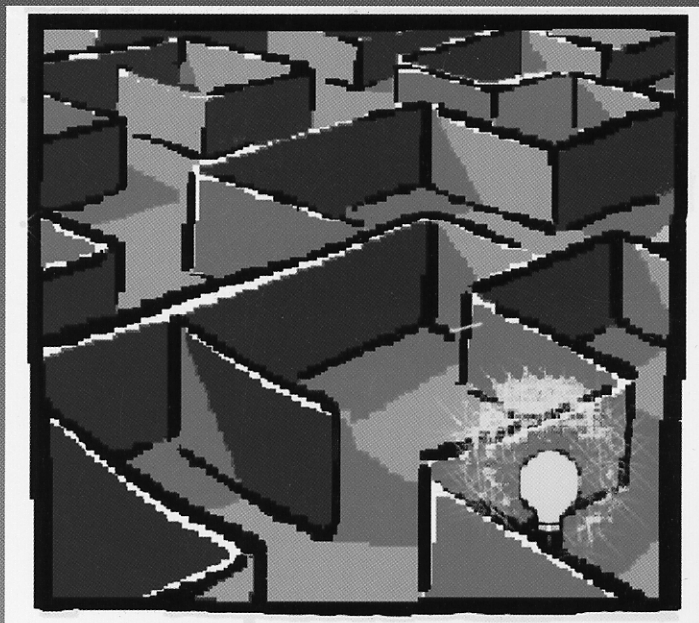


Public Report No. 37  
January 1999

to the Legislative Assembly  
of British Columbia

# FAIR FIRST



*An  
OmbudsAudit  
of the WCB  
Ombudsman*

**Ombudsman PROVINCE OF BRITISH COLUMBIA**

Public Report No. 37

January 1999

to the Legislative Assembly  
of British Columbia

# *Fair First*

An OmbudsAudit of the  
WCB Ombudsman

Ombudsman PROVINCE OF BRITISH COLUMBIA

**Canadian Cataloguing in Publication Data**

British Columbia. Office of the Ombudsman.

Fair first : an OmbudsAudit of the WCB Ombudsman

(Public report no. 37, December 1998, to the  
Legislative Assembly of British Columbia)

ISBN 0-7726-3744-X

1. Workers' Compensation Board of British  
Columbia. Ombudsman. 2. Workers' compensation -  
British Columbia - Administration - Evaluation.  
3. Workers' compensation claims - British Columbia.  
I. British Columbia. Legislative Assembly.  
II. Title. III. Series: British Columbia. Office  
of the Ombudsman. Public report ; no. 37.

HD7103.65.C32B74 1998      353.6'9      C99-960016-8

## TABLE OF CONTENTS

<b>1.0</b>	<b>Introduction to “Fair First”</b>	<b>1</b>
1.1	Open Letter from the Ombudsman	1
1.2	Guiding Principles for this Report	8
<b>2.0</b>	<b>Overview of the OmbudsAudit</b>	<b>11</b>
2.1	Purpose of the OmbudsAudit	11
2.2	The Classical Ombudsman	12
2.3	Background to the Creation of the WCBO	16
2.4	Establishment of the WCBO	18
2.5	Scope of the OmbudsAudit	19
2.6	Research Methodology for the OmbudsAudit	19
<b>3.0</b>	<b>Structure, Mandate and Jurisdiction</b>	<b>22</b>
3.1	Structure, Mandate and Jurisdiction of the Ombudsman for the Province of British Columbia	22
3.2	Structure, Investigative Mandate and Jurisdiction of the WCBO	27
3.3	Mission and Vision Statements	29
3.4	Description of Jurisdiction in WCBO’s Publications and Communication	31
3.5	Investigative Powers	33
3.5.1	Investigative Powers of the Classical Ombudsman	33
3.5.2	Investigative Powers of the WCBO	34
3.6	Investigative Findings	36
3.6.1	Investigative Findings of the Classical Ombudsman	36
3.6.2	Investigative Findings of the WCBO	36
3.7	Types of Recommendations	38
3.7.1	Recommendations of the Classical Ombudsman	38
3.7.2	Recommendations of the Executive Ombudsman	38
3.8	The Roles of the Classical Ombudsman and the Executive Ombudsman	39
3.9	Jurisdiction of the WCBO	41
3.9.1	Questions of Law	42
3.9.2	Questions of Fact	44
3.9.3	Policy Matters	46
3.9.4	Appellate Findings	49
3.9.5	Matters under Appeal	51
3.9.5.1	Matters under Appeal: the Classical Ombudsman	51
3.9.5.2	Matters under Appeal: the Executive Ombudsman	51
3.9.6	Feedback Regarding the Mandate and Jurisdiction of the WCBO	53
3.10	Improving the Model	56



<b>4.0</b>	<b>Independence and Impartiality .....</b>	<b>59</b>
4.1	The Importance of Independence and Impartiality.....	60
4.2	The Appropriate Communication Role to Promote Independence and Impartiality .....	64
4.3	Hallmarks of the Independence of an Executive Ombudsman .....	70
4.3.1	Reporting Relationship and Security of Tenure .....	70
4.3.2	Confidentiality .....	72
4.3.3	Reporting of Investigations .....	76
4.3.4	Practice and Procedures Consistent with Role .....	77
4.3.5	Physical Separation from the WCB .....	79
4.3.6	Administrative Separation from the WCB .....	80
<b>5.0</b>	<b>Visibility and Accessibility of the WCBO .....</b>	<b>82</b>
5.1	Visibility of Services for an Executive OmbudsOffice.....	84
5.1.1	Visibility of a Classical OmbudsOffice vs. an Executive OmbudsOffice .....	84
5.1.2	Visibility of the WCBO .....	85
5.2	Accessibility of the WCBO .....	90
5.2.1	Timeliness of the Services Provided by the WCBO .....	91
5.2.2	Accessibility and Openness in Service Delivery .....	92
5.3	Referrals from the WCB to the WCBO .....	94
<b>6.0</b>	<b>Reporting and Accountability.....</b>	<b>99</b>
6.1	Reporting of Investigations by a Classical Ombudsman.....	100
6.2	Reporting of Investigations by the WCBO .....	103
6.3	Content of the 1997 Annual Report of the WCBO .....	107
6.4	Review of the Annual Reporting Process .....	108
6.5	Internal Reporting Processes .....	110
6.6	WCBO Business Plan .....	113
<b>7.0</b>	<b>Communication with Complainants.....</b>	<b>115</b>
7.1	Delays in Responding to Complainants' Inquiries.....	115
7.2	Fairness in Process Employed by the WCBO.....	117
7.2.1	Description of the Investigative Process .....	117
7.2.2	Adequacy of the Opportunity to be Heard .....	118
7.2.3	Dignity and Respect.....	119
7.3	Full, Adequate and Appropriate Reasons Provided by the WCBO .....	121
7.3.1	Were the Reasons Provided by the WCBO Understandable? .....	121
7.3.2	Were the Reasons Provided by the WCBO Full, Adequate and Appropriate? .....	122
7.3.3	Were Written Reasons Provided? .....	122

<b>8.0</b>	<b>Communication with the WCB.....</b>	<b>125</b>
8.1	Communication between the WCBO and the WCB .....	125
8.2	Feedback Provided by the WCB to Requests from the WCBO .....	128
8.3	Notice to and Consultation with WCB .....	129
8.4	Lack of Follow-up by the WCBO.....	131
<b>9.0</b>	<b>Being Fair First .....</b>	<b>132</b>
9.1	Adequate in the Circumstances .....	132
9.2	Administrative Fairness .....	136
9.2.1	Practising Administrative Fairness .....	136
9.2.2	Promoting Administrative Fairness .....	137
9.2.3	The Experience of the WCBO.....	141
9.2.4	Is the WCB Fertile Ground for a Promoter of Fairness?.....	144
9.2.5	Educative and Preventative Role Regarding Administrative Fairness Issues .....	146
<b>10.0</b>	<b>Efficient and Effective.....</b>	<b>148</b>
10.1	Resourcing an Executive OmbudsOffice .....	150
10.2	Investigations of WCB Complaints by the Ombudsman for the Province of BC .....	152
10.3	Feedback Received Regarding Resourcing and Delays .....	154
10.4	Resourcing the WCBO.....	157
<b>11.0</b>	<b>Recommendations .....</b>	<b>161</b>
<b>12.0</b>	<b>WCB Initial Response to “Fair First”.....</b>	<b>173</b>
	<b>Bibliography.....</b>	<b>175</b>

## **1.0 Introduction to Fair First**

### **1.1 Open Letter from the Ombudsman**

The Workers' Compensation Board (WCB) performs a very important function in our society. The work of the administration of WCB has a significant personal and financial impact on the members of the public it is intended to serve. It is anticipated that the report of the Royal Commission on Workers' Compensation in BC (Royal Commission or Commission) will be made public early in the year. This Ombudsman's **Public Report No. 37, Fair First**, is about our investigation into the office of the WCB Ombudsman (WCBO) and is not intended to duplicate the work of the Royal Commission. It has been issued at a time that I trust will complement and, at the very least, not conflict with the recommendations from the Royal Commission. The Commission will address such issues as governance, adjudication and the appeal system. WCB's implementation of the recommendations in this report may well act as an important check and balance as it considers the work of the Royal Commission. What has become apparent throughout our investigation is how important it is that a public body, such as the WCB, have a fixed point of responsibility to investigate complaints regarding its administrative policies, procedures and practices. A review of this aspect of the work of WCB and, in particular, the WCBO, properly falls to me as the Ombudsman for the Province of BC, the independent Officer of the Legislature entrusted to review the administration of government.

This investigation by my Office sets out to examine the work of the office of the WCBO for the purpose of measuring its effectiveness in addressing complaints from members of the public and its competence in practising and promoting administrative fairness.

Our Office has identified the need for an internal complaint mechanism at WCB for many, many years. WCB had tried to put in place a means by which complaints, including those from our Office, could be dealt with more effectively. The liaison role provided by a WCB Manager had proved effective, but it addressed only a limited range of complaints. There was a need for a much broader and more comprehensive approach by the Board. When I brought this to the attention of the immediate past President, he responded favourably. WCB is, therefore, to be applauded for its appointment of the WCBO two and a half years ago as its first serious attempt to address our concerns. I believe that this initiative

by the then President of WCB attests to the Board's corporate commitment, in principle, to fairness.

In many respects, the establishment of the office of the WCBO was experimental. Although similar ombuds-like, internal complaints offices that are accountable to the executive arm of host agencies are becoming fairly well established in the private sector, they continue to be scarce and varied within the public sector. Some ombuds-like offices are more independent from the body they investigate than others. Some have protection to do their work confidentially, others do not. Some have the power to investigate, while others do not focus on investigations. Some, such as the new Canadian Military Ombudsman or the Ombudsman for the City of Winnipeg investigate a specific agency, while others are specialty ombudsman in a particular field such as environmental protection, corrections or insurance, with a variety of public bodies to oversee.

The WCB is a bureaucracy whose mandate is immense and whose work is tremendously important to injured workers, workers and employers alike. One of the justifications for calling for the establishment of the WCBO was the sheer complexity of the administration of the WCB and the inevitable proportionate problems associated with such an agency. It is an understatement that many people are dissatisfied with the way in which the WCB fulfils its mandate to serve injured workers, workers and employers. When an institution suffers from problems of the magnitude plaguing the WCB, so much so that there is a call for and establishment of a Royal Commission into its operations, setting up an office like the WCBO takes on even greater importance. Why is that so?

An ombudsman is, in part, a person who is authorized to conduct impartial and thorough investigations into complaints from the public about the administrative practices of an agency. In this case, the person responsible for dealing with complaints was permitted to use the name "WCB Ombudsman." This title automatically cloaked the newly established position with credibility and high expectations. The task before the WCBO was, from the outset, formidable. Not only would the effectiveness of the office be measured by how it was dealing with complaints from the public, it would also be scrutinized to ensure that it performed its mandate in a manner that itself did not attract the same criticisms often associated with the WCB. Also, people concerned about policies, procedures and practices at the WCB would be looking to the WCBO to make a remarkable difference at the Board by assuming the customary role of an ombudsman. This role would include fulfilling its mandate through investigations and making recommendations to the Panel of Administrators, as the governance body, to

encourage systemic, comprehensive change within the Board.

The office of the WCBO has been in place for just over two years. It has issued only one annual report. It has conducted many enquiries and investigations. It appears that the WCBO has had reasonable success in making some changes at the Board, particularly in individual cases. Not one person who reported concerns about that office during this investigation attributed them to the personal credibility or competence of the incumbent WCBO.

*An Ombudsman of moderate disposition, positive orientation and unquestionable integrity needs few other grants of power. Failing any one of these character traits the Ombudsman will fail. (K. Anderson, "The Ombudsman as an Administrative Remedy," **Occasional Paper No. 41, International Ombudsman Institute**, p. 8.)*

Clearly the incumbent WCBO meets these criteria. This is not the root of the difficulty I perceive. Rather, the major problems rest with the model as it now exists. Is the office properly called "ombudsman?" Is the office practising administrative fairness itself in responding to complaints? Does it constitute "a remedy adequate in the circumstances," such that my Office could, with impunity, refer complainants to the WCBO, in the first instance?

These questions are of particular importance to my Office. Subsection 13(c) of the **Ombudsman Act**, RSBC 1996, permits the Ombudsman and her delegates to exercise discretion not to investigate a complaint where:

*The law or existing administrative procedure provides a remedy adequate in the circumstances for the person aggrieved, and, if the person aggrieved has not availed himself or herself of the remedy, there is no reasonable justification for failure to do so;*

Clearly my governing legislation contemplates that public bodies will look to establishing administrative on-site complaint mechanisms.

With that in mind, my Office has included as part of its **Administrative Fairness Checklist** the need for all agencies to have "Appeal, Review and Complaint Procedures" in order to demonstrate a commitment to respecting the rules of natural justice and following the principles of administrative fairness. This places responsibility with government to be "**Fair First**."

The Checklist provides that people should be informed at the time decisions are

rendered about all available internal and external avenues of redress. Also, there should be clearly defined complaint procedures at all levels throughout the organization.

The designation of ombudsman for the WCBO was done at my suggestion. It probably enabled the newly established office at the WCB to achieve a higher level of credibility and role understanding in a shorter period of time. Our OmbudsAudit has revealed, however, that the role and work of the WCBO differ significantly from that of the Classical Ombudsman. There is discontent among those surveyed about the use of the name ombudsman by an office located within the organization it is designed to investigate.

It is in the public interest to have fair and adequate remedies available within public bodies. Government should make every effort to be "**Fair First**" when someone complains about a matter within its mandate. Some authorities will determine that the kind of available remedy they choose to put in place will constitute what has become known as an organizational or Executive Ombudsman office. Depending on the characteristics that attach to the office of any given Executive Ombudsman, it may or may not be possible for it to be appropriately called an ombudsman. There is considerable interest in preserving the use of the name ombudsman to ensure that the public does not become misled or confused by the designation. The following quotation is from an article in my Annual Report, **Ombudsreport** 1996. It is an excerpt from a paper by Sir Brian Elwood, Chief Ombudsman for New Zealand, presented at the 1996 International Ombudsman's Conference:

*Given the proliferation...of "ombudsman-like" institutions and the growth in the number of those who would seek membership in the International Ombudsman community, it seems desirable for each jurisdiction in which an ombudsman institution has been established to address the question to what extent are "ombudsman-like" institutions to be allowed to develop with or without restraint...*

*In the ideal situation, harmonization by a specialist ombudsman model with the classical ombudsman model would require conformity to the following principles:*

- *Independence*
- *Used as a last resort*
- *Use of non-adversarial complaint investigation techniques*
- *Ombudsman recommendation to resolve grievances*



- *Ombudsman recommendation to change practices*
- *Public reporting.*

I share that interest and suggest that the designation be available only with the specific permission of the Classical Ombudsman responsible for the territorial jurisdiction where that office or available remedy is established. This is the law in New Zealand. In the case of British Columbia, I recommend later in this Report, therefore, that the **Ombudsman Act** be amended to give that authority to the Provincial Ombudsman.

In the Guiding Principles of this Report that follow, there is an outline of what the criteria are that need to be considered in determining whether an agency provides an available and adequate remedy for the purpose of the **Ombudsman Act**. The principles also set out the criteria that any such agency must satisfy in order to demonstrate that the agency itself is acting as a role model in applying the principles of administrative fairness and the rules of natural justice. These are further discussed throughout this Report. These lists may prove not to be exhaustive. Where an agency can demonstrate a compliance with the majority, if not all of these criteria, the statutory Ombudsman may grant permission to utilize the name. An agency that meets fewer criteria may perform an ombuds-like role, may also constitute an available and adequate remedy and may be tremendously useful and valuable in meeting the goal of being “fair first” but ought not to be entitled to use the designation of ombudsman.

As a result of this Audit of the WCBO, I have a number of concerns in this regard. First, the WCBO’s mandate is not legislated. Second, the WCBO is seen to be part of the WCB and has few safeguards in place to demonstrate the essential characteristics of impartiality and independence. Third, the WCBO has no legal powers to conduct investigations. I conclude, therefore, that the WCBO should continue to use the designation of ombudsman until the WCB implements or fails to implement the recommendations in this Report. I propose a two-stage process in order to avoid the unsettling situation where the name is changed unnecessarily or prematurely and the public becomes confused.

**Recommendation:**

**1-1 I recommend that:**

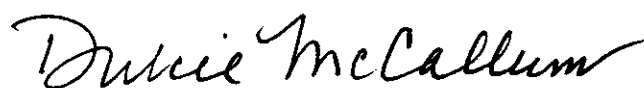
- a. the WCB commit to the recommendations in this Report within six months of publication of the Report;**
- b. the WCB implement the recommendation respecting the designation of the title "Ombudsman" within twelve months of publication;**
- c. if the WCB fails to reconstitute the WCBO in accordance with this Report and this recommendation, the title should be changed to the "WCB Fair Practices Commissioner."**

The WCBO was established as an innovative "experiment" recommended to enhance WCB's capacity and competence to deal with complaints "in-house." It is important to recognize that there was no template available that could instruct and assist the WCB in the establishment of the WCBO. My Office met frequently with the WCBO to try to assist him. The incumbent worked hard to educate and instruct himself and his staff through literature, networking and attending training opportunities. In many ways, the work of the WCBO evolved over time through trial and effort. The weaknesses that emerged during the Audit and that are outlined in this Report are clearly a result of structural and administrative weaknesses in the present situation and not a result of a lack of understanding or respect for Ombudsmanship by the WCBO. A good example is the extent to which lack of confidentiality protection hampers the work and if rectified would enhance its operations.

At the outset, let me be clear about the choices that must now be made and the process to be followed. Given that the Royal Commission will soon be reporting, I have given the WCB a period of time during which they can make their decision to proceed or not. I have indicated that our Report will be reviewed following the Commission's report to determine if any modifications are required. At a minimum, in order for WCB to meet the test of practising administrative fairness as an authority within the jurisdiction of the Ombudsman, I recommend that the principles outlined in the first four sections that follow must be adopted. That means WCB commits to having a fair, adequate and available remedy in place. As a result, a year hence, the title would change.

Finally, it is for the WCB Panel of Administrators to make an executive decision to adopt or not, the concept of an Executive Ombudsman for WCB. If they choose to proceed with full implementation of my recommendations, the use of the name

will continue. It is important to recognize that it is for the Panel to decide whether or not to have an Ombudsman, in the same way as it is for the Legislature in the case of the provincial Ombudsman. If the Panel decides over the course of the next six months to continue with the position of WCBO reconstituted as an Executive Ombudsman, the principles articulated in all five parts of the section that follows will have been fully implemented. An Ombudsman that is executive in nature must be established on the clear initiative of the host executive and not be forced unwillingly on the leadership of the authority. Should the Panel of Administrators of WCB decide to implement the whole of this report by reconstituting the office of the WCBO, as Ombudsman, I commend it for its forward thinking approach to being "**Fair First.**"



Dulcie McCallum  
A/Ombudsman for the Province of British Columbia

## ***1.2 Guiding Principles for this Report***

### **1. WCB bears responsibility in the first instance for complaints from the public.**

In order to foster greater accountability to the public it serves, the WCB must continue to have an in-house position dedicated to ensuring fair administrative policies, procedures and practices.

### **2. The public is entitled to have access to a complaint mechanism regarding process and service at WCB.**

The WCB has an enormous task to fulfil. It is inevitable in an institution as large and complex as WCB that there will be numerous complaints from the public who seek service. It is essential that there be an office where those who are dissatisfied with the services received from the WCB can go to seek redress for their grievances. The mechanism chosen by the WCB must be highly effective or it will be considered as a "twin cousin" of the very organization it is intended to monitor and investigate.

### **3. As the intended monitor of fair practices, the complaints mechanism at WCB must itself demonstrate unequivocally a commitment to administrative fairness. A demonstrated adherence to principles of administrative fairness and the rules of natural justice in its own policies, procedures and practices would include:**

- a. Timeliness in responding to the complaints received;
- b. Notice to all parties potentially adversely affected during the course of an investigation;
- c. Giving parties the chance to be heard and make representations before an investigation is completed;
- d. Consideration of all relevant evidence related to the complaint;
- e. Giving full, adequate and appropriate reasons for a decision;
- f. Making findings known to those adversely affected and giving them the opportunity to respond;
- g. Proposing recommendations that are systemic, remedial and appropriate;
- h. Reporting to the public on the work of the investigating office;
- i. Commitment to operate on clearly articulated principles that may include the following:

- i. Treating everyone with courtesy, dignity and respect
- ii. Being independent, impartial and honest
- iii. Using co-operation, empathy and good will in all work
- iv. Promoting equality, inclusion and access for all persons.

**4. The complaints mechanism must have particular characteristics to ensure its effectiveness as a fair and adequate remedy including:**

- a. A clearly articulated mandate provided for in law or an existing administrative procedure;
- b. Policies, procedures and practices that demonstrate a respect for and are consistent with its legislative authority or administrative procedure;
- c. Absence of bias;
- d. Competence and capacity to receive complaints and conduct thorough reviews, investigations or appeals;
- e. Power to order or recommend corrective action to the public body;
- f. Commitment to the principles of administrative fairness and the rules of natural justice.

**5. The title Ombudsman is held by the person responsible for protecting and promoting a person's right to be heard by government and to be treated fairly. The designation Ombudsman should be used only for an office that can demonstrate compliance with a set of clearly articulated principles that have been developed over time by law and by custom.**

All available remedies within public bodies that practise administrative fairness and are constituted to be "adequate" may not necessarily equate with the role and mandate of an ombudsman. All reasonable steps should be taken to maximize the public's understanding of the role of an ombudsman. The title should, therefore, be protected legislatively to ensure that its use is measured against appropriate criteria. Those criteria would, as a minimum, include:

- a. A clearly articulated mandate that has legislative authority (constitution, statute, by-law, ordinance);
- b. Clearly entrenched competence and capacity to conduct thorough and impartial investigations;

- c. Capacity to investigate on its own initiative;
- d. Independence and impartiality;
- e. Guaranteed functional and political independence from the legislative body who appoints and the public body the Ombudsman reviews.  
Independence is evidenced by:
  - i. security of salary and tenure
  - ii. rigorous appointment, reappointment and removal process
  - iii. sufficient resources
  - iv. authority to recruit, manage and terminate staff
  - v. discretion to determine jurisdiction;
- f. Protection to conduct investigations on a confidential basis and to shield the Ombudsman from release of all information obtained during the course of work as Ombudsman except in accordance with the law;
- g. Duty to report to the governing body annually on the work of the office;
- h. Power to report publicly on the work of the office, individual complaints and systemic investigations;
- i. Commitment to educate the public body(ies) about the principles of administrative fairness and the rules of natural justice.

---

*The term "Ombudsmen" as a plural has not been used in this Report, except in direct quotations, to avoid any suggestion that the term is gender-specific.*



## 2.0 Overview of the OmbudsAudit

In April 1996 the then President and Chief Executive Officer (the President) of the Workers' Compensation Board (WCB or the Board) established the office of the WCBO. During the past two and a half years, my staff have referred many complainants to the office of the WCBO as a first step in attempting to resolve complaints. These referrals are made under subsec. 13(c) of the **Ombudsman Act**, which reads as follows:

**13** *The Ombudsman may refuse to investigate or cease investigating a complaint if, in the opinion of the Ombudsman,....:*

- (c) *the law or existing administrative procedure provides a remedy adequate in the circumstances for the person aggrieved, and, if the person aggrieved has not availed himself or herself of the remedy, there is no reasonable justification for the failure to do so;...*

Complainants could request an investigation by my Office if they were dissatisfied with the outcome of the investigation by the office of the WCBO. Since subsec. 13(c) of the **Ombudsman Act** states that the remedy must be adequate, and appropriate for the person aggrieved, it is essential that I evaluate its effectiveness. I therefore decided to conduct an investigation or OmbudsAudit of the office of the WCBO following its first two years of operation.

## 2.1 Purpose of the OmbudsAudit

I notified the WCB of the OmbudsAudit, advising that I would be reviewing :

- whether the office of the WCBO is an effective means to promote fairness within the administration of the whole of the WCB;
- whether the office of the WCBO complies with the principles of natural justice and administrative fairness;
- whether referrals to the office of the WCBO constitute an adequate remedy.

When the office of the WCBO was created it was anticipated that the Executive Ombudsman model would need to be refined over time. The creation of an Ombuds-like office established by the Executive of a public body should not be viewed as an end but as the launching point in an ongoing journey to promote fairness within an organization. There was little to draw upon by way of precedent when the office of the WCBO was created. For this reason alone, the then

President of the WCB should be commended for his courage in establishing this office. Now that the office of the WCBO has been in place for more than two years, I believe that it is important that my Office and organizations that may be interested in establishing similar offices learn from the evolution of the office of the WCBO.

