. He stressed that IOI has "dual or multidiscipline office" whose task "may also include Human Rights Ombudsman in tandem with governmental Ombudsman" functions (p. 107).

### **Administrative Fairness Plus Procedural Fairness Equals Outcome Fairness**

In accordance with the review of the literature and websites of several government ombudsman offices in Canada, Australia, Hong Kong, England, and the USA, there are common attributes when it comes to sound principles and best practices concerning fairness.

Ombudsman organizations work under the core assumption that the achievement of

equitableness is founded on well-crafted administrative guidelines and efficient, dignified procedures to implement action plans. Fairness is the true spirit of ombudsmanship. To maintain this ideal, the ombudsman must be adept in what to look for and be tactful at offering resolutions or alternatives in a timely fashion. Seizing the moment or *carpe diem* are the axioms in the ombudsman arena.

Based on the review of the literature, fairness implies three phases or components that can be expressed in this equation:

$$AF + PF = OF$$

This formula simply translates to a coordinated, balanced, and harmonious combination of Administrative Fairness and Procedural Fairness, which in turn will produce Outcome Fairness. As proper steps (procedures) follow the dictum of sound policies (administrative), they consequently point towards a good outcome. In other words, wise administrative decisions that were procedurally executed via proper conduits almost always result in a fair, satisfactory outcome. The succeeding pages embellished what these ideas entail.

In the Office of the Ombudsman City of Toronto's web page, administrative fairness means that individuals or agencies have the right to know what is the nature of the complaint against them, to make sufficient notification, to foster the right to presentation (hearings or meetings), and to explain why certain decisions are finalized. Administrative unfairness is about unreasonable delay, failure to implement the planned course of action, not adhering to established procedures, not disseminating adequate information, misleading or imprecise statements, and problematic application of policy, procedure, and practice. The web page defined maladministration as "acts, omissions, decisions, and recommendations" that produce

“inefficiencies, improprieties, poor service, and bad management.”

The Alberta Ombudsman firmly believes that “natural justice and administrative fairness” are the precursors of an investigation. Their web page listed the following

Administrative Fairness Guidelines:

1. Chain of Legislative Authority
2. Duty of Fairness
3. Participation Rights
4. Adequate Reasons
5. Reasonable Apprehension of Bias
6. Legislative Expectation
7. Exercise Discretionary Power
8. Reasonable Decision

The Office of the Ombudsman in Hong Kong also enumerated the criteria that make up the agency’s Administrative Ethics Checklist:

1. Sense of Responsibility and Accountability
2. Making of Decisions
3. Honesty and Integrity
4. Professionalism and Public Interest
5. Courtesy, Equality, and Equity
6. Loyalty and Dedication
7. Economy and Environmental

Administrative fairness includes acknowledging the rules of the games and tools used in

addressing or resolving issues. The duty to be fair and offer equal treatment as well as opportunity to all complainants regardless of their color, ethnicity, creed, religious belief, political affiliation, gender orientation, economic strata, etc. are some of the more pronounced traits embedded in administrative fairness. Common courtesy, civility, responsibility, honesty, integrity, accountability, public interest, and participation are characteristics that belong to administrative fairness.

The Ombudsman Western Australia described that procedural fairness is interested in actions used by decision-makers and not the outcome per se. Their web page stressed that equitable procedures have precedence over the actual end-result. This principle suggests that if a service provider employs fair procedure, it will naturally lead to a just decision.

The Ombudsman Western Australia adheres to the following procedural rights:

1. Opportunity to reply that is appropriate to the situation.
2. Responses to be received and considered before any final decision.
3. Receive pertinent information in preparation for a reply.
4. Reasonable chance to consider one's decision and response.
5. Genuine consideration of everything that was written or stated.
6. Receive information that the case is being heard and what is being considered.
7. Genuine chance to reply to the case being heard before final decisions are rendered.
8. After all valid information is gathered, the right to respond about decisions made.
9. Open-mindedness of decision makers when reading, listening, and making decisions.

The Manitoba Ombudsman web page identified these features exclusive to procedural fairness:

1. Individuals are given advance notification.
2. Individuals are told what information will be used in the decision.
3. Individuals are provided with real opportunity to present one's case.
4. Individuals are given a chance to challenge or dispute any decision.
5. Decision-makers review the case thoroughly and thoughtfully.
6. Decision-makers are impartial and unbiased without a personal interest or stake.
7. Decision-makers offer insightful and understandable reasons for the decision.