## 2.2 The Classical Ombudsman

The modern concept of the Ombudsman originated in Sweden in 1809. The Classical Ombudsman is “established by legislation, headed by an independent high level public official who is responsible to the Legislature, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on his/her own motion, and has the power to investigate, recommend corrective action and issue reports.” (Ulf Lundvik, former Chief Parliamentary Ombudsman for Sweden, *The Ombudsman as a Watchdog of Legality and Equity in the Administration*, **Occasional Paper #9**, December 1980 **International Ombudsman Institute**, International Bar Association resolution, p.2).

Professor Donald C. Rowatt has described the features of the development of the Swedish Ombudsman’s Office as follows:

- ...an Ombudsman is an officer of the legislature and not of the executive.
- ...an Ombudsman is an impartial investigator and is politically independent, even of the legislature.
- ...a significant limitation upon an ombudsman’s power is that, unlike the courts, he (or she) has no right to quash or reverse a decision, and has no direct control over the courts or the administration. His (or her) main power is the right to investigate and get at the facts.
- ...he (or she) has power to investigate on his (or her) own initiative.
- ...his (or her) method of handling appeals against administrative decisions is—unlike that of the courts—direct, informal, speedy and cheap...

(Donald C. Rowatt, **The Ombudsman Plan**, McClelland and Stewart Limited: 1973, pp. 3-4)

Over time the Ombudsman concept spread to other Scandinavian countries. Finland established an Ombudsman in 1919, followed by Denmark in 1955 and Norway in 1962. The first non-Scandinavian country to establish a general purpose Ombudsman was New Zealand, which created a Parliamentary Commissioner (Ombudsman) in 1962. Since 1962, the concept has spread to all corners of the globe.

To refer to a single Classical Ombudsman model as I will in this Report is somewhat misleading in that each country and Legislature has incorporated slightly different features in its empowering legislation. For example, the original Swedish model permits public inspection of all Ombudsman records.

Consequently, the ongoing progress of investigations can be followed through the media in that country. The Swedish Ombudsman has the jurisdiction to review judicial behaviour, but not court decisions themselves. The Swedish Ombudsman can prosecute after completing an investigation. These features are not present in many of the Classical OmbudsOffices that have been established in recent years.

The criteria for a voting member of the International Ombudsman Institute (IOI) are instructive as to minimal, basic characteristics of an Ombudsman:

*A Voting member shall be the office of a person whether titled Ombudsman, Parliamentary Commissioner or like designation who has been appointed or elected pursuant to an Act of a legislature, including a human rights agency and a single purpose Ombudsman, and whose role includes the following characteristics:*

- i) to investigate grievances of any person or body of persons concerning any decision or recommendation made, or any act done or omitted, relating to a matter of administration, by any officer, employee or member or committee of members of any organization over which jurisdiction exists and*
- ii) to investigate complaints against government or semi-government departments and agencies and*
- iii) a responsibility to make recommendations resulting from investigation to organizations under jurisdiction and*
- iv) to discharge the role and functions as an officer of the legislature on behalf of the legislature in a role which is independent of the organizations over which jurisdiction is held and*
- v) to report to the legislature either directly or through a Minister on the results of its operations or on any specific matter resulting from an investigation.*

The Canadian Ombudsman Association (COA) has recently proposed the following as part of its founding by-laws:

*A voting member shall be the office of a person whether or not they hold the title Ombudsman who has been appointed in a Canadian jurisdiction pursuant to an enactment of parliament, a legislative assembly, or other elected, public body and whose role includes all of the following characteristics:*

- i) *mandate to investigate complaints relating to matters of administration against one or more governmental or public sector organizations upon complaint or by initiative;*
- ii) *authority to access information both oral and written;*
- iii) *authority to promote institutional change in public service through the power to persuade by making recommendations to and producing reports about governmental and public sector organizations;*
- iv) *requirement to report publicly either directly or through a Minister to parliament, a legislative assembly, or other elected, public body; and,*
- v) *security of tenure, financial security and independent from and impartial towards the organizations subject to investigation.*

The United States Ombudsman Association (USOA) in its revised by-laws includes in Article II its purposes, which provide, in part:

*In its efforts to promote and encourage the establishment of Ombudsman offices, the USOA shall specifically promote and encourage the establishment of offices that manifest the following characteristics:*

- 1) *a government office created by constitution, charter, legislation or ordinance;*
- 2) *an office with the responsibility to receive and investigate complaints against government agencies;*
- 3) *an office with freedom to investigate on its own motion;*
- 4) *an office which may exercise full powers of investigation, to include access to all necessary information both testimonial and documentary;*
- 5) *an office with the authority to criticize governmental agencies and officials within its jurisdiction and to recommend corrective action;*
- 6) *an office with the power to issue public reports concerning its findings and recommendations; and*
- 7) *an office directed by an official of high stature who a) is guaranteed independence through a defined term of office and/or through appointment by other than the executive and/or through custom, b) is restricted from activities constituting a personal, professional, occupational or political conflict of interest, and c) is free to employ and remove assistants and to delegate administrative and investigative responsibility to those assistants.*

For the purposes of this Audit, in citing the Classical Ombudsman model I will refer to the New Zealand variation which has formed the model for most Commonwealth jurisdictions in parliamentary systems of government, including British Columbia. Professor Rowatt described some key elements of the parliamentary variation of the Classical Ombudsman in the following terms:

*...(The Ombudsman) should be accountable only to parliament, should be appointed on a non-partisan basis for a long term, and should be removable only by parliament. Moreover, his (or her) jurisdiction should extend to all administrative authorities, and to the highest officials in the land...* (Rowatt, p.25)

The Classical Ombudsman in most cases cannot compel an authority to change a decision, practice or procedure, but can recommend that the authority do so. If unsuccessful in dealing with the authority, the Classical Ombudsman can report outstanding or compelling cases and issues to the Legislature or to the public.

In recent times, the term ombudsman has been adopted more widely, with less consistency and commonality. There are now executive, single purpose, organizational, specialty and corporate OmbudsOffices. Some are in the public sector, in such institutions as universities, colleges, corrections, hospitals, and municipalities, hereinafter referred to as Executive OmbudsOffices or Executive Ombudsman. Others are found in the private sector, in banks, insurance companies, mass media agencies and many other bodies. The focus of these ombudsman and ombuds-like institutions is diverse. Some focus on customer service, while many deal only with personnel matters within an organization. There are some specialized OmbudsOffices that derive authority from legislation, such as by-laws, ordinance, charter or constitution.

There has also been considerable debate about the use of the ombudsman title in non-classical roles. In New Zealand, this debate led to an amendment to the legislation establishing the Parliamentary Commissioner (Ombudsman) to require that anyone wishing to create an ombudsman's office in that country must first obtain the written permission of the Parliamentary Commissioner (Ombudsman), who has the sole discretion to authorize use of the title "Ombudsman." The legal protection provides:

**28A** *Protection of name—(1) No person, other than an Ombudsman appointed under this Act, may use the name "Ombudsman" in connection with any business, trade, or occupation or the provision of any service, whether for payment or otherwise, or hold himself, herself, or itself out to be an*

*Ombudsman except pursuant to an Act or with the prior written consent of the Chief Ombudsman.*

*(2) Every person commits an offence and is liable on summary conviction to a fine not exceeding \$1,000 who contravenes subsection (1) of this section.*

**Ombudsman Acts** (1975-1996) by Parliamentary counsel 007, Miscellaneous Provisions.

## **2.3 Background to the Creation of the WCBO**

The Office of the Ombudsman in British Columbia opened in 1979. From the outset, it received a high volume of complaints about claims administered by the WCB. There is a long history to our Office's investigation of complaints about the WCB. The establishment of the office of the WCBO needs to be considered in the context of this history.

In an attempt to reduce the persistent and recurring types of complaints identified through investigations, the Ombudsman issued **Workers' Compensation System Study, Public Report No.7**, in 1987. That report outlined the most frequent and serious systemic issues identified in the course of investigations of complaints from workers and employers, and recommended changes in the complaint review and appeal system. The **Workers' Compensation System Study** explained that its purpose was to make recommendations for structural change in the governance of the WCB. The impetus for the 1987 study was the high volume of complaints about the WCB coming to the Office of the Ombudsman at that time, indicating a high level of dissatisfaction with the system, and the effect of that complaint volume on staff resources.

---

The Ombudsman's Office now devotes 25% of its investigative resources to handling workers' compensation cases. This is a disproportionate allocation to a single system. It means that other deserving areas are underserved.  
**Ombudsman Public Report No.7**, July 1987, p.7.

---

In the years immediately prior to the creation of the WCBO, the WCB had made efforts to respond to complaints made to our Office. Many of these complaints were about delay and communication in initial adjudication and implementation. In an effort to respond in a more timely and concerted way, the WCB appointed a senior manager to act as a liaison person with our Office. The role of the liaison was to facilitate the resolution of complaints referred by staff of our Office. The liaison contact improved communication between our Office and the WCB staff



and resulted in a number of resolutions in individual cases. Through this system the WCB was also able to review complaint patterns. However, the liaison person had responsibility and authority only in claims issues. I considered that there was a need for the WCB to take a more proactive and preventative approach to its systemic problems, and I urged the WCB to establish a complaint review structure encompassing all areas of its operation. My concern was that complainants should be able to access a more formal internal complaint review process before approaching my Office.

As far back as 1966, a Royal Commission into workers' compensation matters recommended the WCB set up a mechanism to handle complaints. The Commissioner, Justice Charles W. Tysoe, considered that the executive level of the Board should be aware of all errors in practice and procedures or in the application of principles as soon as they occurred. Justice Tysoe's recommendation was as follows:

*I RECOMMEND that the Board give very serious consideration to the establishment of a Complaints Department to and through which all complaints of every kind be funnelled. It is my thought that such a department should be under a duty to inquire into the validity of every complaint. If the experience gained at this Inquiry is any guide, I would expect that quite a number of the complaints will at once be seen to be groundless—even frivolous—but some will have merit in them. My thought is that the department should make complete reports of those complaints which have any semblance of being legitimate to the Executive Secretary at frequent intervals, perhaps weekly and in special cases without waiting for the regular reporting time to come round. I want the Executive Secretary to be made aware of all errors in practices or procedures or in the application of principles as soon as they occur. He will then be enabled to take prompt action to correct and put a stop to the continuance of any such errors. It is not my thought that complaints with decisions that can be carried to review within the Administration should be dealt with by the Complaints Department. On the contrary, the complainant in such cases should be informed of and left to his right to apply for a review.*

*I have done no more than set out my ideas in very general terms. My whole purpose is to arouse the Board—and by this I mean the Commissioners and the Executive Secretary—to giving some serious thought to devising some method that will ensure that improper practices and conduct of any kind will immediately become known to the Executive Secretary and, through him, to the Commissioners so that they will not stand uncorrected for long. It seems to me that a Complaints Department could be made a useful instrument for this purpose. It might, too, be able to assist in pacifying some of those workmen who have no real cause for dissatisfaction with the actions of the Board. (Justice Tysoe, p.395)*

While there is a clear distinction between a complaints department and an Executive OmbudsOffice, it is significant that there has been longstanding concern about how the WCB deals with complaints. My concern and that of my predecessors was to promote an internal system, preferably an OmbudsOffice of some sort, to ensure that WCB made the initial attempt to provide redress to the public.

For a number of years following the 1987 systems study, this Office had recommended the establishment of a position such as an internal, organizational or Executive Ombudsman, someone who would provide what I refer to as “a fixed point of responsibility” for complaints. Under this proposed system, an Executive OmbudsOffice could investigate individual complaints, but could also examine broad issues and recommend changes to policies, procedures and practices where necessary. My Office would still be available to investigate matters if the complainant were dissatisfied with the result of contact with the Executive OmbudsOffice, either on the merits of the complaint or about the service received from the WCBO.

## ***2.4 Establishment of the WCBO***

Following discussions between my Office and the WCB, the office of the WCBO came into being on April 15, 1996. The press release announcing the creation of that office explained that the WCBO could receive and help solve complaints from the community and help individuals navigate their way through the WCB system. The then WCB President stated that the appointment of an internal ombudsman was in keeping with a strategic plan to further develop a service focus. He commented that the WCBO could provide assistance in solving individual problems, but could also make recommendations on “fixing the system.” The press release described the WCBO as an independent and impartial source of assistance, who would handle complaints with confidentiality. The announcement informed the public that the WCBO’s position was not a level of appeal and was not meant to replace existing appellate rights of injured workers and employers.

## ***2.5 Scope of the OmbudsAudit***

The Office of the Ombudsman over the years has made recommendations to the WCB on specific individual cases and on systemic policy and legal matters. Some of those recommendations were accepted. However, many of the same types of complaints that prompted the 1987 public report continue to be made to my Office. The scope of this Audit is not to highlight issues that have been previously addressed in specific recommendations from my Office in individual cases or in public reports over the years. In 1996, the provincial government created a Royal Commission to examine the entire scope and operation of the workers' compensation system in this province. The Commission is currently reviewing the broad issues of the prevention and compensation systems. My Audit Report is strictly limited to an analysis of the operation of the office of the WCBO during its implementation period, and an examination of the model of an Executive OmbudsOffice and its suitability to WCB.

I must emphasize that the investigation is not intended as a personal review of the incumbent WCBO or his current staff, but rather as a study of the effectiveness and the services of a recently established Executive OmbudsOffice. In the study I will also be assessing the extent to which the office of the WCBO has been able to establish fair and accessible procedures and promote fairness within the WCB. The lessons learned from this OmbudsAudit may be of interest to other organizations facing similar challenges.

## ***2.6 Research Methodology for the OmbudsAudit***

The OmbudsAudit has been designed to incorporate a variety of methods of assessing the operations of the office of the WCBO during the first two years of its existence. The investigation included the following major tasks:

- a brief review of the literature about Executive OmbudsOffices;
- a review of documents and materials relevant to the operations of the WCBO;
- development of interview and survey questions to be administered to complainants, WCB officials, and advocates/advisors/representatives familiar with the services provided by the WCBO;
- pre-testing ("scoping") of proposed questions to complainants, WCB officials and advocates/advisors/representatives;
- development of a database application to administer questions and organize

- and tabulate responses received from complainants and WCB officials;
- a review of dockets (files) of the WCBO. The "Docket Review" included a randomly selected review of 225 dockets of the office of the WCBO. The sampling of dockets was designed to include cases of varying complexity and duration of investigation. The sampling covered representative periods of activity during the first two years of the WCBO's existence;
- telephone interviews with many complainants who have used the services of the office of the WCBO. In the "Complainant Survey" my staff focused solely on the services provided by the office of the WCBO. However, the intensity of feelings concerning the workers' compensation system made it difficult for some complainants to limit their comments to their interaction with the office of the WCBO. Some responses that we received no doubt reflect dissatisfaction with the WCB and the workers' compensation system in general;
- a written survey of many WCB Management officials. Our scoping interviews confirmed that the office of the WCBO seldom has any contact with the WCB staff; almost all contacts are with WCB Management officials. For that reason, input from the WCB was obtained by way of the "WCB Management Survey," a survey completed by WCB Managers, Directors and Senior Executives. We were successful in obtaining input from WCB Management officials who have frequent contact with the office of the WCBO. The input included representatives of WCB's head office as well as those based in other WCB offices throughout the province. By surveying only WCB Management officials, the impact of the office of the WCBO in promoting fairness within the WCB has likely been over-estimated. Most people's experience with the WCB is at the staff level;
- interviews with a number of advocates/representatives/advisors who refer people to the office of the WCBO or who are otherwise familiar with the workers' compensation system; and
- additional interviews and hearings with complainants, advisors and advocates.

In interpreting the results of the various surveys conducted during the OmbudsAudit, I have adopted a cautious approach. I have reported objective measurements as reinforcement for trends detected through other segments of the Audit (for example, narrative responses, the Docket Review, recommendations offered by those interviewed).

The WCBO welcomed my decision to begin the OmbudsAudit as an opportunity to obtain an independent review of the operations of his office. His office and the WCB provided enthusiastic co-operation during the entire course of the audit. Every question that my staff asked was answered promptly and professionally;

every request for information received a similar response. This kind of co-operation is appreciated and enables an investigation of this nature to be completed in a more timely way.

## **3.0 Structure, Mandate and Jurisdiction**

### **3.1 Structure, Mandate and Jurisdiction of the Ombudsman for the Province of British Columbia**

The Ombudsman for the Province of BC is an Officer of the Legislature, appointed by an all-party committee of the Legislative Assembly pursuant to s. 2 of the **Ombudsman Act**:

- 2(1)** *On the recommendation of the Legislative Assembly, the Lieutenant Governor must appoint as an officer of the Legislature an Ombudsman to exercise the powers and perform the duties assigned to the Ombudsman under this Act.*
- (2)** *The Legislative Assembly must not recommend a person to be appointed Ombudsman unless a special committee of the Legislative Assembly has unanimously recommended to the Legislative Assembly that the person be appointed.*

Suspension or removal of the Ombudsman from office can occur only in accordance with subsec. 6(2) of the **Ombudsman Act**, which reads as follows:

- 6(2)** *On the recommendation of the Legislative Assembly, based on cause or incapacity, the Lieutenant Governor must, in accordance with the recommendation,*
- (a) suspend the Ombudsman, with or without salary, or*
  - (b) remove the Ombudsman from office.*

As is the case with other Classical Ombudsman, the Ombudsman for the Province of BC is not part of any authority, ministry or agency of the Provincial Government or any other public body. The investigative mandate of the Ombudsman is set out in s. 10 of the **Ombudsman Act**:

- 10(1)** *The Ombudsman, with respect to a matter of administration, on a complaint or on the Ombudsman's own initiative, may investigate*
- (a) a decision or recommendation made,*
  - (b) an act done or omitted, or*
  - (c) a procedure used*



*by an authority that aggrieves or may aggrieve a person.*

- (2) *The powers and duties conferred on the Ombudsman may be exercised and performed despite a provision in an Act to the effect that*
- (a) *a decision, recommendation or act is final,*
  - (b) *no appeal lies in respect of it, or*
  - (c) *a proceeding or decision of the authority whose decision, recommendation or act it is must not be challenged, reviewed, quashed or called into question.*

Independence and impartiality, essential components of the Classical Ombudsman model will be reviewed in detail in Chapter 4 of this report. The mechanism by which the Classical Ombudsman reports on the activities of her or his Office is another vital element to ensure the independence of the Classical Ombudsman. As will be discussed in Chapter 6, the Ombudsman reports directly to the Legislature by way of an Annual Report and by various special and public reports. This capacity to report publicly has proven to be a valuable safeguard to ensure that authorities within the jurisdiction of the Classical Ombudsman carefully consider her or his investigative findings and recommendations. The **Ombudsman Act** provides the Ombudsman with independence from the government and protects her or him from unjust repercussions that might otherwise result from the positions taken by the Classical Ombudsman.

While there is broad authority for the Ombudsman to investigate, some limitations are set out in the **Ombudsman Act**:

- 11(1)** *This Act does not authorize the Ombudsman to investigate a decision, recommendation, act or omission*
- (a) *in respect of which there is under an enactment a right of appeal or objection or a right to apply for a review on the merits of the case to a court or tribunal constituted by or under an enactment, until after that right of appeal, objection or application has been exercised or until after the time limit for the exercise of that right has expired, or*
  - (b) *of a person acting as a solicitor for an authority or acting as counsel to an authority in relation to a proceeding.*

The **Ombudsman Act** has restrictions about the matters to be investigated and the timing of investigations. Paragraph 11(1)(a) sets out that the Ombudsman may not investigate when there are appeals available or in progress. The effect of this section is that the Ombudsman is not authorized to investigate a complaint about the merits of a decision if the complainant has access to appeals.

During the first years of its operation, there was a challenge to the authority of the Ombudsman to investigate a matter. This challenge was resolved by the Supreme Court of Canada in ***B.C. Development Corporation v. Friedmann (Ombudsman)* 1984 2 S.C.R. 447**. In that decision the Supreme Court of Canada, at p. 474, determined that a “matter of administration” had wide breadth and scope:

*In my view, the phrase “a matter of administration” encompasses everything done by governmental authorities in the implementation of government policy. I would exclude only the activities of the legislature and the courts from the Ombudsman’s scrutiny.*

The Ombudsman’s jurisdiction in BC extends to all matters of administration regarding the authorities listed in the Schedule to the **Ombudsman Act**, as follows:

Schedule to the **Ombudsman Act**, RSBC 1996, c.340

#### **Authorities**

1. Ministries of the Province.
2. A person, corporation, commission, board, bureau or authority who is or the majority of the members of which are, or the majority of the members of the board of management or board of directors of which are,
  - a) appointed by an Act, minister, the Lieutenant Governor in Council;
  - b) in the discharge of their duties, public officers or servants of the government; or
  - c) responsible to the government.
3. A corporation the ownership of which or a majority of the shares of which is vested in the government.
4. Municipalities.
5. Regional Districts.
6. The Islands Trust established under the **Islands Trust Act**.
7. Improvement districts as defined in the **Municipal Act**.
8. The Capital Improvement District under the **Capital Commission Act**.
9. Boards, committees, commissions or similar bodies established under the **Municipal Act** or **Vancouver Charter**.
10. The Resort Municipality of Whistler and the Whistler Resort Association.
11. A local trust committee, the Trust Council, Trust Fund Board and the

executive committee and persons to whom their powers are delegated under the ***Islands Trust Act***.

12. Library boards as defined in the ***Library Act***.
13. Regional parks boards established under the ***Parks (Regional) Act*** and the Cultus Lake Park Board.
14. A greater board as defined in the ***Municipal Act***.
15. Development districts, water users' communities, comptroller and regional water manager under the ***Water Act***.
16. The commissioners of a district defined in section 58 of the ***Drainage, Ditch and Dike Act*** and an engineer, commissioner, inspector of dikes or land settlement board acting under that Act.
17. The British Columbia Diking Authority and a diking authority under the ***Dike Maintenance Act***.
18. The Okanagan Kootenay Sterile Insect Release Board.
19. Regional transit commissions established under the ***British Columbia Transit Act***.
20. A corporation
  - a) more than 50% of the issued voting shares of which are owned by one or more of the authorities listed in section 4 to 19 of this section, or
  - b) that is controlled by one or more of the authorities listed in sections 4 to 19 and, for the purposes of ascertaining control, a corporation is controlled by one or more of these authorities if a majority of the members of the corporation or of its board of directors or board of management consists of either or both of the following:
    - (i) persons appointed as members by the authorities;
    - (ii) officers or employees of an authority acting as such.
21. Schools and boards as defined in the ***School Act***.
- 21.1 Francophone education authorities as defined in the ***School Act*** and francophone schools operated by francophone education authorities.
22. Universities as defined in the ***University Act***.
23. The University of Northern British Columbia.
24. Royal Roads University.
25. Institutions as defined in the ***College and Institute Act***.
26. Hospitals and boards of management of hospitals as defined in the ***Hospital Act***.
27. Governing bodies of professional and occupational associations that are established or continued by an ***Act***.
28. Regional Health Boards and Community Health Councils established under

the ***Health Authorities Act***.

29. Regional Hospital Districts under the ***Hospital District Act***.
30. The Technical University of British Columbia.
31. The Greater Vancouver Transportation Authority established under the ***Greater Vancouver Transportation Authority Act***.

Although the powers to investigate are sweeping and the spectrum of findings broad, a Classical Ombudsman has no power to make orders or decisions or to require that an authority implement any recommendation. The Classical Ombudsman operates on the basis of her or his power to report pursuant to ss. 25 and 31 of the ***Ombudsman Act***.

### **3.2 Structure, Investigative Mandate and Jurisdiction of the WCBO**

The incumbent WCBO is a WCB employee selected by a Senior Executive Committee of the WCB. The WCBO currently reports directly to the President of the WCB. When necessary, he may report to the Panel of Administrators.

The WCBO first attempts to resolve matters through managers and directors. If there is a conflict and his recommendations are not accepted, in the current system the WCBO takes the matter to the appropriate Vice-President of WCB, the President and the Panel of Administrators. Under the present structure of governance, the President of the WCB reports to a Panel of Administrators. The Medical Review Panel Registrar, the Chief Appeal Commissioner and the Director General of Policy and Regulation also report directly to the Panel of Administrators.

Although the reports of the WCBO state that he may report directly to the Panel of Administrators when necessary, the organization charts on the Internet web site and those produced by the WCB show the WCBO as reporting only to the President, with no direct line of reporting to the Panel.

#### **Recommendations:**

- 3-1 I recommend that the WCBO report directly to the Panel of Administrators.**
- 3-2 I recommend that all literature describing the structure of the office of the WCBO, including the organization charts of the WCB, be clarified to show that the WCBO reports directly to the Panel of Administrators.**

The WCBO's office is situated in the basement of the head office of the WCB. The files of that office are not shared with WCB staff. The computer system is set up so that file information pertaining to individual complainants is separate from the WCB files (e.g., Claim, Prevention or Assessment files). The present complement of the office of the WCBO includes the WCBO, one Assistant WCBO (who has an adjudication background at the WCB), and one administrative support person. In cases where legal questions arise, the WCBO consults WCB staff lawyers.

The jurisdiction of the WCBO was established when the office of the WCBO was created by way of the following March 15, 1996 directive from the then President of the WCB.

---

In late 1995, the Senior Executive Committee decided to create the office of the WCBO. The position was developed in discussion and coordination with the Provincial Ombudsman, Dulcie McCallum.

The WCBO receives complaints from the community, concerning practices, procedures, policies and regulations. The WCBO assists in solving individual problems and may make recommendations on fixing the system. The WCBO is a facilitator or advocate for administrative fairness, intent on satisfying client complaints while having regard to the administrative integrity of the system.

The Strategic Plan places emphasis on developing a service focus. To that end, the creation of the office of the WCBO will further contribute to the service focus by realigning the complaints process within the workers' compensation system.

I am pleased to advise that [the incumbent] has been designated the WCBO. He has been with the Board and has functioned in numerous capacities since 1973. He will be meeting with individuals and groups to explain and contrast the role of an internal Ombudsman with that of a Classical Ombudsman.

The office of the WCBO will be located in the administration building and will begin operation on April 15, 1996.

(E-mail announcement to all WCB staff from Dale Parker, President and CEO, WCB, March 15, 1996).

---

The office of the WCBO provides complaint reports to WCB Directors at quarterly meetings and provides statistics about the number of cases received and their disposition.

### 3.3 Mission and Vision Statements

In March 1998 I issued a **Special Report No. 20, Ombuds Strategic Plan, 1997-2001**, to the Provincial Legislature, in which I outlined the Vision of the Office of the Ombudsman as follows:

*The Vision for the Office of the Ombudsman today and for the future is to ensure fairness and accountability in public administration in British Columbia by improving our quality of service to benefit the public and authorities; working in a supportive environment and serving as a role model for our Guiding Principles; and fulfilling our statutory mandate.*

The Mission Statement for the office of the WCBO reads as follows:

*To provide impartial and confidential assistance to workers and employers.*

In reviewing this Mission Statement, I have also referred to Mission Statements of other agencies that provide services to workers and employers. For example, the following Mission Statement of the Workers' Advisers Services of the Ministry of Labour conveys an interest in improving the fairness of the workers' compensation system that is absent in the Mission Statement of the WCBO.

*As an independent advisory body:*

*To work toward a just and equitable system of Workers' Compensation which fairly serves the needs of workers, and their dependents in a timely fashion.*

*To provide high quality service to the public and clients in a responsive, innovative and non-bureaucratic environment.*

The Mission Statement of the Employers' Advisers Services of the Ministry of Labour reads as follows:

*Our mission is to provide professional advice, assistance, representation, and training to employers in workers' compensation matters in order to ensure the integrity of the system.*

The Mission or Vision Statement of an organization should accurately describe that organization's purpose, role and activities. It should serve as a compass to an organization to ensure that it remains on course. For example, everything that my Office does should be linked with the Vision, articulated in our Ombuds Strategic Plan, of ensuring fairness and accountability in public administration in British Columbia.

The Mission Statement of the WCBO contains little to distinguish the office of the WCBO from other agencies that provide assistance to workers and employers. The Mission Statement contributed to the perception held by some within the WCB organization that the office of the WCBO duplicated services provided by Workers' Advisers. As one respondent in the management survey put it:

---

Currently the WCBO acts as another level of appeal/advocacy and as a lever for other advocates.

---

In fact, the Mission Statements for both the Workers' Advisers and the Employers' Advisers address wider ranging considerations of the type that I would expect to find in the Mission Statement for the WCBO. My review of WCBO dockets has confirmed that some of the activities of the WCBO extend far beyond a mere provision of impartial and confidential assistance to workers and employers. That office has made recommendations for change in practices and procedures. This kind of role is not recognized in the Mission Statement.

Once a newly established Executive OmbudsOffice has completed its second year of operations, it should review its Mission or Vision Statements to ensure that they remain accurate. Based on my review of this matter, it appears to me that the existing Mission Statement for the office of the WCBO is incomplete. The office is involved in initiatives to ensure fairness and accountability within the workers' compensation system. As the organization matures in its role, I would expect the range of such initiatives to widen, and the Mission Statement to reflect such initiatives.

**Recommendation:**

**3-3    *I recommend that the WCBO develop a new Mission Statement that clearly articulates the role of the office.***



### 3.4 Description of Jurisdiction in WCBO's Publications and Communication

The office of the WCBO has produced several documents describing its jurisdiction.

In 1997, the office of the WCBO produced a pamphlet entitled **The WCB Ombudsman** (the pamphlet). The pamphlet includes a statement that individuals or groups with complaints about the fairness of WCB decisions, recommendations, actions, procedures, practices or regulations may contact the WCBO.

The pamphlet states that the WCBO deals with issues involving all divisions including Appeals, Assessments, Compensation and Prevention. It states further that the WCBO can:

- *advise how the system works and how outstanding issues might be resolved,*
- *assist in reaching the individual authorized to deal directly with a concern, and*
- *offer confidential, impartial recommendations on issues within the jurisdiction of the office.*

The pamphlet states that the WCBO cannot:

- *deal with criminal injuries matters,*
- *accept referrals from WCB staff,*
- *handle issues pertaining to the law,*
- *advise on an issue under appeal or involving a right to appeal, and*
- *handle issues being considered by the Provincial Ombudsman.*

On January 20, 1998 the office of the WCBO completed a **Procedures and Protocols Handbook** (the **Handbook**). In that document, the WCBO's mandate is described as dealing with complaints of alleged unfairness concerning:

- *a decision or recommendation made;*
- *an act done or omitted; or*
- *a procedure, practice or regulation used by the WCB.*

These areas conform, in large part, to the mandate set out in the jurisdiction of the Classical Ombudsman. The **Handbook** states that the WCBO deals only with the **Workers' Compensation Act**. It explains that the WCBO helps individuals navigate their way through the WCB system, encourages them to go to the person who can directly address their concerns, and helps clients to deal with their feelings of frustration. The **Handbook** points out that the WCBO is not a

decision maker, but can make recommendations pertaining to issues. It also presents the WCBO function as an informal dispute resolution process. The jurisdiction of the WCBO is described as follows:

*A complaint is analyzed to verify if it falls within the jurisdiction of the WCBO. A complaint is not within the jurisdiction of the WCBO if it pertains to the law/statute; the facts of the case; an issue under appeal or involving a right to appeal at any level; or, an issue being considered by the Office of the Provincial Ombudsman.*

The **Handbook** also states that WCB staff do not refer cases to the WCBO. It describes the initial review as follows:

*When it has been determined a complaint is within the jurisdiction of the WCBO, it is registered. It is then directed to the SDL (Service Delivery Location) manager for initial investigation and reply. When the manager review process was adjusted to free up time for managers, it was anticipated that time could be re-allocated to deal with other complaint issues, such as those referred by the WCBO.*

The WCBO is to be commended for understanding and appreciating the importance of having information for the public to learn about the office.

**Recommendation:**

**3-4 I recommend that all existing and future public education materials be upgraded to clarify the role of the WCBO.**

## 3.5 Investigative Powers

### 3.5.1 Investigative Powers of the Classical Ombudsman

Section 15 of the **Ombudsman Act** sets out the investigative powers of the Provincial Ombudsman as follows:

- 15(1)** *The Ombudsman may receive and obtain information from the persons and in the manner the Ombudsman considers appropriate, and in the Ombudsman's discretion may conduct hearings.*
- (2)** *Without restricting subsection (1), but subject to this Act, the Ombudsman may do one or more of the following:*
- (a) at any reasonable time enter, remain on and inspect all of the premises occupied by an authority, talk in private with any person there and otherwise investigate matters within the Ombudsman's jurisdiction;*
  - (b) require a person to furnish information or produce, at a time and place the Ombudsman specifies, a document or thing in the person's possession or control that relates to an investigation, whether or not that person is a past or present member or employee of an authority and whether or not the document or thing is in the custody or under the control of an authority;*
  - (c) make copies of information furnished or a document or thing produced under this section;*
  - (d) summon before the Ombudsman and examine on oath any person who the Ombudsman believes is able to give information relevant to an investigation, whether or not that person is a complainant or a member or employee of an authority, and for that purpose may administer an oath;*
  - (e) receive and accept, on oath or otherwise, evidence the Ombudsman considers appropriate, whether or not it would be admissible in a court.*

Refusal to provide information to the Ombudsman is included in the following list of offences specified in s. 32 of the **Ombudsman Act**.

- 32** *A person commits an offence who does any of the following:*
- (a) without lawful justification or excuse, intentionally obstructs, hinders or resists the Ombudsman or another person in the exercise of a power conferred or a duty imposed under this Act;*
  - (b) without lawful justification or excuse, refuses or intentionally fails to comply with a lawful requirement of the Ombudsman or another person under this Act;*

- (c) *intentionally makes a false statement to or misleads or attempts to mislead the Ombudsman or another person in the exercise of a power conferred or a duty imposed under this Act;*
- (d) *violates an oath taken under this Act,*
- (e) *contravenes section 16.*

Section 16 of the **Ombudsman Act** provides protection from any form of retribution to those who provide information to the Ombudsman.

**16** *A person must not discharge, suspend, expel, intimidate, coerce, evict, impose any pecuniary or other penalty on or otherwise discriminate against a person because that person complains, gives evidence or otherwise assists in the investigation, inquiry or reporting of a complaint or other proceeding under this Act.*

These statutory provisions provide the Classical Ombudsman's Office, in this case, the Office of the BC Ombudsman, with the investigative powers to conduct its work, and protection for those who complain or comply with requests to assist with or participate in investigations.

### **3.5.2 Investigative Powers of the WCBO**

As it is now constituted, the office of the WCBO has no formal investigative powers that require WCB officials (or anyone else) to respond to questions or to produce documents that are requested. This situation is similar to that of many other Executive OmbudsOffices.

In the absence of formal investigative powers, the office of the WCBO relies on the delegation of authority from the President of the WCB to enlist the co-operation of those who work for the WCB. From a practical perspective, this delegation has provided the office of the WCBO with a means to obtain information within the WCB. The office of the WCBO is provided with full and complete access to both the electronic and the paper files of the Board. However, the informal nature of the present arrangement for obtaining information could present problems. For example, in order to enforce the right to information concerning the WCB's handling of a matter, the WCBO would have to rely on the administrative structure of the Board.

In addition to potential problems that the office of the WCBO could encounter within the Board, this lack of investigative powers also affects the ability of the office of the WCBO to obtain evidence outside the Board. At present, the WCBO

is without established investigative powers to obtain information from anyone, including those who do not work for the WCB.

In order to provide effective complaint handling, the WCBO needs clear and comprehensive investigative powers. The ability to obtain information to help understand problems giving rise to complaints and to facilitate resolutions is critical. The WCBO needs to obtain information from all levels of the Board and, beyond that, from complainants themselves and from external witnesses and institutions.

Section 96 of the **Workers' Compensation Act** gives the Board itself broad powers of inquiry to accomplish the purposes of Part 1 of that Act. Inasmuch as the Part 1 powers of the Panel of Administrators are sufficient to establish the WCBO, it should also be possible to convey investigative powers to the WCBO through a delegation from the Panel of Administrators.

Investigation lies at the heart of meaningful complaints resolution since a genuine understanding of the facts of situations will lead to reasoned and reasonable resolutions and recommendations.

**Recommendations:**

- 3-5** *I recommend that the Panel of Administrators create by-laws establishing the investigative powers of the WCBO to parallel as closely as possible the investigative powers provided to the Ombudsman in s. 15 of the Ombudsman Act.*
- 3-6** *I recommend that the by-laws created by the Panel of Administrators to establish the investigative powers of the WCBO include a mechanism whereby disputes regarding his or her investigative powers not be reliant on anyone within the WCB administration for enforcement purposes.*

## 3.6 Investigative Findings

### 3.6.1 Investigative Findings of the Classical Ombudsman

The **Ombudsman Act** sets out grounds for the Ombudsman to make findings:

- 23(1)** *If, after completing an investigation, the Ombudsman is of the opinion that*
- (a) a decision, recommendation, act or omission that was the subject matter of the investigation was*
    - (i) contrary to law,*
    - (ii) unjust, oppressive or improperly discriminatory,*
    - (iii) made, done or omitted under a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory,*
    - (iv) based wholly or partly on a mistake of law or fact or on irrelevant grounds or consideration,*
    - (v) related to the application of arbitrary, unreasonable or unfair procedures, or*
    - (vi) otherwise wrong,*
  - (b) in doing or omitting an act or in making or acting on a decision or recommendation, an authority*
    - (i) did so for an improper purpose,*
    - (ii) failed to give adequate and appropriate reasons in relation to the nature of the matter, or*
    - (iii) was negligent or acted improperly, or*
  - (c) there was unreasonable delay in dealing with the subject matter of the investigation,*
- the Ombudsman must report that opinion and the reasons for it to the authority and may make the recommendation the Ombudsman considers appropriate.*

This section of the governing legislation enables the Ombudsman to make broad and far-reaching findings following an investigation.

### 3.6.2 Investigative Findings of the WCBO

Although the grounds for recommendations from the Classical Ombudsman are set out in the **Ombudsman Act**, there are no similar grounds described in the public information of the WCBO other than the general description that the office deals with complaints of unfairness. Reading from the **Handbook** the powers are described as:

*Upon completion of an inquiry, the WCB Ombudsman may make a recommendation to the relevant division management, to consider implementing remedial or corrective action.*

*Where a satisfactory administrative response has not occurred, the WCB Ombudsman may present the details to the President/Chief Executive Officer and, where appropriate, inform the Panel of Administrators or a committee of the Panel of Administrators.*

The WCB Fair Practices Advocate in Manitoba, the closest equivalent to the WCBO in Canada, has general but broad grounds upon which recommendations may be based. The Advocate describes her role as:

*The WCB Fair Practices Advocate is an independent and non-partisan officer of the WCB and hears and investigates specific complaints regarding the administration from workers, employers and the public. In acting as a mechanism to resolve objections or concerns from those who believe they have been unfairly treated, the Fair Practices Advocate may become involved during any stage of the claim process. The office need not be utilized strictly before or after the appeal process.*

*The office of the Fair Practices Advocate investigates any concern brought forward by the public or on its own initiative. These concerns may include unfair treatment at the hands of the WCB, incomplete investigation of a claim, disagreement with a decision, misapplication of policy and lack of procedural fairness. This office does not have the authority to alter WCB decisions, but has the power to recommend remedial or corrective action to the WCB where any decision or action of the WCB is clearly wrong or unreasonable.*

## **3.7 Types of Recommendations**

### **3.7.1 Recommendations of the Classical Ombudsman**

Subsection 23(2) of the **Ombudsman Act** sets out the types of recommendations the Classical Ombudsman may make:

- (2)** *Without restricting subsection (1), the Ombudsman may recommend that*
- (a) a matter be referred to the appropriate authority for further consideration,*
  - (b) an act be remedied,*
  - (c) an omission or delay be rectified,*
  - (d) a decision or recommendation be cancelled or changed,*
  - (e) reasons be given,*
  - (f) a practice, procedure or course of conduct be altered,*
  - (g) an enactment or other rule of law be reconsidered, or*
  - (h) any other steps be taken.*

### **3.7.2 Recommendations of the Executive Ombudsman**

While the process by which the WCBO can make recommendations is outlined in the **Handbook**, there is no discussion of the types of recommendations the WCBO might make. The **Handbook** reads:

---

Upon completion of an inquiry, the WCBO may make a recommendation to the relevant division management, to consider implementing remedial or corrective action.

Where a satisfactory administrative response has not occurred, the WCBO may present the details to the President/Chief Executive Officer and, where appropriate, inform the Panel of Administrators or a committee of the Panel of Administrators.

Where the WCBO makes a recommendation and no action that s/he believes adequate or appropriate is taken within a reasonable time, the WCBO may inform the complainant of the recommendation and make any additional comments considered to be appropriate.

---

The other literature produced by the WCBO does not set out the grounds on which the WCBO may make recommendations.



### 3.8 The Roles of the Classical Ombudsman and the Executive Ombudsman

The WCBO **Handbook** provides the following contrast of the roles of the Classical Ombudsman and an internal organization Ombudsman:

#### **Classical Ombudsman:**

- *function is created by law*
- *appointed by legislative body*
- *power to conduct formal investigations*
- *subpoena power*
- *strong legal safeguards for its independence and confidentiality of its records*
- *publish public reports.*

#### **Internal Organization Ombudsman:**

- *employee of the organization*
- *confidential*
- *designated neutral*
- *communications channel*
- *complaint handler*
- *dispute resolver*
- *change maker.*

The description of these roles creates distinctions that are not completely accurate. The Classical Ombudsman also acts as a complaint handler, a communications channel, a change maker and treats complaints with confidentiality. An Executive OmbudsOffice may be able to publish annual reports. Both can investigate and make recommendations; both respect confidentiality. The Classical Ombudsman has statutory safeguards through the **Ombudsman Act** to ensure the confidentiality of investigations. A similar protection of confidentiality does not exist in the case of the Executive Ombudsman. The chief differences between the Executive and the Classical Ombudsman are the independence of the Classical Ombudsman and the formal powers and protection provided through legislation.

The Classical Ombudsman may also initiate investigations on her or his own motion. Having this capacity enhances the independence of the position. This same capacity should be extended to an Executive Ombudsman and may be of particular importance because of the perception of being “an insider” and the

ability to investigate where those most adversely affected by an issue may fear retribution.

***Recommendation:***

***3-7 I recommend that the by-laws established by the Panel of Administrators include the specific power for the WCBO to undertake an investigation "on her or his own initiative."***

### 3.9 Jurisdiction of the WCBO

An Executive Ombudsman does not have the same legislated authority as a Classical Ombudsman. However, the question arises, should an Executive Ombudsman be able to investigate the same wide range of matters as a Classical Ombudsman, with the same restrictions as the **Ombudsman Act** outlines?

The office of the WCBO currently does not define its jurisdiction as dealing with all "matters of administration" that would be investigated by my Office. Broadly stated, the office of the WCBO has adopted the same general parameters for investigation as the Ombudsman for the Province of BC. Closer inspection reveals that the WCBO considers many areas that are routinely investigated by my Office as beyond his mandate. There is an apparent contradiction between the descriptions of the matters the office of the WCBO states that it investigates and the limitations it places on its investigations.

Much of the literature produced by the office of the WCBO defining its work appears to focus on the task of helping workers or employers navigate through the system. The WCB system is extremely complex and legalistic. Helping people navigate through the system is a useful function and enterprise for both my Office and the office of the WCBO; however, there are agencies specifically mandated to perform this task for workers and employers, and advocating for them as well. For example, the Ministry of Labour offers services to workers through one of its branches, Workers' Advisers Services. A similar service is offered by that Ministry to employers by way of Employers' Advisers Services. The investigative role of an internal ombudsman was a key element in my proposal that an Executive Ombudsman be established at the WCB.

The referral of complaints lodged with the office of the WCBO to WCB Managers is a useful exercise as a first step to resolving a complaint and has a number of benefits:

- it alerts the manager to the types of complaints made about the unit,
- it gives the manager the first opportunity to hear the issue and attempt to address it, and
- it allows WCBO staff to investigate matters that were not resolved through this initial remedy.

However, investigations involving a number of WCB departments or divisions may not be suitable for referrals. The role of the WCBO is very distinct from that of a

manager; a referral to a manager is only one step in the process of dispute resolution or investigation.

**Recommendations:**

- 3-8** *I recommend that the Panel of Administrators create by-laws outlining the jurisdiction and mandate of the WCBO, making them expansive, and congruent with the investigative role and fact-finding mandate of the Provincial Ombudsman.*
- 3-9** *I recommend that the Panel of Administrators include in the by-laws the grounds on which the WCBO makes findings, and the types of recommendations he or she may make, embodying the areas set out in the Ombudsman Act.*

### **3.9.1 Questions of Law**

The following limitations of the WCBO's mandate, outlined in documents produced by that office, are of considerable concern to me.

The office of the WCBO informs the public in some of its documents that it does not handle issues pertaining to law. In a letter from the office of the WCBO, the jurisdictional limitations of that office were described in the following terms:

---

**A complaint is not within the jurisdiction of the WCBO if it pertains to changes to the law/statute;** the facts of the case; an issue under appeal or involving a right to appeal at any level; or, an issue being considered by the Office of the Provincial Ombudsman.

In this case, the processes, practices and policies pertaining to the legal activity on the claim fall within the jurisdiction of this office. The legal remedies proposed and the legal options available to the Board and to yourself do not fall within the jurisdiction of this office...

There is no ambiguity, inconsistency, or omission with reference to the processes, practices and implementation of policy pertaining to the legal activity on the claim (Emphasis added).

---

It may be that this phrasing about changes to the law is intended to explain that only the legislators can change laws. The wording used in the public information of the office of the WCBO may be intended to focus on an intention to address complaints about public policy established pursuant to a statute or its

implementation. That understanding is correct and respects the principles of parliamentary supremacy and the rule of law.

Although a Classical Ombudsman has no power to make or change laws, powers are provided to examine the fairness of statutes and regulations and **recommend** that unfair laws be reconsidered with a view to their being amended or repealed. As was noted earlier in this chapter, s. 23 of the **Ombudsman Act** provides the statutory basis for such findings and recommendations by a Classical Ombudsman when a matter is considered to be contrary to law, where a statutory provision or other rule of law is unjust or unfair, or where there is a mistake of law. Classical Ombuds Offices do make recommendations in some instances about the need to consider changes to legislation. For example, in the area of workers' compensation, I recommended changes to the statutory provisions regarding widows' benefits a number of years ago. Similarly, I have made recommendations to change the statutory time frames for Medical Review Panels. The power to recommend a reconsideration of a law has, in the experience of my Office, been used sparingly. It is, however, an important feature when an investigation reveals that the cause of the unfairness is the law itself or the effect it is having, and that the unfairness cannot be rectified without an amendment to the law.

As the **Workers' Compensation Act** provides the statutory authority for all actions and decisions that are reviewed by the WCBO, the phrasing in both the **Handbook** and the pamphlet to the effect that the WCBO will not investigate matters "pertaining to law" is problematic. In his paper on **Reform, Justice and the Ombudsman**, Professor Larry B. Hill wrote:

---

Arbitrary power may be particularly oppressive and ombudsmen have been active in trying to obtain reforms of policies whose legal basis is suspect. Frequently, ombudsmen uncover situations involving a conflict between an agency's operational policy and a higher legal authority. (**International Ombudsman Institute Occasional Paper #17**, July 1982)

---

Some decisions or policies of an authority may be contrary to law. It is within the mandate of a Classical Ombudsman to investigate the legality of those matters. Even in the directive that created the office of the WCBO, the President of the WCB included the ability to review complaints about regulations in his description of the mandate of the WCBO. Curiously, the literature produced by the office of the WCBO describes itself as empowered to look at regulations, but not at the statutes themselves.

As indicated earlier in this chapter, I believe that the office of the WCBO should be investigating a far broader range of complaints than it currently reviews. However, even using the WCBO's own test for assessing its jurisdiction on such matters, it is unclear why complaints that the WCB has improperly applied statutes or is in contravention of legal or constitutional rights under the **Canadian Charter of Rights and Freedoms** would be outside the jurisdiction of the WCBO.

**Recommendation:**

**3-10 I recommend that the Panel of Administrators adopt, in the by-laws governing the mandate of the WCBO, that he or she be entitled to recommend that the WCB or the Minister responsible reconsider matters of law, paralleling the scope of the Ombudsman Act.**

### **3.9.2 Questions of Fact**

Much of the work of a Classical Ombudsman involves a review of the facts in a case. The **Handbook** of the WCBO states that the office may investigate decisions of the WCB. It also states that there will be no investigation of issues surrounding the facts of a case. These statements may cause confusion, since the facts are often the very substance of decisions. For example, disputes arise as to whether there was a witness to an accident, a person was on a site at a certain time, an employer's assessment was based on correct payroll figures or the concentration of chemical vapours was over the allowable limit. It may be that the intent of this comment on the facts is meant to convey that the WCBO would not merely replace the opinion of the decision maker with his own, but would focus primarily on the procedural issues surrounding the decision. However, in some cases an Ombudsman may have to examine the weighing of the evidence and the fact pattern to determine whether a decision is unreasonable or whether all relevant evidence was considered in the case, as integral to ensuring fair process.

Although the office of the WBCO publicly maintains restrictive investigative parameters regarding this issue, in practical terms, such a distinction is extremely difficult to implement. For example, the WCBO has stated that he will not investigate if a complaint is directed at the weight an adjudicator or the Appeal Division has assigned to a particular fact when making a decision. The limitations set out by the office of the WCBO are described in the following letter. In this

docket, the WCBO claimed that he lacked the jurisdiction to investigate a complaint because the issue in contention was a “matter of fact.”

---

A complaint is not within the jurisdiction of the WCBO if it pertains to changes to the law/statute; the facts of the case;...

The contents of memo #XXX and the issues pertaining to hours worked are facts of the case. These facts and disputes surrounding them have been presented before the Review Board and the Appeal Division, respectively. You and/or your agent(s) have, in the past, made various submissions to the claim file outlining your comments pertaining to the complaint issues. The complaint falls outside of the jurisdiction of the WCBO.

---

However, despite the strong statements in such correspondence from the office of the WCBO and in the **Handbook**, the WCBO seems to have acknowledged that his office indeed does look at the facts of a case. He apparently would investigate a complaint if the adjudicator or appeal commissioner had ignored a particular fact or if evidence were brought forward by the complainant after the decision had been rendered. Under such circumstances, the WCBO apparently believes that it would be appropriate to ask the adjudicator or the Appeal Division to determine whether or not it needs to reconsider its decision based on the new information available. These explanations suggest that the strong statements about this issue in the **Handbook** and in some of the correspondence from the office of the WCBO are somewhat misleading.

The Docket Review conducted as part of this OmbudsAudit confirms that there are many situations where the office of the WCBO looks very carefully at the facts presented. For example, the office sought confirmation as to whether or not a doctor had billed the WCB for a letter that was placed on a worker's file when the authorship of the letter was in dispute. Without examining the facts of a case, the WCBO would not be in a position to assess whether or not he should be approaching the WCB with a recommendation relating to a complaint.