Zagoria (1988, p. 20) argued that cases normally start from issues about "fairness of decisions made through established procedures." Procedural fairness describes the series of action plans and how they were carried out every step of the way. This begins from the moment the complaint was received and ends with how the situation was resolved or addressed. Logging the referral, doing initial research or fact-finding, notifying agencies or individuals, gathering information, convening meetings, making decisions, distributing findings, and writing recommendations (if applicable) all encompass procedural fairness.

Outcome fairness is the natural by-product of fair policies and procedures. To ensure the equitableness of a desired result or expected outcome, the sequential steps or process involved in the arrival of a solution need scrutiny by the ombudsman. Closely examining the process gives more significance to a just or fair outcome (Williams, 1998). Williams posited that if agreed upon rules were followed as well as implemented without bias and there was voluntary or team participation, any outcome is justified.

According to Skitka, Winqvist, and Hutchinson (2003), there is perception out there that outcome fairness is similar to outcome favorability. A meta-analytic review of the justice

literature proved otherwise. These researchers learned that there are empirical differences or distinguishable traits between them. They presented the following study impressions (p. 329):

1. The fair process effect is significantly weaker when the criterion is outcome fairness than when it is outcome favorability.

2. Outcome fairness consistently explained significantly more variance than did outcome favorability across various measures, including organizational commitment, organizational citizenship, and job satisfaction.

3. Outcome fairness for the most part had as strong, and sometimes stronger, effects than voices and procedural fairness across different dependent measures.

Skitka et. al (2003) identified marked differences between outcome fairness and outcome favorability. The former has significant variances that are free from the influence of the latter. Additionally, outcome variables trump procedural variables and not *vice versa*. It is not recommended nor a good idea to confuse these two topics as one and the same. The researchers suggested that outcome fairness should receive equal, intense attention just like procedural fairness.

### **Conclusion**

Transparency is the foundation of fairness. It is virtually impossible to be equitable without being open and honest. The public and consumers of services should have the ability to see through as well as understand what is going on. There has to be congruence between what you are doing (action) and what you are accomplishing (outcome). Now more than ever, transparency is widely encouraged and gaining popularity and public support, especially with regard to the expected behavior of public servants and service providers.

The newly elected governor of Tennessee in 2002 created his own spreadsheet and crunched the numbers as the public watched him in action. This example of transparency and financial management style reportedly instilled public confidence, and resulted in two gubernatorial terms. Exemplified by many other progressive-minded politicians in this country, proactive as well as open governments are good, acceptable indicators of fairness.

As stated in a White House memorandum to heads of executive departments and agencies, openness in government is a major commitment of the current administration. The President mandated that the executive branch work together in order to gain public trust via a system of transparency, public participation, and collaboration. He indicated that transparency promotes accountability and offers information about what the government is doing. As ordered, this memorandum is published in the US Federal Register.

In November, 2010, a 115-page “Review of the Children’s Commissioner (England)” by John Dunford named the Paris Principles and U.N. Convention on the Rights of the Child as bulwarks for ensuring that rights of children are safeguarded. In his report, which was presented to the British Parliament, Dunford documented that children and young people reported feeling that they are not fairly represented about decisions that influence them (p. 85). He recommended that it is “equally important that the business planning process is transparent and involved external people” (p. 67). Dunford further encouraged that the Children’s Commissioner should always be aware of personal responsibility and accountability.

From the federal to the state level and beyond, transparency is becoming an expected and common practice. This is where the ombudsman can play a pivotal role. The need to become the guardian of fairness could not come in a more opportune time. Protecting the best



interest of society and individuals is a worthwhile mission. This task fits the ombudsman regardless of jurisdiction and methodology.

In summary, the pros and cons or differences about the issue of equitableness dwell in the implementation of its characteristics. Filing a grievance that fairness was not practiced is a relatively easier move to make. However, finding a resolution based on consensus is a harder end-result to achieve. As forums on equitableness take shape, the locus of the discussion should be on the desired, fair outcome acceptable to the aggrieved party. Preserving sound agency policies and encouraging best practice are challenges for many ombudsmen whose duty is to remind everyone that fairness rules.

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