It remains unclear to me whether or not there exists a philosophical difference of opinion regarding the jurisdiction of the office of the WCBO about its review of factual matters. At the very least, it would appear that the statements issued by the office of the WCBO overstate the restrictions affecting that office's review of factual matters in dispute. The following recommendation is intended to revise the existing statements of the office of the WCBO regarding this issue. As the manner in which the office of the WCBO is dealing with this issue remains

somewhat unclear, I would anticipate that the WCBO would work to follow this recommendation.

**Recommendation:**

**3-11 I recommend that the WCBO review the statements regarding the limitations of the office in reviewing factual matters, and revise all public information that he or she produces so that it accurately reflects the appropriate scope of the investigative jurisdiction of the office.**

### **3.9.3 Policy Matters**

My Office has undertaken a number of broad investigations involving unfair policies, such as the previous continuity of income policy that precluded those with an existing pension from receiving income payments pending a pension reassessment. That policy has recently been revised to allow consideration for those with existing pensions who are awaiting reassessment and meet other eligibility criteria.

In correspondence and in interviews, the WCBO advised that he does not review policies for fairness, but only ensures that policies are consistently and appropriately applied. Letters from the office of the WCBO advise complainants that the Board applied the correct policy. This letter discloses WCBO's reliance on policy to explain the conduct complained of:

---

It is consistent with policy and practice for Board staff to request long-term earnings information from confirmatory sources.

---

The following quotations from letters sent from the office of the WCBO provide specific examples of the limitations that it has placed on its investigations:

---

The initial adjudication and readjudication of the above noted claim complied with policy and practice. The repayment of monies previously recovered ...complied with policy and practice established to reflect[an] Appeal Division Decision. Successful resolution of your vocational future will depend on determining your level of physical recovery within the policy framework of the Vocational Rehabilitation department. This office is satisfied that the WCB is correctly following its policies, practices and procedures in determining the nature and level of support offered to you. There is no appealable vocational rehabilitation decision issued on your claim.

---



As noted above, the office of the WCBO has interpreted its role in reviewing policies, procedures and practices to mean that it reviews actions to ensure that the relevant WCB policies, procedures and practices have been followed. The office of the WCBO has not viewed its jurisdiction as extending to a consideration of the fairness of policies.

In considering issues involving Board policy, it is interesting to note that the structure of the WCB has led to the adoption of an interpretation of policy that is not found in many, if any, of the other 2,800 plus authorities within my jurisdiction. In most authorities, policies are developed through a process of staff review and recommendations that lead to adoption by the senior management of the organization. At the WCB, official policies can be issued only by the Panel of Administrators, a governance body that is separate from the senior management of the WCB. In a letter to me, the President of the WCB advised that policies and practices are "words with very particular meaning to the WCB." He observed that the WCB makes the following distinction between policies, practices and procedures:

---

In our lexicon, "policy" refers to the published policy of the WCB while "practice" refers to the operational instructions beyond any written "policy" or "procedure"...

---

Under such a structure, those who manage the WCB's activities are more detached from the policy approval process than is the case with many other authorities under the jurisdiction of my Office. WCB officials must await the consideration of the Panel of Administrators of a request for a policy change to have such a change "published." Without a formal delegation of authority from at least the Panel of Administrators, the WCBO has viewed his role as not extending to any areas that could be viewed as touching upon the mandate of the governance body of the WCB. As decisions to create or amend official WCB policy are the domain of the Panel of Administrators, the WCBO has decided that he has no mandate to consider complaints about the fairness of WCB policies, but only whether these policies were applied and whether they were applied appropriately and consistently. Notwithstanding that there are already many ways for policy issues to come to the attention of the Panel, the Ombudsman ought to be another source.

This strong sentiment of respect for institutional policy presents a formidable challenge for any Executive Ombudsman. As a Classical Ombudsman, I reject claims of authorities that legislation and policies are "etched in stone." If

legislation is unfair, a Classical Ombudsman can recommend that the law be reconsidered with a view to remedying the resulting unfairness. Claims that an organization's policies are similarly "untouchable" should be given even less consideration by any Ombudsman, Classical or Executive, notwithstanding the custom of how policy is reviewed, amended or promulgated in the particular organization.

It is also interesting to note that amidst the myriad of Board policies, the ***Rehabilitation and Claims Services Manual*** (the ***Manual***) appears to outline a more expansive interpretation regarding the application of policy and the exercise of discretion than some letters from the office of the WCBO express.

---

In the adjudication of individual claims, the Board is not "bound" by either internal policy directives or by external authorities in the field of compensation, at least not in the sense of the word "bound" as understood at common law. However, in issuing internal directives, the Board gives general indications of how it will act when certain circumstances come before it. When these circumstances arise, the applicable directive will normally be followed. It is recognized that there is an infinite variety of circumstances that can arise and that it is not possible to lay down in advance policies to finally determine every conceivable situation. Furthermore, there is the obligation on the Board to decide each case in accordance with its merits and justice and the right of individual persons affected under the rules of natural justice to present argument and evidence in their own behalf. Therefore, regard must always be had to particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy. There will also be situations arising from time to time which are not covered by existing policy.

---

From Section #96.10 Precedent and Policy, of the ***Manual***.

---

The ***Manual*** states that Board officers may refer claims, with the approval of their manager, to the Director where it appears that a departure from policy is desirable or where there is no applicable policy.

An Executive Ombudsman does not provide an effective means of investigating complaints if he or she is limited to a consideration of whether or not existing policies, procedures, and practices of the organization have been followed. I would urge all organizations that are considering creating an Executive Ombudsman to ensure that the office is empowered to assess the fairness of the organization's policies, procedures, and practices. This will greatly improve the perception of the impartiality of the OmbudsOffice.

I find that the existing interpretation that the office of the WCBO cannot examine the fairness of policies, procedures and practices of the WCB, but only whether there has been consistent and fair application of these policies, procedures and practices, is inappropriate and unnecessarily restrictive. The following recommendation is intended to address this serious gap in the investigative mandate of the WCBO:

**Recommendation:**

**3-12 I recommend that the mandate of the WCBO include the power to consider and comment on the fairness of WCB policies, procedures and practices as a vital means of assessing and investigating complaints.**

### **3.9.4 Appellate Findings**

There is a contradiction in the written material from the office of the WCBO regarding its role in investigating the decisions of appeal bodies. The WCBO states that it investigates decisions of the WCB. The literature also says that the WCBO investigates appeal findings. However, some of the correspondence from that office suggests that there is no investigation if there is an appellate finding on a matter. This is demonstrated in the following samples of correspondence to complainants:

---

...On compensation matters, decisions of the Appeal Division are final and binding on all parties. Disagreement with their judgment is not sufficient to negate their findings. Thus, it is not the role of the Ombuds office to scrutinize the work of the Appeal Division, either to review the...decision or to direct them to reconsider additional information.

---

Disagreement with the judgment rendered by an appellate body does not fall within the jurisdiction of the WCBO. You appear to remain dissatisfied with the findings of the prior Commissioners.

---

Whether or not to grant the extension of time is a matter exclusively within the purview of the Appeal Division. If your request for an extension is denied, this office will assist you.

---

From these statements, it is unclear why the office of the WCBO has determined that it cannot investigate these types of decisions by the Appeal Division. It may be that the intent of the restrictions placed upon the role of the WCBO in

investigating the decisions of appellate bodies is tied to the concept of *functus officio*. This concept restricts an appellate body from reopening or reconsidering a matter unless there are legislated grounds to do so. Even when there are grounds to reopen and reconsider, these grounds may be very restrictive and narrow. However, in some cases, appellate decisions may be found to be so fundamentally flawed that they can in effect become null and void.

A Classical Ombudsman can apply tests similar to those utilized in a judicial review to determine whether there is sufficient basis to pursue investigation into a decision of an appeal body that is constituted by statute. A Classical Ombudsman considers whether there was an error of law, an unfair process, whether the facts appear correct, or whether the decision appears patently unreasonable. For example, in cases where a matter has been before a Medical Review Panel composed of independent medical specialists, there would need to be considerable question raised about the medical findings for a Classical Ombudsman to recommend a reconsideration of a decision. However, there have been a number of cases investigated by the Office of the Provincial Ombudsman involving issues such as the composition of the expert panels, the appropriateness of the specialty of the physicians on a panel, apprehensions of bias, ambiguity in the decision and the impact of new medical knowledge on an early Medical Review Panel certificate. In a number of cases, Medical Review Panel decisions were declared null and void because of the problems identified in the investigation by my Office. It is important to remember that the role of an ombudsman is to investigate, and not to serve as a level of appeal.

***Recommendation:***

***3-13 I recommend that the WCBO be given jurisdiction to make recommendations to reconsider laws and regulations, and that he or she investigate and make findings and recommendations about whether decisions, appellate or otherwise, and policies are contrary to law or unfair.***

### **3.9.5 Matters under Appeal**

#### **3.9.5.1 Matters under Appeal: the Classical Ombudsman**

Paragraph 11(1)(a) of the **Ombudsman Act** precludes my Office from investigating the merits of a case when there still exists a right of appeal of the merits of a case to a court or tribunal. This section reads as follows:

**11(1)** *This Act does not authorize the Ombudsman to investigate a decision, recommendation, act or omission*

(a) *in respect of which there is under an enactment a right of appeal or objection or a right to apply for a review on the merits of the case to a court or tribunal constituted by or under an enactment, until after that right of appeal, objection or application has been exercised or until after the time limit for the exercise of that right has expired,...*

#### **3.9.5.2 Matters under Appeal: the Executive Ombudsman**

The public information states that the WCBO will not investigate when there is a right of appeal. In some cases reviewed in this audit, it would appear that the office of the WCBO conducted investigations that were later discontinued on the basis that a right of appeal remained. In reviewing the dockets of the office, the rights of appeal that were eventually identified as the reason for discontinuing the investigation seem to have been available when the office of the WCBO decided to attempt to resolve some issues in dispute.

The WCB Management Survey indicated that many WCB Management officials are unclear as to when the WCBO investigates complaints and when it decides that it cannot or will not investigate a matter. The following is a sample of the comments we received from these officials regarding this issue:

---

The Ombudsman considers complaints of delays and inappropriate behaviour. The Ombudsman does not investigate claim-related issues.

---

...(The WCBO) declines when a reasonable decision has been given and issues can go to appeal.

---

I am not absolutely sure when they would decline other than if there was inconclusive evidence to support the decision being made.

---

I am unaware of declined cases.

---

Clarification is required. It should be after all avenues of appeal are exhausted.

---

The existing workers' compensation system includes a complex system of appeals and appeal levels. Final appeal decisions do not necessarily produce the closure and finality desired, but afford new opportunities for appeals of decisions associated with the implementation of the original decision. Many workers and employers grow weary and frustrated waiting for the appeal processes to grind out decisions in this often exasperating system. This is the context in which the WCBO attempts to promote fairness. Efforts to resolve disputes through the intervention of an Ombudsman (either Classical or Executive) can be frustrated by the web of appeals that may or may not constitute an adequate remedy to the complainant's concerns.

In some situations it is exceedingly difficult to determine when an investigation should be discontinued. In raising this issue, my intention is not to criticize the WCBO for investigating any particular decision made where an appeal remedy existed. Instead, it serves to emphasize that if dispute resolution remains a function of an Executive Ombudsman, guidelines need to be developed to establish when the Executive Ombudsman becomes involved in intervention while an appeal awaits. Such guidelines should also specify when complainants are to be referred by that office to the appeal system or alternative remedies.

**Recommendation:**

**3-14 I recommend that the WCBO, in order to promote clarity, develop and publish guidelines regarding his or her involvement in dispute resolution activities when appeal rights exist.**

### **3.9.6 Feedback Regarding the Mandate and Jurisdiction of the WCBO**

The WCB Management officials interviewed for this audit were generally unclear about the WCBO's mandate and jurisdiction, and about the authority under which the WCBO operates and makes recommendations.

In the survey of WCB Management officials, we received the following responses to our question asking "Is the role of the WCBO clear?"

---

Yes. I think it (the role of the WCBO) is clear but others have a different understanding. I don't know if my understanding is correct.

---

Not as clearly defined as I would like.

---

No, I don't think that the role of the WCBO is clear. Not that I realized it until now, but no, and I don't think staff are aware of the role either.

---

The current role is very limited...Yes, the role is clear, but I do however feel it could be expanded upon and improved upon.

---

Yes. The role is clear; actual implementation of the role is different.

---

No. Missing the end result re follow-up and implementation of decisions so it's not clear as to how their intervention differs (from) other types of interventions.

---

No. I would appreciate a clear description of their mandate and position they should be coming from.

---

While I think it is clear, it could be made clearer throughout the system.

---

In total, one-third of the Management officials surveyed believed that the role is not clear. However, a good majority of the WCB Directors and Senior Executives responded that the role of the WCBO is clear. With the WCB Directors and Senior Executives removed from the survey, almost half of WCB Managers indicated that the role is not clear.

Experienced WCB Management officials described the WCBO's role in the following terms:

---

I believe it (the office of the WCBO) was designed to review issues internally and make recommendations for resolution, particularly if law or policy were not followed.

---



---

To ensure that each client has received due process and consideration in line with accepted WCB policy and procedures.

---

A further reflection of the lack of clarity regarding the role of the WCBO was provided in reviewing the responses to a question in the WCB Management Survey. Based on the responses that we received to this question, it was apparent that many of those who had responded that they considered the role of the office of the WCBO to be clear, were in fact not clear about that role. As will be outlined in the next chapter regarding the independence and impartiality of the WCBO, many WCB Management officials could not identify to whom the WCBO reported.

The Complainant Survey demonstrated that many complainants who had used the services of the WCBO remained unclear as to its role and mandate, even after going to the office. This was demonstrated through their responses to questions regarding the role and mandate of the office of the WCBO and in their recommendations regarding that office. Some of the comments were as follows:

---

I would like to have the role made clear...If just a counsellor, let people know; if a watchdog, let people know that.

---



---

I don't really know what the WCBO mandate is but they should take an interest in workers' complaints, try to help them solve their problems...

---

Forty-eight per cent of complainants interviewed reported that the office of the WCBO had provided them with no explanation of what that office did.

Workers' representatives also provided interesting perspectives regarding the interpretation that the office of the WCBO had given to its mandate and jurisdiction.



---

As described to me, the office of the WCBO tries to ensure that the Board follows its policies and procedures.

---

The WCBO tends to limit its interpretation of its mandate. I am not sure why issues are beyond their (the WCBO's) mandate. There should be a broad interpretation of its mandate...There needs to be more clarity regarding the role and mandate of that office...There is no reason why this principle shouldn't be working, but it isn't. This may be a problem with the mandate.

---

We believe that the WCBO is increasingly being stonewalled by the WCB Management...Some (representatives) believe that the WCBO has been challenged and told to back off from investigating certain areas...The mandate needs to be defined...There is presently no public accountability regarding the fairness of WCB policies; there needs to be.

---

Most advocates are unclear as to whether the WCBO has any authority...or to whom he reports. The mandate of the WCBO is very unclear to most advocates...The existing structure is unsatisfactory...At present, the WCBO cannot cause anyone at the WCB much pain.

---

Many representatives also believed that if the WCBO reported directly to the Office of the British Columbia Ombudsman, the problems regarding the mandate of the WCBO would be remedied.

**Recommendation:**

**3-15 I recommend that the WCBO commit to developing an ongoing process of outreach and education regarding his or her mandate and jurisdiction. This educational initiative should be targeted to inform WCB staff and management as well as those outside the WCB who work in the workers' compensation field.**

### **3.10 Improving the Model**

The recommendations that I am making are intended to provide an Executive Ombudsman with a legislative mandate, investigative powers, duties and responsibilities similar to those held by a Classical Ombudsman. This objective could be accomplished by a number of different measures. Some jurisdictions have chosen to establish separate Officers of the Legislature to provide Ombudsman-like services in a specialized field. For example, there are environmental commissioners in New Zealand and Ontario established by legislation. In many locations specialized Ombudsman-like offices have been created by legislative action to handle complaints in the areas of police services, correctional services and childrens' services.

In the United States, a number of states have taken legislative action to create Executive OmbudsOffices to investigate complaints against Workers' Compensation Boards. For example, legislative amendments to the **Workers' Compensation Act** of Oregon created the Worker's Ombudsman – Workers' Compensation Board of Oregon in 1987. The amendments also apply to the more recently established Small Employer's Ombudsman-Workers' Compensation Board in that state. These individuals report to a State Director of a State of Oregon Department. There is no reporting relationship with anyone within the WCB of Oregon. In the State of Kentucky, legislative action was taken to create a specialized Ombudsman service for workers' compensation issues. The role of the Division of Ombudsman and Workers' Compensation Specialist Services seems different from that of the WCBO in BC. However, it is important to note that legislative action was taken by the State Legislature of Kentucky to establish that Division and distinguish it from other WCB offices.

There was a call at one time for a Labour Ombudsman in the province of British Columbia, and legislation drafted to create that position passed third reading in the Legislature. Although that legislation was never proclaimed, the Labour Ombudsman would not, in any event, have had jurisdiction on workers' compensation matters. There have also been positions entitled Ombudsman within BC at universities, colleges, hospitals and municipalities.

I should add that other authorities within my jurisdiction have instituted methods of addressing complaints prior to an investigation by my Office. For many of these authorities, the volume of complaints received has not warranted the creation of a special unit dedicated to the handling of complaints referred from my Office.

However, our Office has assisted wherever possible to encourage organizations to develop their own internal complaints processes as part of respecting the principles of administrative fairness and the rules of natural justice, and of working towards the goal of being ***"fair first."***

A different complaint process has been developed by the Insurance Corporation of British Columbia (ICBC), another authority that has generated a high volume of complaints to our Office. At ICBC, a special unit, the Ombudsman Referral Unit, responds to complaints referred by my Office. The Ombudsman Referral Unit investigates the complaints, usually relating to decisions, policies or procedures, in an impartial and objective manner, and seeks a resolution through a consultative relationship with the appropriate staff. It is conceivable that such units can be modified and improved upon to move closer on the continuum to an executive ombuds-like agency.

I have carefully considered a range of other models that could be employed to conduct independent and impartial investigations of complaints against the WCB.

I am of the opinion that the office of the WCBO should be maintained and that if reconstituted in accordance with the following recommendations the WCBO should proceed to have the name issue reconsidered.

***Recommendation:***

***3-16 I recommend that the WCB's Panel of Administrators utilize the extensive powers currently granted to it under the Workers' Compensation Act and enact by-laws to provide the WCBO with all the features listed here:***

- a. A clearly articulated mandate that has legislative authority (constitution, statute, by-law, ordinance);***
- b. Clearly entrenched competence and capacity to conduct thorough and impartial investigations;***
- c. Capacity to investigate on its own initiative;***
- d. Independence and impartiality;***
- e. Guaranteed functional and political independence from the legislative body who appoints and the public body the Ombudsman reviews.***  
***Independence is evidenced by:***
  - i. security of salary and tenure***
  - ii. rigorous appointment, reappointment and removal process***

- iii. **sufficient resources**
- iv. **authority to recruit, manage and terminate staff**
- v. **discretion to determine jurisdiction;**
- f. **Protection to conduct investigations on a confidential basis and to shield the Ombudsman from release of all information obtained during the course of work as Ombudsman except in accordance with the law;**
- g. **Duty to report to the governing body annually on the work of the office;**
- h. **Power to report publicly on the work of the office, individual complaints and systemic investigations;**
- i. **Commitment to educate the public body(ies) about the principles of administrative fairness and the rules of natural justice.**

## ***4.0 Independence and Impartiality***

During the OmbudsAudit surveys and interviews, the single most frequent concern that was raised by complainants, representatives and WCB officials regarded the extent to which the office of the WCBO is truly independent from the WCB. Many of the recommendations I received from complainants interviewed during the OmbudsAudit were directed at creating more of an arm's length relationship between the WCBO and the WCB. Some complainants and representatives doubted that the office of the WCBO could perform an independent and impartial review of WCB complaints if that office continued to have any reporting relationship within the WCB.

When the position of WCBO in British Columbia was created, it was intended to be an Executive Ombudsman within the structure of the WCB. There are many ways that the office could be made more independent from the WCB.

As I described in Chapter 1 of this Report, it is important to view the WCBO as evolving, and in need of being reevaluated during various stages of its evolution. Without significant changes on many fronts, the concerns that have been expressed about the independence and impartiality of the WCBO will continue. In this chapter, I examine procedures that will provide increased confidence in the independence and impartiality of that office.

I want to be clear and repeat that these comments are not about the personal integrity of the WCBO himself. Despite reservations about the impartiality and independence of the review that they had received, a very high percentage of complainants advised us that they were treated with dignity and respect by the WCBO. Many outside representatives and WCB Managers also spoke very favourably of their respect for the personal integrity of the incumbent WCBO. The high rating on this issue cut across all segments of the complainants who were surveyed. Even those complainants who were very dissatisfied with the office of the WCBO and called for its dismantling often spoke well of the personal integrity and commitment of the WCBO and his staff. Frequently, we heard the following type of statement:

---

I hold nothing against the WCBO; I know he tried his best to do what he could. He treated me with dignity and respect, although he could have returned my calls faster. He didn't have the powers or the resources to take on the WCB on my issue.

---

## 4.1 The Importance of Independence and Impartiality

Independence and impartiality are at the heart of the effectiveness of an ombudsman. When individuals require the services of an ombudsman, it is important that they have exhausted all existing ways of resolving their concerns. In order to reach this stage, they have often interacted with many representatives of the organization with whom they are disputing a matter. At this point, they need to feel confident that the OmbudsOffice involved in the final review of their complaint is independent from and not controlled by the organization that they view as the cause of their grievance. They need to feel that this final review is objective and unbiased. The legislation creating a Classical Ombudsman instils confidence in the independence and impartiality of that Office. An Executive Ombudsman faces a more formidable challenge in convincing individuals that they will receive an independent and impartial investigation of their concerns because of the actual and perceived proximity of the Executive Ombudsman to the host organization.

In my review of the literature regarding Executive OmbudsOffices, concern about the extent to which an Executive Ombudsman is independent from the organization he or she investigates is a recurring theme. Professor Roy Gregory of the Centre for Ombudsman Studies at the University of Reading in Great Britain devoted considerable attention to questions of independence and impartiality in his 1994 paper published in *The Ombudsman Journal*. In that paper, he observed that there "is a widely held view among ombudsmen and ombudsman scholars" that the two characteristics "impartiality and independence and the relationship between them, are clearly of fundamental importance to the success of ombudsman schemes." (*Building an Ombudsman Scheme: Statutory Provision and Operating Practices, The Ombudsman Journal*, Number 12 1994, p.85).

Ombudsman in other Canadian provinces have also noted the importance of independence and impartiality. The Ombudsman for the Province of Ontario reported that a survey of public opinion commissioned by her Office revealed the absolute importance of independence to the Ombudsman function.

*It is at the heart of the Ombudsman's essential purpose that she be independent of government, and without bias in the conduct of her investigations... This independence and neutrality must both be demonstrated and appear to be demonstrated in every act, since the survey I conducted indicates the Ontario*

*public is sceptical that the Ombudsman really is independent. (The Ontario Ombudsman's Annual Report 1990-1991, p. 6)*

Many of the questions regarding the role of an Executive WCBO and the relationship between a Classical Ombudsman and an Executive WCBO were debated in the Province of Manitoba when a WCBO was created in 1989. There was considerable controversy over the use of the title "ombudsman" by any person other than the Ombudsman for that province. The Manitoba Ombudsman argued successfully against the use of the name by showing that the WCB position did not have the identifying features of a Classical Ombudsman: independence, the legislated authority to investigate a matter and the power to make impartial recommendations.

*I do not feel it is in the public interest to administratively establish positions entitled "Ombudsman" within departments or agencies of the Provincial Government as the proliferation of this title may lead to confusion and misconceptions. The important characteristics of the Manitoba Ombudsman which are recognized as being traditional in the Ombudsman field are:*

- 1. The Ombudsman is appointed by an act of the Legislature.*
- 2. The Ombudsman is an independent Officer of the Legislative Assembly who does not report to any particular Minister or the government but rather to the Legislative Assembly.*
- 3. The Ombudsman has the powers of a Commissioner appointed under Part V of the **Manitoba Evidence Act**, which enables him to perform thorough, impartial investigations following which recommendations about redress of valid grievances may be made.*
- 4. The Ombudsman may report publicly to bring public scrutiny to government actions...*

*In closing, while we may be raising concern about the establishment of an "Ombudsman" within the Workers' Compensation Board, our office certainly supports the establishment of positions within departments or agencies to investigate and respond to complaints and liaise between the public and their operations. We would suggest however that other departments and agencies who create this role reflect the differences in its role and that of a Legislative Ombudsman by the title of the position, such as, Commissioner of Complaints, Executive Review Officer, Vice-President Customer Services, etc. ...*

*(Ombudsman of Manitoba, 1989 Annual Report pp. 12, 13)*

Following the 1989 Annual Report of the Manitoba Ombudsman, the title of the position within the Manitoba Workers' Compensation Board was changed from the "WCBO" to the "Fair Practices Advocate."

When the office of the WCBO was created in British Columbia it was always anticipated that the Executive Ombudsman position proposed to WCB would need to be refined over time. The creation of an Executive OmbudsOffice should be viewed as the launching point in an ongoing journey to promote administrative fairness and establish an available remedy within an organization, possibly an Executive OmbudsOffice.

I believe that it is important to consider our investigation in the context of developments that have been occurring in the Ombudsman community over recent years. There is a tendency for those working in Classical OmbudsOffices that have been in existence for two decades or more to believe that their brand of Ombudsmanship represents the genuine model and that more recent variations created around the world must look to them for guidance. However, some countries that have only recently created an Ombudsman position have incorporated in their nation's Constitutions the right to an independent review of complaints by an impartial Ombudsman. Such developments are both exciting and challenging for the rest of us. The goal posts for even Classical Ombudsman have moved. Classical Ombudsman cannot carry on business unaltered by such winds of change. This also holds true regarding the establishment of Executive Ombudsman offices. It would be naive to think that such offices will not spring up across the globe in developed and developing nations, and in both the public and the private sector. What is important is that the use of the word accurately reflect the work done by the office and that the Classical Ombudsman assume a legislated role in preserving its meaning and controlling its use.

Public bodies may establish available remedies that realize standards of administrative fairness and are considered to be "adequate" by the Ombudsman. However, these remedies may not necessarily meet the standards required to assume the role and mandate of an ombudsman. The title Ombudsman is held by the person responsible for protecting and promoting a person's right to be heard by government and to be treated fairly. The designation, ombudsman, should be used only when the titleholder can demonstrate compliance with a set of clearly articulated principles that have been developed over time by law and by custom. The title should, therefore, be protected legislatively to ensure that it is used appropriately. The principal statutory Ombudsman should be responsible to declare whether an agency embodies the principles and core elements that would entitle it to bear the name.

I have recommended in Chapter 1, therefore, that the WCBO continue to use the title Ombudsman if the recommendations in this Report are implemented. If the



recommendations are not implemented, the name should be changed to the WCB Fair Practices Commissioner. I find that in order to ensure appropriate use of the name, there is an important role for the Classical Ombudsman within the jurisdiction to control the use of the name "Ombudsman."

**Recommendation:**

**4-1** *I recommend that the government of British Columbia, and in particular the Attorney General, reconsider the Ombudsman Act with a view to an amendment similar in kind to the legislative provision in New Zealand, as follows:*

*Protection of name—No person, other than an Ombudsman appointed under this Act, may use the name "Ombudsman" in connection with any business, trade, or occupation or the provision of any service, whether for payment or otherwise, or hold himself, herself, or itself out to be an Ombudsman except pursuant to an Act or with the prior written consent of the Provincial Ombudsman.*

## ***4.2 The Appropriate Communication Role to Promote Independence and Impartiality***

Those who approach the office of the WCBO frequently ask for information that will help them to understand various aspects of the workers' compensation system and the WCB's handling of their claim. In assessing whether or not to provide such information, the office of the WCBO must weigh the benefits of providing quick and helpful information in the office's possession against the perception that the office is acting as an arm of the WCB in providing such information.

A simple request for information about the role of the office of the WCBO can be dealt with quickly and effectively. This occurs frequently on the initiative of the WCBO. Although an Executive OmbudsOffice needs to be careful about extending its provision of information beyond the scope of its own office, the following example strikes me as an appropriate tailoring of the Classical Ombudsman concept to an Executive OmbudsOffice.

---

A worker contacted the office of the WCBO because he was concerned about the time that it had taken to obtain a review of his medical condition by a Medical Review Panel (MRP). He also inquired as to whether or not he would need to submit to a physical examination as part of the MRP process. As a date had recently been set for the MRP, the office of the WCBO advised the worker of this information. The office also noted that the MRP process is designed to reach a decision regarding the medical dispute. Consequently a physical examination by the medical review panel was an integral part of this process. The worker was satisfied with this explanation provided to him on the same day that he contacted the office of the WCBO.

---

While this may be a totally appropriate provision of helpful information by an Executive OmbudsOffice, reflect upon the following other situations where the office of the WCBO provided information to complainants.

---

A worker contacted the office of the WCBO because he was concerned that he had not received any funds from the WCB, even though he believed that his claims had been accepted. The office contacted the WCB Manager responsible for this area and learned that the claim had just been accepted and two cheques had been forwarded to this individual. After the office of the WCBO had closed its file on this matter, the worker contacted the office of the WCBO as he still had not received any funds from the WCB. The representative of the office of the WCBO reviewed the WCB's electronic file

---

and advised the worker directly that his claim had been accepted the previous day and that two cheques had been sent to him.

---

An agent contacted the WCBO with an inquiry about the payment of substitutes during the period of a worker's disability. Without consulting with anyone from the WCB, the WCBO faxed the agent a copy of the relevant section of the Rehabilitation Services and Claims Manual. He also advised that the claimant's pension was being reviewed and that new evidence on wages would be considered after the pension assessment had been completed.

---

The role of an Executive Ombudsman in these types of situations requires careful reflection.

In the first example, the action satisfied the worker's immediate concern. There is no denying that the approach taken by the office of the WCBO expedited the handling of his request. However, it would appear that such activity by the office of the WCBO may inappropriately place that office in the role of a communicator of WCB decisions and actions to a WCB claimant.

This raises an interesting question for an Executive Ombudsman. If a Classical Ombudsman's Office is organized such that a group of staff become familiar with a given subject matter, there will be situations where there appears little need to consult with the organization involved to deal with some of the requests that come to that office. The Classical OmbudsOffice may tend to limit those areas where no consultation is deemed necessary to ensure that misinformation is not conveyed to complainants. Perhaps departures from the Classical Ombudsman model may be appropriate when the Executive OmbudsOffice official has little doubt about the accuracy of the information that he or she is conveying. Based on the number of complaints that Executive OmbudsOffices receive and the resources at their disposal, this may be a necessary coping mechanism.

Unfortunately, there are inherent risks in accepting that Executive OmbudsOffices have a role as direct providers of information about the organization that they are investigating. The ability of an Executive OmbudsOffice to investigate complaints about the fairness of an organization's policies may be reduced when representatives of that office are giving information about the policies of the organization directly to complainants. Every time the representative of an Executive OmbudsOffice provides direct information about the policies of the organization that his or her office is investigating there is the potential for erosion of the credibility of that office as an independent investigator of the organization. Since the OmbudsAudit survey indicates that complainants are already often

suspicious about the independence of the WCBO, there is a danger that complainants will view such activity as confirmation that they cannot expect a fair review of their concerns. As this is by far the most frequent theme raised in the literature about Executive Ombudsman and in the hearings that I conducted as part of this OmbudsAudit, this issue deserves careful consideration.

The second example raises interesting questions regarding the differences between a Classical and an Executive Ombudsman. While it may be inappropriate for a Classical Ombudsman to provide sections of manuals to agents, perhaps it is appropriate for an Executive Ombudsman, equipped with the current manuals, to provide such information from the organization's manuals. If such activity represents an acceptable tailoring of the ombudsman function to the needs of an Executive OmbudsOffice, it is important to determine how far the Executive OmbudsOffice can extend in explaining the workings of the system that it investigates.

Consider the following example:

---

A matter was investigated by the office of the WCBO and a closing letter was issued to the complainant. In that letter, the office of the WCBO quoted the relevant section of the WCB's Rehabilitation Services and Claims Manual. The office did not notify the WCB that it was investigating this matter, nor did it seek any input from the WCB. The office of the WCBO did review the Board's electronic file on this claim. The letter concluded with the statement that "it is consistent with policy and practice for the Board staff to request long-term earnings information from confirmatory sources."

---

In this case, the WCB was not notified that the office of the WCBO was investigating this matter. The WCB was not informed that the office of the WCBO was citing a section of a WCB Manual to explain a WCB decision. The WCB was unaware that the complainant had been advised that the actions taken by the WCB were consistent with WCB policy and practice. The office of the WCBO assumes the role of WCB spokesperson when it does not choose to ask the WCB for its position, and issues a finding itself without any notification or input from the WCB.

The concerns expressed by complainants and their advocates about the true independence of the WCBO become magnified when one considers that the office does not view its mandate as extending to complaints about the fairness of WCB

policies. The following quote from a WCB Manager reflects the thinking within the WCB regarding the role that the office of the WCBO should be playing at the WCB.

---

The WCBO's staff appear to have a more thorough knowledge of WCB law and policy (than the Provincial Office). This enables them to respond to a greater number of complaints without involving the local manager.

---

For WCB Managers, one of the main benefits of the WCBO has been to "effectively weed out complaints with no substance." WCB Managers and the WCBO believe that it is appropriate and indeed a principal function of the WCBO to respond to complaints without ever needing to consult with the local WCB Manager.

As was noted above, the office of the WCBO has attempted to tailor its reporting system to its perception of the needs of the WCB. For this reason, a system of closing categories was developed whose sole design would appear to be one of tracking the extent to which the office of the WCBO provides "value added" to the WCB. The office of the WCBO has made use of these closing statistics to demonstrate that it is now dealing with far more of the complainants that come to that office without ever having to consult with the WCB. During the period from April to December of 1996, 53% of dockets required some form of consultation with WCB representatives. This is referred to at page 6 of the WCBO's 1997 Annual Report. As the office of the WCBO has evolved, it has consulted with the WCB less frequently, 27.95% of occasions for 1997 as reported in the WCBO's 1997 Annual Report. This trend has been viewed favourably by the office of the WCBO as an appropriate method of demonstrating that it is providing "value added" to the WCB. There is no doubt that this approach has been successful in attracting respect within the WCB for the office of the WCBO.

However, an Executive OmbudsOffice should ensure that its systems reinforce the independence and impartiality of its review of complaints. Beyond the occasional provision of publicly available information, an Executive OmbudsOffice should take all measures possible to ensure that no one has the perception that it is speaking on behalf of the organization that it is established to investigate.

I should note that Classical OmbudsOffices face similar challenges. For example, my staff often acquire considerable expertise in the subject matter that they investigate. On occasion, they could no doubt answer the questions raised by complainants in an effective and expeditious manner. However, an experienced

Classical OmbudsOffice representative would recognize that such explanations can be provided only by those who represent the organization under investigation.

If an Executive OmbudsOffice is to be perceived as an independent third-party reviewer of concerns, there should be very few situations where it does not consult with the organization that it investigates to obtain the organization's official position. Executive OmbudsOffices should take whatever measures possible to reduce the allegation that they act on behalf of the organization that they are investigating. In my opinion, if they do not consult with organizational representatives, they are not striving to be third-party neutrals providing an independent and impartial service. They are, in reality, complaints bureaus or customer service sections of an organization as a whole. Both of these units are helpful in resolving disputes. However, they should not be considered or referred to as Executive OmbudsOffices.

In many areas, I recognize that Classical OmbudsOffices have been slow to accept the changes that have occurred in the Ombudsman landscape in recent years, with the proliferation of special purpose and other Executive OmbudsOffices. These changes also present exciting opportunities to improve on the Classical Ombudsman concept. However, there remain features of the Classical Ombudsman model that could and should be utilized by Executive OmbudsOffices to support their independence from the organization they are investigating. Consequently, I believe that Executive OmbudsOffices should move as quickly as possible to a Classical Ombudsman model of service delivery regarding this issue of consultation with staff of the organization being investigated.

The issue of independence and impartiality is vital to the success of the Executive Ombudsman function. In considering the type of Ombudsman model to install, Professor Gregory describes issues of impartiality and independence as the first question to consider.

*There is however, a further important point to be underlined about impartiality and independence. In this connection, appearances matter, and probably matter almost as much as substance. (Building an Ombudsman Scheme, p. 89).*

Although each Ombudsman will no doubt view this matter differently, the OmbudsAudit convinces me that the direct provision of information by an Executive OmbudsOffice detracts from the public's perception of that office as

independent from the organization that it investigates. At one level, it may seem difficult to representatives of Executive OmbudsOffices to refer individuals with questions to others when they possess the answers themselves. However, it is important that an Executive OmbudsOffice take all measures possible to emphasize that it has no on-line administrative or program-specific duties as a representative of the organization that it is investigating. The following recommendations serve to strengthen the independence of an Executive OmbudsOffice from the organization that it investigates.

**Recommendations:**

- 4-2** *I recommend that the WCBO and his or her staff avoid any practices or activities that could be perceived as placing them in the position of speaking on behalf of the WCB.*
- 4-3** *I recommend that the WCBO advise the WCB of each substantive complaint received about WCB services and obtain and document the WCB's position regarding such complaints before he or she finalizes the handling of the complaints.*
- 4-4** *I recommend that the WCBO obtain explanations of WCB policies, procedures and practices from WCB representatives before referring complainants to the appropriate WCB official. If such explanations are unclear, the WCBO should investigate the lack of clarity of such explanations.*
- 4-5** *I recommend that the WCBO avoid providing information that could and should be provided by WCB officials who have the on-line responsibility to do so.*

### **4.3 Hallmarks of the Independence of an Executive Ombudsman**

I am outlining a number of hallmarks that can be used to measure or enhance the independence of an Executive Ombudsman from the organization it investigates.

#### **4.3.1 Reporting Relationship and Security of Tenure**

In the case of a Classical Ombudsman, the terms and conditions of the appointment, duration of service, remuneration and termination are set out in legislation. In British Columbia, s. 2 of the **Ombudsman Act** establishes the process whereby the Ombudsman is appointed.

As an Officer of the Legislature, a Classical Ombudsman is not accountable to or under the direction of the executive arm of government. The Ombudsman is appointed for a set term and has, by statute, a salary equivalent to that of the Chief Justice of the Provincial Court. She or he is under a duty to table an Annual Report with the Legislative Assembly. The Ombudsman may table various special or public reports, or go public, as she or he considers necessary to pursue an Ombudsman matter. She or he can communicate a report to the Lieutenant Governor in Council, where appropriate. These legislative provisions afford the independence to investigate matters without fear of reprisal as the Ombudsman sees fit. The Classical Ombudsman can make decisions to lease space, hire staff and allocate resources and services as she or he deems appropriate.

There are seldom analogous legislative provisions in place regarding an Executive Ombudsman. While it may be difficult to create legislative provisions that would provide the same level of independence for an Executive Ombudsman, it is very important that measures are in place to protect an Executive Ombudsman from arbitrary termination.

The WCBO is an employee of the WCB, reporting to its President. An article in a 1996 internal Board publication, **Board Talk**, outlined the appointment of the incumbent WCBO. The article included the following statement:

---

The ombudsman is appointed by the Senior Executive Committee and reports directly to the president, but cannot be removed without the approval of the Panel of Administrators. "That gives me the latitude to say things that need to be said, even if they're not popular," [said the incumbent].

---



A number of complainants and representatives expressed concerns regarding the method used to appoint an ombudsman for the WCB and questioned the fairness of selecting a long-time WCB official for such a role. For example, complainants provided the following observations:

---

...The WCBO should not be a former officer of the WCB.

---

The WCB should not pay or appoint the WCBO. He should be appointed (from) outside the provincial sector.

---

I am not convinced that the position should never be held by someone with long experience in the host organization. What is important is how the person is chosen.

The provision for termination of the WCBO by the Panel of Administrators provides some protection of the independence of the WCBO, albeit not legislative protection. To the best of my knowledge, any conflict between the work of the WCBO and the executive branch of the WCB has not reached the Panel of Administrators under the present structure, despite the fact that the WCBO can report directly to the Panel.

The independence and impartiality of an Executive OmbudsOffice can be better maintained and demonstrated if there is a reporting arrangement outside the normal administrative channels. The body to whom it reports must have the authority to impose changes stemming from an Executive Ombudsman's recommendations or reports. The existing structure of the WCB provides such a body in the form of the Panel of Administrators. I have, therefore, recommended that the WCBO report directly to the Panel of Administrators or whatever governance body heads the WCB in the future.

#### **Recommendations:**

- 4-6 I recommend that in future an independent committee selected from the Panel of Administrators select and appoint the WCBO for a time certain.**
- 4-7 I recommend that the Panel of Administrators prepare by-laws regarding the terms and conditions for the WCBO, including selection by committee, setting terms of office, termination for cause or incapacity, benefits and salary set and commensurate with responsibility, and power to appoint and remove staff for his or her office.**

### 4.3.2 Confidentiality

In those jurisdictions that have freedom of information and protection of privacy legislation, exemptions have usually been provided to Classical Ombudsman. Decisions rendered by the Information and Privacy Commissioner of BC have confirmed that it is not possible to access records relating to the work of my Office through the **Freedom of Information and Protection of Privacy Act**, RSBC 1996 (**FIPPA**). This provision is established in para. 3(1)(c) of **FIPPA**.

**3(1)** *This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:...*

*(c) a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;...*

Section 9 of the **Ombudsman Act** also addresses confidentiality and reads as follows:

- 9(1)** *Before beginning to perform the duties of the office, the Ombudsman must take an oath before the Clerk of the Legislative Assembly*
- (a) to faithfully and impartially exercise the powers and perform the duties of the office, and*
  - (b) not to divulge any information received by her under this Act, except if permitted by this Act.*
- (2)** *A person on the staff of the Ombudsman must, before beginning to perform duties, take an oath before the Ombudsman not to divulge any information received under this Act except if permitted by this Act.*
- (3)** *For the purposes of subsection (2) the Ombudsman is a commissioner for taking affidavits for British Columbia.*
- (4)** *The Ombudsman and every person on the staff of the Ombudsman must, subject to this Act, maintain confidentiality in respect of all matters that come to their knowledge in performing their duties under this Act.*
- (5)** *The Ombudsman or a person holding an office or appointment under the Ombudsman must not give or be compelled to give evidence in a court or in proceedings of a judicial nature in respect of anything coming to his or her knowledge in the exercise of duties under this Act, except*
- (a) to enforce the Ombudsman's powers of investigation,*
  - (b) to enforce compliance with this Act, or with respect to a trial of a person for perjury.*

- (6) *An investigation under this Act shall be conducted in private unless the Ombudsman considers that there are special circumstances in which public knowledge is essential in order to further the investigation.*
- (7) *Despite this section, the Ombudsman may disclose or authorize a member of his or her staff to disclose a matter that, in the opinion of the Ombudsman, is necessary to*
  - (a) *further an investigation;*
  - (b) *prosecute an offence under this Act; or*
  - (c) *establish grounds for conclusions and recommendations made in a report under this Act.*

Before the creation of the office of the WCBO was announced, the issue of confidentiality of records was examined by the WCB. Board staff surveyed the operations of a number of Executive OmbudsOffices in Canada and the United States. It was determined that in those jurisdictions that had freedom of information and protection of privacy legislation, most of these offices had either specific provisions that excluded them from such legislation or had other reason to believe that they were excluded from such provisions. In many instances, this remains of major concern to many OmbudsOffices. As early as January 1996, the WCB recognized that it would be advisable to obtain a legislative amendment to exclude the newly forming Executive OmbudsOffice at WCB from **FIPPA**.

When the office of the WCBO was created, the press release stated that complaints to that office would be treated as confidential. The current WCB web site also states that all contacts with the office of the WCBO are confidential. However, the issue of **Board Talk** announcing the creation of the office states:

---

As the WCBO, [the incumbent] remains a Board employee, and is subject to the ***Freedom of Information and Protection of Privacy Act***.

---

This information was also noted in the following section of a reporting memo from the WCBO to the President of WCB in 1997.

---

***FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT  
(FIPPA) AND THE OFFICE OF THE WCBO***

The office of the WCBO is not exempt from **FIPPA**. Like other WCB departments, the records of the WCBO are records of a public body and upon request are submitted to the Freedom of Information Office of the WCB for disclosure in compliance with **FIPPA**.

---

The records of the Office of the Provincial Ombudsman are not captured by **FIPPA**. An exclusion is contained in s. 9 of the **Ombudsman Act**.

If it is felt that the records of the WCBO should be excluded a specific amendment would have to be made to the **WC Act**.

---

This matter also attracted the interest of the Legislative Assembly as is evidenced in the following excerpt from Hansard:

---

**L. Reid:** ...The second issue I want to raise with respect to [the incumbent] is around the confidentiality issue. As the minister is aware, if you were to approach the provincial ombudsman's office, Dulcie McCallum's office, the information that you would share directly with that office would not be open to requests under freedom of information. The same parameter, if you will, does not exist for the internal ombudsman. I think the minister can appreciate that that's a huge concern for clients, for customers, of the Workers' Compensation Board. They cannot share their information if indeed it is going to be open to public scrutiny, because this is often private, very personal information.

My question is to the minister: is he in a position to put in place the same statute limitations, if you will, around the internal ombudsman of the Workers' Compensation Board as are currently in place with the provincial Ombudsman's office?

**Hon. M. Sihota:** My plan would be to seek the advice of [the incumbent] about this matter.

(British Columbia, Legislative Assembly, **Debates of the Legislative Assembly**, Volume 2, Number 16 [August 8, 1996] at 1652)

---

Although plans were initially set in motion to obtain this amendment, no such amendment has yet been proposed or put in place.

The inadequacy in the present legislation presents a number of interesting challenges for the office of the WCBO. Since all other information about an individual worker that is relevant becomes part of a claim file, the extent to which the WCBO is able to maintain confidentiality is a measure of its separation from the regular operations of the Board. These problems also lead to a somewhat confusing method of communication in which WCB Management are advised that the office of the WCBO does not believe that such communication should be included with the Board's file. Efforts to separate communication with

the office of the WCBO may or may not be successful. In addition, the lack of a clear exemption from **FIPPA** has caused the office of the WCBO to adopt the following measures outlined in the 1997 memo from the WCBO to the President of WCB noted above:

---

In order to protect the personal information and privacy of individuals, certain initiatives have been undertaken. The records created in the office of the WCBO are very brief. They chronicle general events and use generic job titles rather than individual names to describe contact etc. All records are subject to the protection granted under **FIPPA** and protection under s. 95 of the **WC Act**.

---

These operational practices were adopted as a response to the absence of a specific exclusion from the provisions of **FIPPA**. Since this memo was issued, the Docket Review noted a trend to more complete record keeping by the office of the WCBO although that has not always been the case. As a general observation, when record keeping is "very brief," follow-up becomes difficult, as does the accurate identification of trends and patterns to complaints.

The office of the WCBO has attempted to protect confidentiality by seeking exclusion from the disclosure provisions of **FIPPA**. The WCBO has relied thus far on my Office's exclusion from **FIPPA** to prevent access to the records of the WCBO, although there is no statutory protection for this exemption. As there is no formal delegation of any powers from myself as Ombudsman to the WCBO and no formal reporting or statutory relationship, I believe that the original proposal to obtain a legislative amendment is sound and should be addressed quickly.

Confidentiality protects the investigative process and those who are a part of or party to it. Embedded in the search for an understanding and resolution of processes is a need for frankness that can best be protected by the maintenance of strict confidentiality. Adherence by the WCBO to strict confidentiality must be respected and complemented by a statutory protection. Confidentiality protection enables many to come forward with valuable information who may otherwise be reluctant to do so.

Section 95 of the **Workers' Compensation Act** requires "secrecy" in respect to matters that come to the attention of officers and employees of the Board and, so far as it goes, it is an important protection for those whose information is held by the Board. It does not preclude disclosure in the appellate system of the Board and it is also subordinate to **FIPPA**.

Not much of the work of the WCBO is likely to be subject to general disclosure under the access process in **FIPPA**. That statute mandates that personal privacy and third party business interests be excepted from disclosure (ss. 21 and 22) and legal advice and law enforcement documents may also be withheld from disclosure (ss. 14 and 15). The WCBO has information related to identifiable individuals, such as claim or injury information, and to business enterprises, such as assessment rating information. The WCBO may also receive legal advice and will accrue information that could lead to law enforcement, such as penalties and sanctions. It should be possible, therefore, to protect the WCBO's records from disclosure regarding general access requests. However, when individuals seek access to information about themselves, the situation may be more complex. Some information may have to be released since decisions to withhold by the WCBO are subject to review by the Information and Privacy Commissioner.

**Recommendations:**

- 4-8** *I recommend that the by-law creating the WCBO and his or her office include a section indicating that he or she must maintain strict confidentiality in respect to all information collected in the course of performing his or her functions.*
- 4-9** *I recommend that the WCB consider seeking an amendment to the Workers' Compensation Act that would protect the confidentiality in all of the work of the WCBO; or in the alternative, I recommend that the Panel of Administrators seek an amendment that the WCBO be excluded from the provisions of the Freedom of Information and Protection of Privacy Act.*
- 4-10** *I recommend that the WCB and the WCBO clarify all information made available to the public regarding the confidentiality of the services provided by the WCBO.*

### **4.3.3 Reporting of Investigations**

In chapter 6, I will discuss in detail the reporting requirements and practices of the Classical and the Executive Ombudsman. The use of annual, public or special reports shows the public bodies, their staff and the general public that the office of the WCBO is able to stand apart and give critical comment to an agency or authority, if necessary. The reporting function highlights the unique and independent position of the WCBO.

The profile of the OmbudsOffice gives weight, in part, to its reports and

recommendations. It is clear from this Audit that the work of the office of the WCBO is not widely known or recognized, and that the work and recommendations of the WCBO have not had wide circulation, even within the WCB itself. The publication of a separate 1997 Annual Report in the fall of 1998 is a step forward in this regard. The reporting issue is also more broadly discussed in chapters to follow.

#### **4.3.4 Practice and Procedures Consistent with Role**

An Executive OmbudsOffice must also ensure that its role and function are in effect and in appearance distinct from those of the authority it investigates. This distinction will delineate the practices and procedures undertaken as an ombudsman, as opposed to those of the authority.

Professor Gregory offered the following observations:

---

It might be argued, of course, that some ombudsmen are not outside the hierarchy of command and control. They are virtually officials of the authorities they investigate. (*Building an Ombudsman Scheme*, p. 109)

---

Prior to the creation of the office of the WCBO, my Office and the WCB developed an effective liaison system. Staff of my Office were able to contact a key person within the WCB who could inform my investigating staff of developments in cases of individuals who had lodged complaints to my Office. The contact person was often able to play a pivotal role in obtaining definitive statements from the WCB regarding matters of concern to complainants. The WCB liaison person was also critical in ensuring that my Office received satisfactory service regarding requests for information from the WCB. Many complaints to my Office were resolved with the assistance of the WCB liaison person.

Although the volume of WCB complaints investigated by my Office certainly decreased with the establishment of the office of the WCBO, individuals continued to approach my Office with concerns regarding WCB matters. My Office has received 1,653 complaints about the WCB since the creation of the office of the WCBO. Of those complaints, 113 were lodged by individuals who returned to my Office after contacting the office of the WCBO. For some of these individuals, the office of the WCBO did not represent an adequate remedy for their concerns. Others approached my Office with complaints about the delays encountered in obtaining a response from the WCBO. Others still returned to my Office because

the WCBO's review of the matter in dispute had not resolved their concerns. The specifics of the 113 cases that returned to my Office will, because of confidentiality requirements, be dealt with in my usual course of reporting to the authority and will not form part of this Report.

Based on the experience of the first two years of the office of the WCBO, it appears that our decision to abandon the effective liaison system that had been established with the WCB was ill advised. Such a position is still necessary for those complaints that my Office investigates, which tend to be the most complex and involved cases that remain unresolved. Without a liaison person in place, our staff made general requests to the office of the WCBO to obtain basic information on complaints that did not necessarily involve or appropriately engage the office of the WCBO. This practice is not consistent with my general observation that an Executive OmbudsOffice needs to reject any functions that can and should be performed by those responsible within the organization that it investigates, including a liaison position.

As a result of the OmbudsAudit, we have learned how important it is, when an organization establishes an Executive OmbudsOffice, to retain a liaison person within the organization for contact with the Classical OmbudsOffice. If no such liaison person exists, designating such a person at that time would strengthen the independence of the newly establishing Executive OmbudsOffice. This action would ensure that the Office of the Provincial Ombudsman distinguishes between an organizational liaison person and the representative of the Executive OmbudsOffice. Such action is necessary to reinforce the independence of the Executive OmbudsOffice. Confidence in the independence of an Executive Ombudsman is weakened when he or she performs duties that should be performed more appropriately by the host organization.

The office of the WCBO may be asked for assistance from other agencies or staff about matters that do not fall within its prescribed role. Such requests should be addressed through regular channels within the WCB. It is important that the independence of the office of the WCBO be upheld in all circumstances.

**Recommendation:**

**4-11 I recommend that the WCB reestablish a liaison contact for the British Columbia Ombudsman's Office to ensure that requests for information or general inquiries pertaining to regular WCB administration be referred to appropriate line staff through the liaison contact.**



### **4.3.5 Physical Separation from the WCB**

Distance from government is an important safeguard for the independence and impartiality of a Classical Ombudsman. For that reason, most Classical Ombudsmen have chosen to locate on premises that emphasize their physical separation from the authorities that they investigate. The degree to which an Executive OmbudsOffice is seen as removed and distant from the body it investigates is a factor in gaining the confidence of complainants.

The office of the WCBO is located in the basement of the head office of the WCB, in an area not frequented by the majority of line staff. The current WCBO has worked hard to maintain a separate space within the WCB, insisting on closed and walled offices with a security system to protect confidentiality. This enclosed space for the office of the WCBO was achieved at a time when much of the Board was being reorganized into offices separated only by small partitions. These efforts are to be commended.

There are some advantages to situating an Executive OmbudsOffice within the administrative centre of the organization it investigates. In this location, the Executive Ombudsman is able to interview appropriate staff and access files easily during investigations or enquiries. However, some complainants and representatives questioned the wisdom of locating the office of the WCBO within the head office of the WCB where its employees share parking lots, cafeterias and social connections with colleagues whom they are investigating.

Workers' Advisers Services and Employers' Advisers Services of the Ministry of Labour are two organizations that rely on frequent contact with the WCB from leased offices near the head office of the WCB. The physical and structural separation of those agencies from the WCB has been helpful in convincing workers and employers that they are distinct from the WCB. It appears to me that the location of the office of the WCBO within the corporate headquarters of the WCB does not convey any sense of separation from the WCB and does not reinforce that office's independence from the organization.

#### **Recommendation:**

**4-12 I recommend that the WCB provide the WCBO with his or her own office space separate from any WCB-occupied property.**

#### **4.3.6 Administrative Separation from the WCB**

The Classical Ombudsman is wary of utilizing systems support, legal services, financial services, human resources or security services from the authorities that she or he investigates. The degree to which resources and services are shared between an Executive OmbudsOffice and the organization that it investigates may reflect the level of independence of that Executive OmbudsOffice.

There are many areas where the office of the WCBO shares resources with the WCB. Although utilizing resources provided by the organization that it investigates is cost-efficient for an Executive OmbudsOffice, such a practice may weaken the independence of that office. Has the Appellate Division at WCB experienced a similar problem? For example, should the office of the WCBO rely on the Communications Department of the WCB to ensure that its brochures, pamphlets and annual report use Board-approved language? Would not this process be in direct conflict with efforts of the office of the WCBO to be independent and separate from the WCB? Consider the following examples of resources that the office of the WCBO shares with the WCB.

The office of the WCBO has to a large extent a completely separate computer system, so that line staff at the WCB cannot access the WCBO's dockets. The complaint files handled by the WCBO are not shared with WCB staff. The computer system is set up to run reports on general statistics and complaint categories. Early in 1997, an arrangement was initiated whereby WCB Management could request data pertaining to their areas and the WCBO would monitor the preparation of these reports by a systems support person designated within the Board. The purpose of this access was to provide general statistical information to assist WCB management in examining trends and patterns of complaints. The WCBO discontinued this arrangement later that year. We understand that plans are now in place that will enable a staff member of the office of the WCBO to prepare all statistical information requested by the Board. However, systems support is still provided to the WCBO's database by WCB staff. In my opinion, WCB staff should not be allowed any access to the WCBO's database, since such access diminishes the independence of the office of the WCBO.

The office of the WCBO relies on legal counsel within the WCB to provide legal opinions. On occasion, the WCBO requests legal opinions from WCB's legal department to ascertain his jurisdiction to investigate complaints against WCB.

Without an independent source of legal advice, the office of the WCBO must rely on the interpretation of his jurisdiction by the WCB Legal Services Section. I do not believe that such an arrangement promotes any sense of independence for the office of the WCBO.

The WCBO prepares budgets for approval and submits quarterly budget estimates to a Vice President of the WCB in the same way that other Cost Centres within the Board report. The WCBO reports on his ongoing operations, financial results (including a review of any variances from budgeted expenditures and information relating to staffing), and the office's ability to meet strategic results. I will be commenting on the implications of the existing budgeting arrangements in Chapter 10.

The WCBO also acts as an administrative manager for the employees under his authority, utilizing WCB's human resources policies.

In one case reviewed for the OmbudsAudit, there was concern that a complainant was making threats. The office of the WCBO chose to involve the WCB's Safety, Health and Security Services Department directly in this matter rather than dealing with it in-house. Correspondence was sent to the complainant by a representative of that WCB Department. I do not believe that such an intervention by a branch of the WCB upholds the arms-length and confidential nature of the interaction with the office of the WCBO. This issue raises questions about how the office can maintain confidentiality when there is a possible threat to safety and what resources should be available to that office if there are concerns about staff security.

#### **Recommendations:**

- 4-13 I recommend that the WCB develop strategies to reduce and eventually eliminate the reliance of the office of the WCBO on resources shared with the WCB, and, in particular, because of the need for confidentiality, systems data and legal research.**
- 4-14 I recommend that the Panel of Administrators examine alternative methods of receiving a proposed budget and funding the WCBO in order to ensure the financial independence of the office.**

## **5.0 Visibility and Accessibility of the WCBO**

For an Ombudsman service to function effectively, it must be visible and accessible, and its role and function must be clearly articulated. The primary responsibility for ensuring that people are informed about the services provided by the WCBO rests with that office.

Professor Gregory made the following observations on these issues.

---

...the ombudsman ought to be readily accessible to aggrieved citizens, free of charge and with a minimum of formality. Complaint-handling machinery which is hard to reach and which can be set in motion only with difficulty is clearly of limited use. (**Building an Ombudsman Scheme**, p. 90).

---

The importance of a complaints system being accessible has also been noted by the Ombudsman for the Government of Ireland who wrote as follows in his 1997 Annual Report.

---

In many of the complaints which my Office receives, the basic problem is a failure on the part of the complainant and the public body concerned to communicate properly. An internal complaints system, if it were publicised and accessible to all, can help in identifying such cases and resolving them locally...(Chapter 4)

---

The principle of making an OmbudsOffice as accessible as possible is unassailable. However, every OmbudsOffice that embarks on a program to make its services better known to potential complainants must come to terms with the possibility that such efforts will generate an influx of new complaints. Most OmbudsOffices are not resourced to cope with such large increases. For a Classical Ombudsman, there exists the possibility of reporting to the Legislative Assembly the need for additional resources to fulfil the Ombudsman's statutory mandate. An Executive Ombudsman would not have such an option. For that reason, I can understand why Executive OmbudsOffices that usually operate with minimal resources would be apprehensive about launching initiatives to make their services better known and more accessible.

However, OmbudsOffices must not abandon their duty to make their services as accessible as possible, even if these efforts generate short-term difficulties in

handling an increased volume of complaints. The services of an OmbudsOffice should be available not only to those who have the resources, education and language skills to seek out those services; they should be accessible to everyone who has a complaint against an authority within the ombudsman's jurisdiction to investigate. The principles of clarity of role and accessibility of services are vital cornerstones for OmbudsOffices.

## ***5.1 Visibility of Services for an Executive OmbudsOffice***

In order to be accessible, an OmbudsOffice must make its existence known and its role understood. Professor Gregory described it as “essential,...therefore, the office should be publicized effectively.” An Executive OmbudsOffice must be visible both within the organization that it investigates and outside that organization. An Executive OmbudsOffice needs to be highly visible within an organization to reinforce the importance attached to its role. A highly visible Executive Ombudsman can expect greater levels of co-operation from officials within the organization and more referrals of dissatisfied individuals. Outside the organization, it is vital for an Executive Ombudsman to establish a profile separate from that of the organization in order to instil confidence in the independence and impartiality of the service. Without such a profile, referrals of complainants from a variety of sources will be limited.

An Executive Ombudsman faces difficult decisions in attempting to obtain a high level of visibility. If efforts are concentrated on obtaining a high profile within the organization, there is a risk that the service will not be viewed as independent and impartial by outsiders. Alternatively, promotional activities can be targeted predominantly outside the organization to make the service known to potential complainants and their representatives. However, if such activities alienate officials within the organization, a service that is perceived to be independent and impartial to outsiders may not benefit anyone if it does not receive co-operation from within the organization.

In theory, an Executive OmbudsOffice service that is highly visible to both those within the organization that it investigates and outside that organization should not be offensive to either side. The drawback is that this level of visibility requires resources, resources that are often limited for a newly established Executive OmbudsOffice that has not yet clearly established its utility.

### ***5.1.1 Visibility of a Classical OmbudsOffice vs. an Executive OmbudsOffice***

A Classical Ombudsman in a parliamentary system of government can emphasize the independence and impartiality that comes from being an Officer of the Legislature. The fact that the Classical Ombudsman reports to the Legislature and not to government assists in distinguishing that Office from the authorities that it

investigates. In addition, the public reporting features provided for by legislation establishing Classical OmbudsOffices provide an invaluable means by which to demonstrate the independence and impartiality of these Offices. The range of authorities investigated by Classical Ombudsman ensures that interest in its activities will be broadly based and will not be limited to those interested in specialized fields. The resources available to Classical Ombudsman can also be utilized effectively to produce a highly visible profile for such Offices.

The newly established Executive OmbudsOffice usually has few of these advantages. As we heard from complainants and representatives during this investigation, it is difficult for an Executive Ombudsman to achieve a profile separate from the organization that he or she investigates, if he or she reports to the President of that organization. If the contents of promotional material, pamphlets, brochures and even annual reports are reviewed in advance of their being made public by the organization that it investigates, it is difficult for an Executive OmbudsOffice to be viewed as a separate entity. Obtaining and maintaining a profile separate from the large organization that it investigates requires constant attention for an Executive OmbudsOffice.

### ***5.1.2 Visibility of the WCBO***

During the past year the WCBO made a conscious decision to maintain a low profile so as not to be seen to compromise the investigation of the Royal Commission. However, in general, despite severe resource limitations, the office of the WCBO has tried to make itself visible both within the WCB and outside that organization. For example, the WCBO meets with Management officials of the various WCB divisions on a regular basis. He attends quarterly Management meetings when invited. He appears to have been successful in obtaining a forum within the WCB for his office's perspective when he considers it necessary. He also meets with outside representatives and advisers on an ongoing basis to inform them of trends and patterns that his office is following. He has met with MLAs and Constituency Assistants for MLAs to give them information about the services of his office. In a small Executive OmbudsOffice where there are only two people to review substantive complaints, it is very difficult to devote as much time to these activities as needed.

When the office of the WCBO was first established, an electronic mail directive was sent by the then WCB President to all staff of that organization announcing the creation of that office. The WCB issued a News Release on June 10, 1996 publicly announcing the creation of the office of the WCBO. Many WCB

Management officials surveyed during the audit also recalled a cover story in the June 1996 edition of the WCB's internal staff publication **Board Talk** in which the WCBO was profiled. In addition, the WCB President has brought to my attention another article in the July/August 1996 edition of the WCB's **Prevention at Work** publication as well as information on the Board's web site. There are also plans to include material about the office of the WCBO in the Board's developing Intranet that will be available to WCB employees. However, there was only a brief mention of the WCBO in the Board's 1996 Annual Report and no mention of that office in the Board's 1997 Annual Report.

Despite these initiatives, many WCB Management officials could recall few if any references to the office of the WCBO in WCB materials.

---

...I have not seen/heard of any communication to staff about the role.

---

...I haven't heard these office presentations but they did do some when the office was first set up.

---

Similar feedback was provided by representatives familiar with the workers' compensation system.

---

...there is not very much information available in the form of pamphlets/brochures/policy manual about the office of the WCBO.

---

WCB Management officials advised that the office of the WCBO had an extremely low profile at the WCB. Other than periodic faxes sent by the office of the WCBO and the occasional review of complaint statistics at Management meetings, WCB Managers generally reported that the office of the WCBO played a minimal role at the WCB. We received the following responses when WCB Management officials were asked "What methods does the office of the WCBO use to communicate to staff about the role of that office?"

---

I think there is an information void, to some degree.

---

I am not aware of a specific "official" communication vehicle.

---

There have been from time to time presentations outlining complaints received, etc., - only once in the past year have I seen this.

---



...presentation in management meetings; little actual contact with staff.

---

Ombudsfaxes on specific cases; not familiar with other methods of communication.

---

Many of the individuals we contacted during the OmbudsAudit commented that the office of the WCBO does not have a profile to identify it as separate or independent from the WCB. Rather than seeking to distinguish itself from the WCB, the office of the WCBO has relied on assistance from the Communications Department of the WCB to ensure that it uses language that is consistent with other Board publications.

Many representatives who are familiar with the workers' compensation system pointed out that there was not enough marketing or promotion of the office of the WCBO outside the WCB.

---

...It is difficult to discern the office of the WCBO from the WCB...The whole situation is a foggy mess...There is a lack of public visibility for the position and since there have been no reports from the WCBO, there is no accountability...

---

The office of the WCBO is unknown to the public. There was not much fanfare regarding the office when it first started up.

---

...The Board does not see the (office of the) WCBO as a separate entity.

---

We also heard the following types of comments from WCB Management officials who believed that the office of the WCBO needed to become more visible within the Board and needed to increase its presence and profile.

---

...they need a higher profile so support is more readily available.

---

(The office) needs to become more visible in the corporation.

---

...(The office is) probably not profiled in a way that highlights its role. The office needs to make greater impact on WCB by way of better communication of its role, its successes and its observations and recommendations.

---

...(The WCBO needs) more contact with staff through meetings to allow all staff members to understand their mandate.

---

In coming to the conclusion that the office of the WCBO has a low profile at the WCB, I have attached considerable weight to the views expressed by WCB Managers, who are in fact the individuals most frequently contacted by the office of the WCBO. WCB Management officials have noted that promotional initiatives about the office of the WCBO were concentrated during the first few months of that office's existence. Since then, many reported that they had not heard very much in Board publications about that office.

---

...Beyond the initial introduction of the office I am not aware of any other communication.

---

At this time, there is no communication. At the inception (of the office), there was e-mail and personal presentations.

---

Very little (communication about the role) now. Two years ago (the WCBO) held some info sessions--nothing since.

---

The single article featuring the WCBO was prominently displayed in the WCB's internal publication. Although this was a positive first step in promoting the office of the WCBO, this article was written at a time when that office was just becoming familiar with its mandate. Since the office was so new, the WCBO could not provide many of the concrete examples that employees of an organization need to hear in order to acknowledge that there is role for a promoter of fairness within the organization. As a Classical Ombudsman, I know that such examples are essential to convince staff and managers that my Office has relevance to the work that they perform on an ongoing basis.

Other mechanisms can be created to provide an ongoing profile for the consideration of fairness issues within an organization. For example, ICBC adopted a communications approach to practising administrative fairness that was quite different from that taken by the WCB in publicizing the office of the WCBO. ICBC was faced with an interesting challenge when it needed to educate private investigators who perform work for ICBC about renewed efforts to promote the adoption of fair practices. In addition to initial fanfare surrounding the new approach, a question and answer column written by the Manager of the ICBC Information and Privacy Department was included in periodic newsletters that were sent to all private investigators performing work for ICBC. This mechanism provided a regular reminder about the new approach being taken and brought practical examples to the attention of those who needed to possess this

knowledge. There is considerable potential for such an approach at the WCB where an internal publication has readership across the entire organization. This is but one example of the benefits that might arise through increased dialogue between the WCBO and other organizations that face similar challenges.

Another means of assessing the visibility of the office of the WCBO is the extent to which it is perceived by WCB Management officials as having been instrumental in increasing staff awareness of principles of fairness. In total, only 37% of those surveyed believed that the office of the WCBO had increased staff awareness of principles of administrative fairness. It is interesting to note that a much higher percentage of WCB Directors and Senior Executives indicated that they believed that the office of the WCBO had increased this awareness. This response contrasts with the 28% of WCB Managers who responded that they believed that the office of the WCBO had been responsible for increasing staff awareness of principles of fairness. These results were consistent with the overall trend that the office of the WCBO seemed more visible to senior management officials within the WCB than to WCB Managers.

**Recommendations:**

- 5-1** *I recommend that the WCBO develop a procedure to establish a separate and improved profile of that office.*
- 5-2** *I recommend that the WCB provide the WCBO with adequate resources to conduct public information outreach and to cover the costs associated with increased demands on the service of the office.*
- 5-3** *I recommend that the WCBO engage in a dialogue with other similarly positioned organizations in British Columbia and elsewhere to seek methods of establishing an identity separate from that of the WCB.*

## **5.2 Accessibility of the WCBO**

Complainants generally considered the services of the office of the WCBO accessible for their needs. A clear majority of complainants reported that they found it easy or very easy to access the services of the office of the WCBO. Some of these individuals indicated that they realized that the office of the WCBO received many phone calls and understood that there would not always be someone there to take their call immediately.

We found that people learned about the office of the WCBO through a wide variety of sources. Of the complainants interviewed during the OmbudsAudit, 88% first contacted the office of the WCBO by telephone. For the most part, complainants were satisfied with telephone contact.

Of the minority of complainants who did not find this method of communication acceptable, a very high percentage would have preferred to meet with someone in person to discuss their concerns or would have preferred to speak with someone directly rather than leave a message. One complainant described his concerns in this area in the following way:

---

...they should give everyone who wants to come to them an interview. This is especially difficult for people whose first language isn't English.

---

There would seem to be a group of complainants who did not believe that they were able to properly convey their concerns to the office of the WCBO without a personal interview with someone from that office. The existing resourcing levels of the office of the WCBO make it very difficult to provide interviews to complainants, even if an interview is requested.

Unlike other areas of feedback received in the interviews of advisers, advocates and representatives, a range of opinion was offered regarding the accessibility of the services of the WCBO. Despite reservations about many other aspects of the office, one representative noted that the office had done a good job of making itself accessible and making it easy to communicate with that office. While some representatives maintained that most advocates active in the workers' compensation field knew enough about the office of the WCBO, others were convinced that "even advocates don't know enough about the WCBO." One

representative observed that making a service such as the office of the WCBO accessible was often a matter of “putting information in front of people in a teachable moment.”

Several representatives observed that accessibility can be measured at many levels. They questioned whether the office of the WCBO was truly accessible if it could take calls, but was not resourced to a level that enabled staff to talk in person about the substance of a complaint. In addition, since initial contact is by telephone, the WCBO must be aware that many workers who are injured may have a disability and may have a language other than English as their first.

An OmbudsOffice must ensure that its entire investigative process is accessible to those who might need that service. For example, if an OmbudsOffice demanded that complainants communicate with it only in writing, then the service would become inaccessible to that segment of the population that encounters difficulty in communicating by this method. Among this segment would be those who are marginally literate or illiterate and those whose first language is not English. How one is able to communicate with the WCBO must be flexible.

#### **Recommendation:**

**5-4 I recommend that the WCBO take the necessary steps to ensure that the office is accessible, including alternate telephone service (TDD), multi-language brochures and in-person intake interviews, when appropriate, that may require the assistance of interpreters.**

#### **5.2.1 Timeliness of the Services Provided by the WCBO**

A more frequent concern than the basic accessibility of the WCBO's services was the timeliness of those services. Complainants and representatives often focused on the delays that they encountered in getting responses from the office of the WCBO. We heard allegations that when the office of the WCBO gets involved in an investigation of an issue, “there is no closure to the process (especially with systemic issues), even when that office is aware and interested in pursuing an investigation of the complaint.”

Although we heard frequent concerns about delays, almost as many complainants were satisfied with the timeliness of the services provided by the office of the WCBO as those who expressed dissatisfaction. This is an important factor to

consider given that the delay within WCB itself is often central to complaints that may be filed with the WCBO. I will say more about delay in Chapter 7.

### ***5.2.2 Accessibility and Openness in Service Delivery***

Operating an accessible Executive OmbudsOffice extends beyond being open for phone calls during regularly scheduled business hours. An Executive OmbudsOffice needs to be accessible to those who are in a position to be aware of systemic problems with the organization that it investigates. Such an office also needs to gain the confidence of those who might raise such concerns. However, providing a sympathetic and confidential ear to those who may raise systemic issues is insufficient to maintain this valuable channel of communication. There must also be effective follow-up and reporting of the outcome of investigations of these major issues in order for these communication channels to continue.

The feedback that we received regarding this aspect of the operations of the office of the WCBO was decidedly negative. Although the office of the WCBO seems interested in learning of systemic concerns, those representatives who have initiated inquiries about these concerns have indicated that they rarely if ever hear back from that office regarding the outcome of their inquiries. It may well be that because of the intervention by the WCBO, systemic changes are made, and only those who raised the issue are left uninformed. Some of these individuals have concluded from these experiences that the office of the WCBO lacks openness and accessibility. Representatives noted that the office of the WCBO seems to prefer to negotiate everything “behind closed doors” within the WCB and provides no public reporting of its activities. Since they see little evidence to indicate that their concerns have been investigated by the office of the WCBO, most of these representatives have advised my Office that they no longer go to that office with concerns nor do they refer complainants there. I find this situation both surprising and troubling, and hope that the recommendations I am bringing forward in this Report will help to address these concerns, since these representatives are a very important potential source of complaints to be investigated.

WCB Management officials have expressed similar frustrations in their dealings with the office of the WCBO. As outlined below, one senior WCB official described the office of the WCBO as “secretive.”

---

In an effort to protect privacy of complainants, (WCB) Ombudsman staff tend to give off a perception of secretiveness. To the degree that it is possible, more openness will enhance the relationship with ...staff.

---

As is mentioned elsewhere in this Report, a major portion of this problem is attributable to the unclear situation concerning the confidentiality and privacy provisions as they apply to the WCBO. In the next chapter, I will also review issues of concern that relate to the WCBO's reporting procedures.

### **5.3 Referrals from the WCB to the WCBO**

One measure of the accessibility of an Executive OmbudsOffice is the extent to which the organization it investigates has empowered its employees to refer dissatisfied clients to that office. The Docket Reviews, the surveys and the interviews conducted during the investigation indicated that surprisingly few complainants learned about the office of the WCBO from WCB employees. The feedback received during the OmbudsAudit suggests that very few complainants are referred to the office of the WCBO by WCB officials. Comments provided by WCB Management officials indicate that there was considerable doubt whether WCB staff and managers believed that they were permitted to advise clients that they could take their concerns to the office of the WCBO if they remained dissatisfied with WCB's actions. For that reason, I corresponded with the President of the WCB for clarification of this matter. On this point, I asked the following questions:

4. *Is there a WCB policy or practice to restrict on-line WCB staff and/or WCB Managers from referring potential complaints to the office of the WCBO?*
5. *If there is such a policy or practice:*
  - a) *How has this policy or practice been conveyed to WCB staff and/or Managers?*
  - b) *Does this policy or practice apply to all levels of WCB Management?*
  - c) *What is the reason for any policy or practice restricting WCB staff and/or Managers from referring matters to the office of the WCBO?*

I have reproduced relevant sections of the WCB President's response as follows:

4. *In our lexicon, "policy" refers to the published policy of the WCB while "practice" refers to the operational instructions beyond any written "policy" or "procedure." I am also interpreting a "potential complaint" to be an issue raised by a worker, employee, or dependent regarding a decision, action or omission that would be within the role of the WCBO to consider. There is no "policy" to restrict on-line WCB staff and/or Managers from referring "potential complaints" from workers or employers to the office of the WCBO. It is, in fact, common practice for staff and managers to identify the WCBO, Review Board and Workers' or Employers' Advisors as appropriate avenues of support. However, it is up to the worker (or employer) to actually make contact with any of these including the Internal Ombudsman. This is essential to the confidentiality of the case. Staff do facilitate the referral of "potential complaints" by transferring calls,*



*providing mailing information and forwarding written requests to the WCBO wherever possible.*

5. a) *The practice has been conveyed to staff through informal instruction, mentoring, general discussion and news/information...The practice...has also been conveyed by the WCBO in training and briefing sessions with line staff.*
- b) *The practice applies to all levels of the WCB Management.*
- c) *There is no restriction on staff referring "potential complaints" within the jurisdiction of the Ombudsman to the Ombudsman. The only practice restricting staff or managers from referring "matters" to the Ombudsman is where such "matters" are not within the role or mandate of the WCBO. As part of further informing our staff about the role and mandate of the WCBO, we are creating a web page on our intranet, BoardNet. This page will contain the WCBO's annual report, brochure and information for staff about the role of the WCBO and how staff referrals to the office are made...*

From this response it would appear that employees from all levels of the WCB are permitted "to identify" the WCBO as an appropriate avenue of support and to facilitate referrals of potential complaints to that office. However, the pamphlet issued by the office of the WCBO clearly advises that the WCBO cannot "accept referrals from WCB staff." In his 1998 Business Plan, the WCBO states, "WCB staff do not refer cases to the WCBO office."

Our Office uses the term "referral" to mean that a complainant is advised of an existing remedy, right of redress or administrative process; for example, a manager review in the workers' compensation system. For most authorities within my jurisdiction as Provincial Ombudsman, the complainant is expected to initiate contact with the authority directly. A referral would include advising a dissatisfied worker or employer about the existence of the office of the WCBO as a potential avenue of complaint. Under this scenario, I would hope that WCB staff and managers are encouraged to provide the phone number and/or address of the office of the WCBO to the dissatisfied individual.

The office of the WCBO does not believe that it is appropriate for WCB staff and managers to advise complainants that they will refer their complaint "directly" to the office of the WCBO and that someone from the WCBO will contact the complainant. We noted some situations where WCB Management attempted to reduce tensions by taking this approach. The WCBO has resisted such direct referrals since acceptance of complaints in this manner might compromise his

office's independence and ability to set priorities on the workload. This position, in my opinion, was correct. I was also advised in a letter from the President of the WCB that it would not be appropriate for WCB management or staff to commit or require the WCBO to review a case or meet with a worker within a given period, as this would compromise the independence of the WCBO. As independence is critical to an Executive OmbudsOffice, I agree that this type of referral and commitment to act could seriously compromise the independence of the WCBO.

In Chapter 3 of this Report, I noted the extent to which the WCBO's present interpretation of his office's jurisdiction varies from the interpretation that I had envisioned when I recommended the establishment of that office. As was described in earlier chapters, WCB officials do not have a clear understanding of the mandate of the WCBO. They have little sense of what will be investigated by the office of the WCBO and what is currently considered to be outside that office's jurisdiction. Since WCB officials do not know the role or mandate of the WCBO, it is not surprising that they have difficulty knowing whether they are restricted from referring matters to that office. As was noted earlier, it is very important for WCB officials to have a proper understanding of the role and jurisdiction of the WCBO.

The confusion as to whether or not WCB officials are permitted to refer potential complainants to the office of the WCBO was apparent in the comments of WCB Management officials surveyed during the investigation. A number of these officials believed that they were not allowed to advise dissatisfied workers or employers that they could take their concerns to the WCBO. Some of these officials indicated that they made such referrals anyway, even though they did not believe that such referrals were sanctioned by the WCB.

The Docket Review indicated that the office of the WCBO almost never has direct contact on a docket with non-management WCB staff. Consequently, the profile of the office of the WCBO among WCB staff would appear to be even lower than that reported by their managers. This is of great importance to the office of the WCBO, as WCB staff members have the most frequent interaction with workers and employers, the major sources of complaints for the office of the WCBO. This absence of a profile among WCB staff could also be responsible for the lack of reported referrals from the WCB to the office of the WCBO.

The information regarding the referral process needs to be clarified so that WCB staff and managers can provide useful information to workers and employers about the role of the WCBO. Potential complainants should be aware that the

WCBO is not a level of appeal. They should also be aware that the WCBO cannot compel the WCB to take action.

**Recommendations:**

- 5-5** *I recommend that the WCB, in consultation with the WCBO, take appropriate measures to clarify when and how WCB staff and management can refer potential complainants to the office of the WCBO.*
- 5-6** *I recommend that any decision about whether a matter falls within the mandate or jurisdiction of the WCBO be articulated in the by-laws and, thereafter, be determined solely within the discretion of the WCBO, subject to judicial review.*



## 6.0 Reporting and Accountability

Most Classical and Executive Ombudsman do not have the power to order decisions, policies, procedures or practices to be changed. One of the mechanisms available to the Classical Ombudsman to encourage implementation of recommendations is to produce public or special reports that receive broad public review and lead to scrutiny by the Legislative Assembly. The Classical Ombudsman relies on her statutory authority, independence and credibility to give weight and credence to her or his reports and recommendations.

---

Many classical ombudsmen have the power to issue annual reports and/or special reports and, sometimes, the powers to publicize the cases. As discussed..., this power is a great weapon. Many executive ombudsmen do not have such power; rather, they only have the power to issue annual reports. (Mjemmas G.J. Kimweri, "The Effectiveness of an Executive Ombudsman", in *The Ombudsman: Diversity and Development*, Linda C. Reif, Mary A. Marshall, and Charles Ferris, eds, 1993, p. 60).

---

An Executive Ombudsman may also be empowered to publish annual or special reports to highlight issues of concern. The use of public reports can demonstrate to the authority it investigates, its staff and the general public that the Executive Ombudsman is able to stand apart and criticize an agency or authority if necessary. The capacity to report serves to highlight the unique and independent position of the Ombudsman.

Some of the people interviewed during the OmbudsAudit commented that they would be convinced of the independence and impartiality of the office of the WCBO only if an improved mechanism for reporting the activities of that office were developed. Many complainants and representatives observed that, at present, there was very little information available with which to assess the extent to which the office of the WCBO was effective. It is clear from this OmbudsAudit that the work of the WCBO is not widely known or recognized, nor have the work and recommendations of that office had wide circulation, even within the WCB itself.

As was reported in earlier chapters, some complainants, representatives and WCB officials believed that the Executive Ombudsman model had proven unworkable at the WCB. Others indicated that changes to the WCBO's reporting structure, resourcing, communications practices and investigative practices would instil confidence in that service only if its operations were more visible and

accountable to the public. Rather than focusing on internal issues, those contacted during the investigation clearly wanted information about the scope of the issues that the office of the WCBO had reviewed and the trends that were of concern to that office.

## **6.1 Reporting of Investigations by a Classical Ombudsman**

Legislation establishes the method by which reports may be issued by a Classical Ombudsman. In British Columbia, the following sections of the **Ombudsman Act** provide guidance to public reporting by the Ombudsman:

- 25(1)** *If within a suitable time after a request has been made under section 24 no action is taken that the Ombudsman believes adequate or appropriate, the Ombudsman, after considering any reasons given by the authority, may submit a report of the matter to the Lieutenant Governor in Council and, after that, may make a report to the Legislative Assembly respecting the matter as the Ombudsman considers appropriate.*
- (2)** *The Ombudsman must attach to a report under subsection (1) a copy of the Ombudsman's recommendation and any response made to it under section 24, but the Ombudsman must delete from the recommendation and from the response any material that would unreasonably invade any person's privacy, and may delete material revealing the identity of a member, officer, or employee of an authority.*
- 31(1)** *The Ombudsman must report annually on the affairs of the Ombudsman's office to the Speaker of the Legislative Assembly.*
- (2)** *The Speaker must lay the report before the Legislative Assembly as soon as possible.*
- (3)** *If the Ombudsman considers it to be in the public interest or in the interest of a person or authority, the Ombudsman may make a special report to the Legislative Assembly or comment publicly about a matter relating generally to the exercise of the Ombudsman's duties under this Act or to a particular case investigated by the Ombudsman.*

Three types of public reports are envisaged by the **Ombudsman Act**. First, the Classical Ombudsman is under a statutory duty to make a report to the Legislative Assembly annually. Second, the Classical Ombudsman may make special reports to the Legislature about particular cases that in the view of the Ombudsman highlight a particular injustice that was not addressed by the authority. Finally, the Classical Ombudsman also has the authority to make public reports that take a systemic approach to a particular authority or issue.

The reporting function of the Classical Ombudsman is an extremely important mechanism for advancing the goals of that Office. The spectre of publicity also helps to ensure that authorities within the Classical Ombudsman's jurisdiction are accountable for their actions. The Ombudsman has no power to issue orders; the recommendations of an Ombudsman have no compulsory legal effect. (In the case of British Columbia there is one exception, in that the Provincial Ombudsman has the ability to issue a temporary injunction to preserve a heritage site pending the outcome of an investigation. This is a new and extraordinary "order-making" power). The Ombudsman must therefore rely on the persuasive nature of the investigative findings and recommendations to effect change. However, recommendations from an Ombudsman can have a compelling effect if the thoroughness and impartiality of the investigation and the description of a finding of fairness are convincing.

One common goal of the Classical Ombudsman is to be a catalyst for change, so that authorities develop more of their own policies and procedures to prevent complaints of unfairness. Many authorities have advised me that they find annual reports from my Office helpful in examining trends and changes within their own organization and assessing their effectiveness in dealing with unfairness within their own administration.

Since its inception in 1979, the Office of the Ombudsman for BC has produced a number of special reports to the Legislative Assembly on individual cases, as well as a number of systemic public reports recommending broad structural changes in administration. The vast majority of individual cases, however, are closed without public reporting. Investigations might resolve matters or find a complaint unsubstantiated; the complainant might have alternate remedies to explore within the system or have statutory remedies that bar the involvement of the Ombudsman. Public reports of investigations generally deal with a wider unfairness matter or a particularly intransigent authority. The public reporting of individual or systemic cases in addition to the regular annual report can serve to highlight areas of concern with particular authorities.

**Recommendation:**

- 6-1** *I recommend that the WCBO be provided with explicit authority, similar to that of the Ombudsman for the Province of British Columbia, to have the discretion to report details of investigations to the Panel of Administrators or the public.*



## 6.2 Reporting of Investigations by the WCBO

Although the duty of the Classical Ombudsman to report to the public is clear, the Executive Ombudsman has no similar legislative requirement. As is the case with many Executive Ombudsman, there is an expectation that the office of the WCBO will produce an annual report. However, beyond the following brief statements from the Position Description for the WCBO, there is little insight as to what is entailed in issuing an annual report.

*Publishes an annual report which includes statistics on the number and types of complaints received, services rendered and complaints resolved.*

*Provides feedback to the President/Chief Executive Officer and the Panel of Administrators with respect to problem areas.*

There was clear feedback from WCB Management officials regarding the lack of information about the activities of the office of the WCBO. The following comments are reflective of this feedback.

---

Be more public in celebrating their successes. Tell staff how many complaints were resolved without sending a fax to the Managers. Explain what administrative changes have occurred that are positive. I think there is an information void, to some degree.

---

The WCBO should publish reports twice per year for all staff to see what type of calls, numbers, etc., are handled by this office...with recommendations for improvement listed.

---

The office needs to make greater impact on WCB by way of better communication of its role, its successes and its observations and recommendations.

---

...Annual Report should be to the Panel.

---

Representatives of complainants connected this lack of public profile with the importance of achieving increased accountability through a public reporting process.

---

There is a lack of public visibility of the office (of the WCBO) as there is not reporting and accountability.

---

...there needs to be proper public reporting...now there is a problem with accountability.

---

There are no public reports and no public censure.

---

There is the perception that the office of the WCBO is not effective...The Board doesn't listen to the Ombudsman...The Board does not respect the WCBO as it has no option to provide fall-out; there is little accountability.

---

I should note that these comments were obtained before the release of the WCBO's first annual report (1997) in the fall of 1998, knowledge of which might or might not have changed these responses.

The interviews of complainants led to more personalized accounts of the reporting practices of the office of the WCBO. Complainants expressed frustration that they could not obtain adequate reports from the office of the WCBO regarding their own concerns.

---

The WCBO...should review files and investigate and make recommendations like an Ombudsman should.

---

The WCBO should provide more information about the efforts taken during the investigation by the WCBO. The office of the WCBO does not provide a sufficient report back to complainants.

---

I think that the office of the WCBO should look into files more thoroughly. If they did, they didn't tell me much about it. There were communications problems in reporting back to me...

---

I would like a better explanation of how they looked at my concerns, rather than a referral to someone else. I wanted to hear from someone different from the Division that I was dealing with. I wanted the Division out of the picture.

---

The office of the WCBO has produced regular reports to Directors and the executive branch of the WCB outlining summaries of its activities. However, beyond the annual report recently issued by the WCBO two and a half years after the office began its operations, there has been very little public information issued regarding the WCBO's activities.

---

During the period before the WCBO issued an annual report, there was only the following brief mention of that office in the 1996 Annual Report of the WCB:

---

In April 1996, the WCB opened an Ombudsman Office to deal with fairness complaints from workers, employers, and outside members of the public. The Ombudsman does not serve as an advocate for individual workers, employers, or others, but encourages overall fair practices and processes. Since opening, the Ombudsman fielded approximately 1,000 calls.

---

The 1997 Annual Report of the WCB made no mention of the office of the WCBO.

Contrast this with the profile given to similar offices by the WCB in other locations. For example, in addition to his own annual report, the Workers' Ombudsman for the State of Oregon writes an entire chapter of the annual report of that State's Director of Business and Consumer Affairs (the organization responsible to the State Legislature for the WCB of Oregon). In addition to the annual report of the WCB Fair Practices Advocate herself, the Manitoba WCB has devoted a section of its annual report to the comments of the Fair Practices Advocate.

### **Recommendation:**

**6-2 I recommend that the WCBO prepare and be required to make public an Annual Report on the work of the office, independent of any Annual Report released by the WCB.**

Reporting outcomes of investigations and practices intended to resolve complaints is an important function because it informs complainants and the Board, serves to bring closure to matters, and educates. Reporting could and should be done at individual and more public levels.

Annual reports and public reports have the potential to bring about change through education about fair practices. Under the existing **Workers' Compensation Act** such reporting may be difficult. Moreover, **FIPPA** requires protection of individual privacy and could operate as a block to disclosure. That Act does, however, allow for disclosure of information, even personal information, where it is clearly in the public interest to do so.

Disclosure must be done in a context mindful and respectful of the importance of confidentiality in Ombudswork. Annual reports can and should maintain the anonymity of any individuals referred to and public or systemic reports, where

possible, should do so as well. Yet even carefully worded reports might offend secrecy and privacy provisions in legislation and beyond this, there will be times when situations are so grave and of such import that the principle of privacy ought to be abrogated. Disclosure must be done for a purpose consistent with promoting an investigation or Ombudsmanship generally. The WCBO, therefore, needs to be able to report in various ways to have an effect on the administration and the public at large.

**Recommendation:**

**6-3** *I recommend that the by-law establishing the office and powers of the WCBO delegate to him or her the power to disclose information when he or she determines that it is in the public interest to do so and that this provision would apply despite the confidentiality section of the by-law.*

## **6.3 Content of the 1997 Annual Report of the WCBO**

In the WCBO's recently released Annual Report for 1997 there is very little detail provided as to complaints resolved, case-specific recommendations that were accepted or systemic recommendations that led to changes within WCB. Little is said about the kinds of cases and complaints that the office of the WCBO has reviewed. The OmbudsAudit has revealed that in many cases complainants have been assisted by the office of the WCBO. The annual report does not publicize these situations.

The WCBO reported in its 1997 Annual Report on a number of systemic problems that his office had raised with the WCB. These included the following:

- Process pertaining to wrongful recording and release of private information
- Strategies to improve communication
- Processes pertaining to history taking and statements made under oath
- Processes for handling allegations affecting external parties
- Strategies to fast-track investigations pertaining to new and emergent medical conditions.

However, the Report gives no information about the nature of the WCBO's findings, the recommendations made and whether the WCB implemented these recommendations.

Issues such as the release of information and the taking of evidence are significant ones of interest to those who follow workers' compensation issues. Although the office of the WCBO has apparently taken action to try to improve these processes, detailed information has not been provided to the public. These are the kinds of topics the WCBO could include in his or her annual report.

### **Recommendation:**

- 6-4** *I recommend that the Annual Report of the WCBO include details, issues and outcomes regarding the cases that he or she has investigated, while still maintaining the confidentiality of the individuals involved.*

## 6.4 Review of the Annual Reporting Process

A number of WCB Management officials advised us that they were unclear as to what happens if the WCBO and the WCB cannot agree on the outcome of a complaint lodged with the office of the WCBO. Although the WCBO can ask that the Panel of Administrators consider a concern that he has raised, during the first two and a half years of the office being operational, no such request has been made. Thus far, the WCBO has taken to the President of the WCB only one issue that he could not resolve to his satisfaction.

As was noted in Chapter 3, the WCBO has prepared a **Handbook** to clarify the procedure whereby the WCBO can raise concerns through the WCB hierarchy to the Panel of Administrators, if necessary. This description identifies the formal path by which the WCBO can attempt to obtain a suitable remedy to a concern that he has raised with the Board. This segment of the **Handbook** helps those dealing with complaints to the office of the WCBO to know what happens when the WCBO disagrees with the position being taken by the WCB.

This procedure would seem to be an effective tailoring of the provisions outlined in Classical Ombudsman legislation to the special circumstances of an Executive Ombudsman.

### **Recommendation:**

**6-5 I recommend that the Annual Report of the WCBO include, where applicable, a review of cases where he or she believes that the WCB has not taken appropriate action to address the recommendations made.**

As was mentioned earlier in this Audit, the WCB Fair Practices Advocate has been established in Manitoba to review complaints against the WCB in that province. Since the Fair Practices Advocate is the closest Canadian example to the WCBO, it is interesting to compare the public reporting activities of the two offices. The Fair Practices Advocate prepares her annual report and provides it to the WCB of Manitoba. Although the Fair Practices Advocate reviews the Board's comments regarding her annual report, the WCB provides no input into the content of her report. This process ensures that the WCB has an opportunity to respond to the positions being taken by the Fair Practices Advocate, but the Fair Practices Advocate is solely responsible for the contents of her annual report.

By contrast, the decision to issue the annual report of the WCBO rested with the

WCB. The WCB President and the Communications Department of WCB reviewed and approved the only annual report issued by the WCBO to date, including the distribution list for that report. Although the WCBO assures us that there were no substantive changes made as a result of this input, more rigorous safeguards should be in effect to ensure the reporting independence of the WCB. The important point is for the WCBO to have confidence that the WCB does not have the authority to require the report to be changed, which may influence how the report is written in the first instance.

**Recommendation:**

- 6-6** *I recommend that the WCBO establish a procedure whereby the WCB is given his or her Annual Report in advance of publication, but that the WCB respect the independence and impartiality of the reporting process by having no role to require any changes.*

## **6.5 Internal Reporting Processes**

The WCBO has provided three different types of reporting to inform the WCB of the activities of his office.

First, there is internal reporting that occurs as a result of the WCBO's review of specific concerns. These can be limited to the consideration of a single complainant's situation or can be extended to broader systemic concerns that the WCBO has examined. In both of these situations, WCB Management officials indicated an interest in obtaining some type of report of the WCBO's review of such matters.

The second kind of ongoing reporting is that of statistics, trends and issues of importance that occur during the year. Some of this reporting goes to the various divisions of the WCB on a quarterly or semi-annual basis. Quarterly reports are also prepared by the WCBO for executives within the WCB to track the operations of the office of the WCBO. This forms the bulk of the information provided to WCB. The way in which this is provided by the WCBO is discussed in detail in the next section.

A third kind is the annual preparation of a business plan for the office of the WCBO in which the WCBO outlines to the President of WCB the objectives, strategies and challenges of his office for the coming year. I will deal with this separately at the end of this chapter.

WCB Management officials voiced considerable displeasure about the reporting practices of the office of the WCBO. A majority of WCB Management officials advised that they did not receive any formal report from the office of the WCBO or WCB Management after a complaint had been discussed with them. When WCB Directors and Senior Executives are removed from the survey sample, this number rose even higher.

### **Recommendation:**

**6-7** *I recommend that the office of the WCBO provide the person in WCB Management involved in a complaint investigated by that office with a report of the outcome of the complaint, in a timely fashion, after the investigation has been concluded.*



A similar pattern emerged when WCB Management officials were asked if statistical reports produced by the office of the WCBO were helpful to them. Sixty-four per cent of WCB Directors and Senior Executives indicated that these statistical reports were helpful. These individuals tended to describe the WCBO's reports as "being useful in planning." Other feedback indicated that the office of the WCBO takes measures to provide this information to WCB Directors and Senior Executives. By contrast, only 42% of those at the Manager level advised that the statistical reports were helpful.

WCB Management Officials provided the following comments regarding the case-specific reports and statistical reports issued by the office of the WCBO:

---

I would like to see a verbal report with open discussion on any trends identified.

---

I don't see the reports. If I could see them, I might have suggestions.

---

Reports could be better grouped into types of complaints (i.e., policy, procedure, customer service) and also expressed in ways that show trends.

---

#### **Recommendations:**

- 6-8** *I recommend that the WCBO make more specific and detailed internal reports to the Managers and Senior Executives, as appropriate, of cases he or she has investigated and the outcomes obtained.*
- 6-9** *I recommend that the office of the WCBO revise its reporting system to reflect activity on all dockets closed within a given period of time rather than the present practice of all dockets opened and active within a given period.*
- 6-10** *I recommend that the office of the WCBO review and revise its system of closing categories to ensure that the system provides meaningful indicators of the work of the office to both internal and external audiences.*
- 6-11** *I recommend that the office of the WCBO not close dockets until it is satisfied with the response received to any Ombudfax or other request submitted to WCB Management and that no further work or follow-up is required by the office of the WCBO.*

- 6-12** *I recommend that the office of the WCBO reopen existing dockets or create new dockets if some time has passed and subsequent inquiries or investigatory work is done that should form part of the record.*
- 6-13** *I recommend that the office of the WCBO revise the category selected for the closing of a docket if the additional work on a reopened docket indicates that a change to the previous closing category is appropriate.*
- 6-14** *I recommend that the WCBO, in the course of the review of closing categories previously recommended, develop further categories in line with the closings of the Ombudsman for the Province of British Columbia; create a "Settled" or "Resolved" category; and that the closing category of "Resolved following consultation with staff" be specific in the by-laws developed by the Panel of Administrators.*
- 6-15** *I recommend that the Panel of Administrators include in the by-laws the criteria to be used in the closing category of "Discretion," similar to those in s. 13 of the Ombudsman Act.*
- 6-16** *I recommend that the WCBO develop and implement a system for recording the eventual outcome of all dockets in which recommendations have been made to the WCB. This system should include documentation of how the recommendations were tracked and the reasons why the office has accepted the actions taken by the WCB in response to the recommendations made.*
- 6-17** *I recommend that when the WCBO has made recommendations to the WCB regarding matters that have arisen as a result of an investigation of an individual's complaint, a comprehensive and thorough report be provided to the complainant at the conclusion of the investigation of the matter, providing details of any recommendations made.*

## 6.6 WCBO Business Plan

During each fiscal quarter, the WCBO reports to a Management official within the WCB in the same way that other Cost Centres within the Board report. In the quarterly reports, the WCBO reports on the office's ongoing operations, its financial results (including a review of any variances from budgeted expenditures and information relating to staffing) and its ability to meet strategic results. Although there is more emphasis provided on goal-setting and strategic options in the annual business plan, the plan still provides detailed information about the ongoing operations of the office of the WCBO.

After reviewing these reports, I believe that the quarterly reporting mechanism calls into serious question the independence of the WCBO and should be discontinued immediately. As I have noted elsewhere in this OmbudsAudit, it is not enough for an Executive OmbudsOffice to be given free rein to conduct independent and impartial investigations and inquiries outside the structure of the organization being investigated. An Executive OmbudsOffice must also be seen to be independent and impartial. The existing system of quarterly reporting enables the Executive of the WCB to exercise very direct monitoring of the activities of the office of the WCBO, the resources at that office's disposal and its plans to fulfil its mandate. Such monitoring does not give the appearance of, or promote the actual independence from the WCB. To strengthen the perception of independence and impartiality, I believe that, without the approval and authorization of the Panel of Administrators, no official within the administration of the WCB should have any direct involvement in monitoring the plans and strategies adopted by the WCBO.

The most consistent issue of concern to complainants and representatives interviewed in this Audit was the question of the extent to which the office of the WCBO is truly independent. Similar views were expressed by a number of WCB Management officials. These concerns lead me to believe that the annual business plan process should also be restructured. In recommending such action, I recognize that there must be some form of accountability by Executive Ombudsman for funds expended and services provided. However, the development of such a process should be guided by the principle that an Executive OmbudsOffice must be independent from those that the office is responsible for investigating. No one within the Executive of the organization being investigated should exercise any form of budget or resourcing control over an Executive OmbudsOffice charged with investigating complaints against that organization.

This recommendation is consistent with my earlier recommendation that the office of the WCBO should be removed from any reporting relationship with the Executive of the WCB.

**Recommendations:**

- 6-18 I recommend that the present practice whereby the WCBO submits business plans to a WCB official be discontinued immediately. Any such plan initiated by the WCBO can be issued in the annual or a public report, or to the Panel of Administrators, as required.**
- 6-19 I recommend that a mechanism for direct budget approval be developed with the Panel of Administrators.**
- 6-20 I recommend that no WCB official have any role in reviewing fiscal, human resources or other business plans issued by the WCBO.**

## **7.0 Communication with Complainants**

The apparent failure to properly advise complainants of the outcome of the investigation conducted by the office of the WCBO has contributed to the dissatisfaction expressed by many complainants and representatives contacted during our investigation. Communications issues were identified by complainants as the second most frequent area of concern about the existing services of the WCBO.

Advocates and representatives of workers and employers who were interviewed provided even stronger feedback about the communication of the office of the WCBO with complainants. These individuals had seldom if ever seen any written account of an investigation conducted by that office. Some doubted that the office wrote letters outlining its findings. Others indicated that complainants had told them that they received written findings only after repeated requests for a written account of the WCBO's investigation.

### **7.1 Delays in Responding to Complainants' Inquiries**

Many individuals surveyed were concerned about the delays that they experienced in dealing with the office of the WCBO. Although many complainants surveyed were satisfied with the time that it took for the office of the WCBO to review *their concern*, more were dissatisfied. Many people indicated that the office seemed ill equipped to meet the urgency of their needs. When complainants placed calls to check on the status of the review of their complaint, many became frustrated to be advised that their complaint was in the middle of a six-week "queue" of dockets that had not yet been reviewed. As noted in the following example, complaints about delays in the workers' compensation system were often subjected to additional delays in obtaining a review of the matter by the office of the WCBO.

---

A complainant approached the office of the WCBO because she was concerned that she had received no decision from the WCB regarding her pension. The matter had been with the relevant WCB department for almost two years. It took the office of the WCBO over four months to review the electronic file. At that time, it was discovered that the pension issue had been resolved that day and the pension had been issued.

---

Neither the WCB nor the complainant was ever contacted during this investigation. The docket was closed without confirming that the complainant's receipt of the pension resolved her concerns.

---

Some complainants recognized that the office of the WCBO did not seem to have enough resources to cope adequately with the volume of complaints that it received. Some suggested that it would be helpful to receive an estimate of how long it would take to obtain a review of their concern. If the time specified proved insufficient, they indicated that they would appreciate a subsequent estimate from the office, with reasons for the delay. This practice would give the WCBO the latitude to set priorities for investigations. Advocates and representatives of workers and employers noted that they too experienced considerable delays in hearing back from WCBO. One representative provided the following blunt description of her frustration with the delays encountered in dealing with the office.

---

The prevailing attitude of the office of the WCBO seems to be that "if we ignore you long enough, you'll die or go away."

---

A number of representatives cited the delays that they experienced as evidence for their belief that individual complainants were subjected to unacceptable delays in obtaining a review of their concerns by the WCBO.

**Recommendations:**

- 7-1    *I recommend that the WCBO keep the complainant informed from time to time throughout the investigation as he or she considers appropriate.***
- 7-2    *I recommend that the WCBO develop his or her own set of guidelines to articulate how his or her discretion will be exercised to give a complaint priority.***

## **7.2 Fairness in Process Employed by the WCBO**

Any Ombudsman, either Classical or Executive, bears a special responsibility to ensure that her or his own investigative process is as fair as possible. As the promoter and “champion” of fair practices and procedures within the organization that it investigates, it is essential that an Executive OmbudsOffice demonstrate a commitment to the principles of administrative fairness and employ a fair investigative process itself. This theme will be expanded upon in Chapter 9.

### **7.2.1 Description of the Investigative Process**

During the OmbudsAudit, complainants were asked whether the representative of the office of the WCBO explained what that office did. Of those complainants surveyed, nearly half did not recall such an explanation having been given them by the WCBO. A high percentage of complainants advised that the office of the WCBO had not explained the process it would follow in reviewing their complaint. Only about one-quarter recalled having been informed of the process that would be followed.

When the office of the WCBO receives a complaint from an individual, a representative often contacts the relevant WCB Manager and requests that the Manager review the concern and contact the complainant. If the complainant receives a subsequent call from the WCB, he or she may be unaware that this was as a result of contacting the office of the WCBO. The office of the WCBO does not usually contact the complainant following the initial discussion of the complaint if it makes such a request to a WCB Manager. Although the office of the WCBO expects that complainants will return to that office if they are dissatisfied with the follow-up provided by a WCB official, there is little evidence to suggest that this expectation is made clear to complainants. The results of interviews conducted during the investigation indicate that many complainants are unaware that they are responsible for contacting the office of the WCBO under such circumstances.

It would appear that the office of the WCBO should take measures to ensure that complainants receive an adequate explanation of the role of the WCBO and the procedure to be followed in reviewing their concerns, following a referral.

**Recommendations:**

- 7-3** *I recommend that during the initial contact with the complainant the WCBO ensure that the complainant is provided with an adequate explanation of the role of the office.*
- 7-4** *I recommend that during the initial contact with the complainant the WCBO ensure that the complainant is provided with an adequate explanation of the procedure to be followed in reviewing his or her complaint and an estimate of the time that it will take to review the complaint.*

**7.2.2 Adequacy of the Opportunity to be Heard**

The investigation revealed that half the complainants surveyed believed that they were not given an adequate opportunity by the office of the WCBO to provide all relevant facts and present their position before the office reached conclusions about their concerns. A slightly differently worded question provided a remarkably similar result in that again, half the complainants surveyed believed that the office of the WCBO did not give them the opportunity to be heard nor did it listen to their concerns. The similarity in the results of these two questions suggests to me that a significant proportion of complainants to the WCBO did not believe that they received an essential component of a fair investigation by that office. Many of those who believed that they were not truly heard by the office of the WCBO indicated that the office representative seemed either not interested in hearing what they had to say or did not have time to listen to their concerns. Complainants and their agents questioned the extent to which the office of the WCBO was willing or able to depart from the positions already provided to them by the WCB.

In reviewing the dockets of the WCBO, there was evidence that the office did not always seek input from complainants regarding their complaints. Unless complainants were persistent in their efforts to speak with the representative of the WCBO handling their concern, the review conducted by the office of the WCBO was often limited to an assessment of the Board's paper or electronic files.

Complainants and their representatives questioned the extent to which the office of the WCBO investigated the issue raised by their complaint. One representative described her concerns in the following terms:



---

I have not seen a situation where the WCBO looked at the whole issue and reported back (to the complainant) in a letter. No one is told what happened. Complaints just vanish!

---

Other representatives observed that the office of the WCBO may be conducting full-scale investigations of important issues, but they were not aware of such investigations being done. In the following example, the decision conveyed to the complainant indicated that a full and thorough investigation of this worker's concerns had been conducted by the office of the WCBO.

---

The representative of the office of the WCBO reviewed the WCB file but did not notify the WCB that she was investigating an important issue about the authenticity of a document. The decision to not substantiate this allegation seems to have been based solely on a review of the WCB file. The office of the WCBO did not contact the complainant to provide her with an opportunity to present her position. Despite the limited review conducted, the office of the WCBO corresponded with the complainant to advise her that the review had not identified any evidence to pursue her allegation.

After the investigation was completed, the complainant and her representative contacted the office of the WCBO eight more times. Nine months after the docket had been closed, the office of the WCBO first approached the WCB for documentation to determine the authenticity of the document in question. At that time, this action was described by the office of the WCBO representative in a file note as a "reasonable first step in the investigative process."

---

I do not believe that the investigation conducted into this matter before that time was sufficient nor did it provide the complainant with an adequate opportunity to present her position.

#### **Recommendation:**

**7-5 I recommend that the WCBO ensure that complainants are given an adequate opportunity to provide all relevant evidence and to be heard, before he or she reaches conclusions about their complaints.**

### **7.2.3 Dignity and Respect**

Despite the negative feedback received from many complainants and representatives regarding communication with the office of the WCBO, it would

appear that all representatives of that office treat people with dignity and respect. A very high percentage of complainants reported during the investigation that they were treated with dignity and respect by the office of the WCBO. This significant, favourable assessment is even more meaningful in that it has not been linked to the outcome of complaints dealt with by the WCBO.

## **7.3 Full, Adequate and Appropriate Reasons Provided by the WCBO**

Our investigation revealed that the office of the WCBO often reviews issues and concerns more thoroughly and comprehensively than many complainants and advocates realize. However, out of an apparent abundance of caution about compromising the confidentiality of its discussions with WCB Managers, the WCBO seldom reports such activity to the complainant.

### **7.3.1 Were the Reasons Provided by the WCBO Understandable?**

When the WCBO does provide a complainant with a written account of his review of a matter, according to a number of complainants and advocates, the letter often shed little new light on the concerns. They believed that such correspondence tended to echo the official positions already taken by the WCB. Some described these letters as written in "boardspeak," a language shared by long-term WCB Managers and understood by those familiar with the WCB. Although the use of such language is understandable in the circumstances, it is important that an Executive OmbudsOffice avoid communicating in a way that mirrors the language employed by the host agency, or in a way that may not be clear to the complainant.

Despite such criticism, I should note that just over half of complainants interviewed stated that they understood the reasons given by the office of the WCBO regarding the outcome of their complaint. Although this figure is significantly higher than the number of those who did not understand the reasons provided to them, it should be kept in mind that only one-third of those surveyed could recall having been given written reasons for the outcome of their complaint.

Those who received written responses from the office of the WCBO were considerably less likely to report that they had not understood the reasons given. A small percentage of those who received written responses reported that they did not understand the reasons given by the office of the WCBO concerning the outcome of their complaint. For those who received oral responses, this percentage increased only marginally.

### ***7.3.2 Were the Reasons Provided by the WCBO Full, Adequate and Appropriate?***

Many complainants surveyed expressed considerable frustration with the reluctance of the office of the WCBO to provide them with a meaningful explanation of the outcome of their complaint. While they understood the reasons provided, only one-third indicated that they found the reasons adequate and over half did not believe that they had received adequate and appropriate reasons. This percentage was considerably higher for those who received written reasons. Over two-thirds of those who received written reasons believed that the reasons were not adequate and appropriate. Nearly half of those who received verbal responses also indicated that they were dissatisfied with the adequacy and appropriateness of the reasons provided.

The investigation has clearly indicated that there is dissatisfaction with the adequacy of the reasons provided by the WCBO. Under such circumstances, it is not surprising that many complainants have indicated that there was little purpose served in approaching that office.

Since a number of representatives maintained that they had never seen any written outcome provided by the office of the WCBO, they could not address this issue adequately. However, those representatives who were willing to comment on this aspect of the operations of the office of the WCBO believed that the reasons provided by the office of the WCBO were neither understandable nor adequate.

### ***7.3.3 Were Written Reasons Provided?***

Of the complainants surveyed during the investigation, 35% claimed that they had received a written response from the office of the WCBO regarding their concerns. Another 44% indicated that they had been given a verbal explanation. Opinions were divided as to whether a written response would have been of use to the complainant.

Forty-six per cent of the complainants surveyed indicated that they would have preferred to have received a written response from the office of the WCBO. Many of these individuals explained that had they received such a document, they would have been able to keep a more effective record of their interaction with that office. Without such a document, the review of the office of the WCBO became blurred with all of the other dealings that these individuals had had with the workers' compensation system. For this reason alone, I believe that the WCBO

should send a concluding letter to complainants reporting on the review conducted. This procedure would establish the closure to complainants and their representatives or advocates that some have identified as being missing at present.

I understand that more letters are being sent to complainants now than was the case during the early months and years of the operations of the office of the WCBO. At present, the office of the WCBO sends reporting letters at the conclusion of an investigation if:

- the matter is complex;
- the conversation with the complainant suggests that the reasons provided by the office of the WCBO are not well understood;
- the complainant requests such a letter; or
- it has become evident that further verbal communication is not conducive to good rapport with the complainant.

Since this trend towards providing more reporting letters is a positive development, it does not appear that a recommendation requiring that a letter be sent to every complainant who approaches the office of the WCBO would be appropriate at this time. As noted above, many complainants surveyed said that they were satisfied with an oral explanation of the review conducted by the office. For many of these complaints, little action was required or undertaken. To require a letter to every complainant would not meet complainants' needs any more effectively and would utilize resources better expended on other aspects of the operations of the office.

The following recommendation is intended to ensure that everyone who comes to the office of the WCBO with a complaint will receive an adequate explanation of that office's review of his or her complaint. I would ask that the office of the WCBO send a reporting letter to a complainant when there is any doubt as to whether a reporting letter is required.

#### **Recommendations:**

- 7-6    *I recommend that the WCBO endeavour to provide every complainant who approaches the office with appropriate feedback including reasons, and a full and adequate explanation of the outcome of the complaint investigation.***

- 7-7** *I recommend that dockets of the WCBO not be closed until the office confirms that the WCB has taken the action that it has committed to take, or refused to take steps to address the situation in dispute; and that the WCBO communicate all appropriate information to a complainant in a timely fashion.*
- 7-8** *I recommend that the WCBO ensure that all complainants are notified specifically when their dockets are closed.*
- 7-9** *I recommend that the WCBO ensure that he or she completes an appropriate investigation of all important components of an individual's complaint, including complaints regarding customer service, before the investigative docket is closed.*

## **8.0 Communication with the WCB**

An Ombudsman, Classical or Executive, must maintain effective communications with the organization that it investigates and have its active co-operation. Otherwise, there is little potential, particularly for an Executive OmbudsOffice, to achieve its goals.

### **8.1 Communication between the WCBO and the WCB**

When the office of the WCBO identifies a situation where it needs to consult with a WCB official, it usually gives notice by way of an "Ombudfax" to the relevant WCB Manager. On many occasions, this fax outlines the concerns raised and requests that the WCB Manager review the situation and ensure that someone contacts the complainant. The office of the WCBO attaches to the Ombudfax the following standard request to the WCB official:

*Could you please follow up directly with the complainant within the next couple of working days. Please advise the WCBO contact person when the issue has been resolved, or if you require more than two (2) days to resolve the issue.*

The office of the WCBO has employed this procedure to obtain a review of the complainant's concerns and to facilitate dialogue between the WCB official and the complainant. A speedy resolution of a complainant's concerns often occurs as a result of the Ombudfax from the office of the WCBO.

As this is the most frequent document that the office of the WCBO sends to WCB officials, care must be taken to ensure that it reflects that the office is a fair investigator of complaints. While WCB Managers and Directors who had dealt with the office of the WCBO generally found their working relationship with that office positive, some Managers expressed concern that the office tended to take the side of the complainant against the WCB. As noted elsewhere in this Report, it is essential for an Executive Ombudsman to take all steps possible to demonstrate that his or her office provides a fair and impartial investigation of complaints and is not an advocate or advisor for the complainant.

In reviewing the wording of the Ombudfax, it would appear that WCB Managers are being asked to "resolve" the issue raised by the complainant. In many situations, the issue in dispute has been contentious for some time and the WCB official may be unable or unwilling to resolve the issue on the complainant's terms. Resolution of the issue (certainly resolution within two days) is often an unrealistic expectation, given the considerable history that has often preceded an individual's approach to the WCBO. At the time the Ombudfax is sent, the complaint may not have been thoroughly investigated by the WCBO. It may be appropriate for the office of the WCBO to request that a WCB official take action to resolve a complaint once the WCBO has conducted a thorough investigation of the complaint. However, the present phrasing of this initial document contributes to a perception held by some WCB officials that the WCBO seeks resolutions of disputes on terms proposed by the complainant, without having heard from the authority.

I recognize that the Ombudfax gives WCB Managers a final opportunity to review an individual's concern before the WCBO begins its investigation. Employing this method of communicating concerns to WCB Managers has considerable merit. A revision of the standard wording of the Ombudfax may assist in demonstrating that the office of the WCBO has not favoured either side in the dispute, prior to beginning an investigation.

The office of the WCBO seems to have used this approach in one case where the following request was included in a second Ombudfax sent to a WCB Manager.

---

(Please) follow up with complainant and discuss his concerns. Also, please advise our office when the employability assessment is expected to be completed and the file returned to ... for their consideration.

---

With this set of expectations clearly identified, the WCB Manager contacted the office of the WCBO the following day to advise regarding the outcome of the discussion with the complainant. I am making the following recommendation in the context of a general lack of understanding regarding the role and function of the WCBO revealed during the OmbudsAudit. As mentioned elsewhere in this Report, I believe that it is important for the WCBO to ensure that every procedure it employs reinforces the independence and impartiality of that office.



**Recommendation:**

- 8-1** *I recommend that the Ombudfax from the WCBO be revised to clearly set out the follow-up that the office expects to receive from the WCB official receiving the fax and that the language employed is plain and impartial, such as:*

*Could you please follow up directly with the complainant within the next couple of working days. Please advise the WCBO contact person when you have reviewed this matter and have been in touch with the complainant, or if you require more than two (2) days to address the issue. Alternatively, if you are unable to address the concerns of the complainant, for any reason, please advise this office.*

## **8.2 Feedback Provided by the WCB to Requests from the WCBO**

Our review of the files indicates that in 1996 WCB Managers typically provided the WCBO with the requested updates regarding the outcome of their reviews of the matters brought to their attention by that office. However, records of responses being provided by the WCB to the Ombudfax or other inquiry from the office of the WCBO indicate that the response seldom occurred as quickly as requested by the office of the WCBO. In addition, the office of the WCBO might have been more effective in documenting and retaining the feedback received from the WCB in its first several months of existence.

---

In one situation, the office of the WCBO closed its docket on the same day that it faxed a request to search for a worker's allegedly missing reopening request. Almost four months later, the WCBO sent a follow-up fax as the worker was still unable to obtain any information about his reopening request. Despite this second request, there is no record of the WCB Manager having provided the WCBO with the requested feedback regarding this matter.

---

Both WCB Managers and representatives of the office of the WCBO have indicated that Managers provide the office with information regarding their actions to address complainant's concerns as requested. As noted in the following quotes from WCB Managers responding to the WCB Survey, the investigation revealed some evidence to confirm that such follow-up does in fact occur.

---

Usually we copy e-mail of resolution or follow-up to their office, so no follow-up required by them.

---

I always answer them promptly and fax a copy of the response to the WCB office.

---

In one of the dockets reviewed, for example, the office of the WCBO was provided with a short memo outlining the action taken and the outcome of the WCB's review of the matter within one week of receiving a faxed request to contact a complainant. This follow-up enabled the office of the WCBO to effectively report back to the complainant regarding the outcome of its investigation. This is the type of follow-up that I would be expecting WCB officials to provide in response to inquiries from the WCBO.

### **Recommendations:**

- 8-2** *I recommend that the WCBO take measures to ensure that all relevant information that he or she obtains pertaining to complaints and investigations is retained in one easily accessible location and archived in accordance with provincial standards.*
- 8-3** *I recommend that the WCBO continue to develop and enhance a secure and independent system for retaining all records relevant to the work of the office that come into his or her possession.*
- 8-4** *I recommend that the WCB take steps to ensure that WCB Managers respond appropriately within the time frames stipulated by the WCBO when he or she requests information about a complaint.*

## **8.3 Notice to and Consultation with WCB**

The Docket Review revealed many situations where the office of the WCBO conducted investigations of complainants' concerns with no notification to the WCB.

In these situations, the WCB would not have been aware that the office of the WCBO was conducting an investigation. As was the case in the following example, the WCB was never advised that the investigation conducted by the office of the WCBO had identified that the claim had been handled fairly.

---

The WCBO conducted an investigation of a worker's lengthy history with the compensation process including a review of his file with the WCB. He was advised in a letter from the office of the WCBO of the following:

*The initial adjudication and readjudication of the above noted claim complied with policy and practice. The repayment of monies previously recovered from you complied with policy and practice...*

Although some other alternatives were identified, it seems that the WCBO issued findings that policy and practice were followed so "there is no basis for further investigation by the office of the WCBO." Under such circumstances, no notification was given to the WCB that the issue was being investigated nor that findings were issued.

---

WCB Managers reported that they did not often learn of the outcome of investigations conducted by the office of the WCBO. The following are observations of WCB Managers surveyed during our investigation:

---

One WCB Manager noted that he or she had requested a formal report from the office of the WCBO: "In one instance I did request follow-up but did not get a response."

---

A new WCB Manager advised "I receive... a note on e-mail that leaves me uncertain if the matter is concluded or not."

---

Sometimes a fax is the only communication received. A fax is not a formal report.

---

Others noted that the absence of any written report or feedback from the office of the WCBO contributed to the lack of clarity about the role of that office.

---

Missing the end result re: follow-up and implementation of decisions so (it) is not clear as to how their intervention differs from other types of interventions.

---

Under such circumstances, it is often helpful for decision makers within the WCB organization to be aware that their decisions were reviewed by an independent and neutral body, in this case, the office of the WCBO, and that the complaint has not been substantiated. The existing system of the office of the WCBO of providing feedback to WCB Managers and staff does not take full advantage of the learning opportunity provided when investigations confirm that a complainant has been treated fairly. Such feedback is also helpful in emphasizing to the organization that the Executive OmbudsOffice provides both positive and negative feedback, in an impartial manner, regarding the organization's administrative practices.

**Recommendation:**

**8-5 I recommend that the WCBO endeavour to provide WCB officials with appropriate feedback including reasons, and a full and adequate explanation of the outcome of all complaints.**

## **8.4 Lack of Follow-up by the WCBO**

For an OmbudsOffice to function effectively, it is important that a documented "bring forward" system is in place. Without such a system, there is no assurance that commitments made are implemented. Organizations under investigation may make commitments that are specific to a review of an individual case. On other occasions, the investigation of an individual case or cases may lead to a review of policies, procedures, practices and even proposed new legislation. If a decision is made that an individual docket should be closed, there must be an effective system in place whereby the OmbudsOffice follows up with the organization being investigated to ensure that the organization's review of the matter meets the Ombudsman's standard of fairness, or proposed resolution or recommendation.

### ***Recommendation:***

**8-6** *I recommend that the WCBO develop and implement a tracking system to follow up on commitments made by the WCB in response to resolutions and recommendations from the WCBO.*

## 9.0 Being Fair First

### 9.1 Adequate in the Circumstances

One of the major motivating factors in proposing the establishment of an Executive OmbudsOffice at WCB was to provide an on-site remedy for injured workers and employers. This was identified to WCB and the WCBO as one of three major issues that would be considered in the course of this investigation.

Subsection 13(c) of the **Ombudsman Act** reads as follows.

**13** *The Ombudsman may refuse to investigate or cease investigating a complaint if, in the opinion of the Ombudsman,...*

*(c) the law or existing administrative procedure provides a remedy adequate in the circumstances for the person aggrieved, and, if the person aggrieved has not availed himself or herself of the remedy, there is no reasonable justification for the failure to do so;...*

Such a provision enables an Ombudsman to exercise her or his discretion not to investigate a complaint brought to the Ombudsman's Office. While Ombudsman frequently utilize this provision, what exactly does such a provision mean? Although similar provisions are contained in legislation establishing most Classical Ombudsman Offices, surprisingly little has been written in this area. This is despite the fact that those Offices having the benefit of such a provision have relied upon it heavily in the course of their work. Is the wording of this discretionary provision met if an Ombudsman is able to identify someone who may be able to resolve an individual's concerns? Or does it require a higher standard? If, as I maintain, it does require a higher standard, what are the factors that should be taken into account in assessing the adequacy of a remedy?

There are many factors to consider when deciding whether a remedy is adequate in the circumstances sufficient that a Classical Ombudsman or her or his delegates can refer a complainant to that remedy.

First and foremost, in order to fall properly under subsec. 13(c), a remedy must be in place, that means existing at a time prior to the complaint being filed. Any *ad hoc* arrangement developed by an authority in response to notification that the Ombudsman has received a complaint or during the course of an investigation

would not enable a Classical Ombudsman or her or his delegate to appropriately utilize subsec. 13(c) in closing a complainant's file. Indeed, it must be in place **by virtue of the law** making provision for it or that it constitutes an **existing** administrative procedure. A careful examination of the subsection supports the need for the remedy to be in place.

The second factor is whether the remedy is adequate **in the circumstances** that form the subject matter raised by the complainant. It is important, therefore, that the OmbudsOffice assess all elements of a complainant's concerns to ensure that the referral will provide a remedy that is **de facto** adequate for the particular complaint lodged. If certain elements of the complaint are clearly beyond the mandate of the possible remedy, then there should be no referral. If a portion of the complaint can be dealt with through an available remedy and can be separated from the remainder of the complaint, then a referral of that part can be made. Caution should be exercised in cases when a matter is divided up in a way that may lead to confusion on the part of the complainant or to poor service. In the end, circumstances in the complaint must match the kinds of circumstances for which the remedy was created.

And the third factor to consider is whether the remedy is **adequate** in the circumstances.

First a brief statement about just how important the assessment is to determine whether a remedy is adequate, particularly from the public's perception. Classical Ombudsman should exercise due diligence in assessing whether or not an existing law or procedure provides an adequate remedy. The strength of Ombudswork, after all, rests on the soundness of the investigations conducted. People are not convinced to change their conduct because the Ombudsman can compel them to do so but rather because the investigation conducted reveals the true state of facts that ought to persuade even the most intransigent of authorities. The investigation is at the core of the work of the Ombudsman. All investigations must be done thoroughly and impartially to discover whether the complaint is substantiated and exposes an unfair administrative policy, practice or procedure or is unsubstantiated and discloses no unfairness. Therefore, it is of the utmost importance to make referrals under subsec. 13(c) only when it is patently clear that the remedy is adequate. In such cases, the Ombudsman or her or his delegates makes this declaration that a remedy may be fair and adequate in a particular situation in advance of conducting or completing an investigation into the complaint.

Many complainants will feel confused by such a referral. How does the Ombudsman know in advance of looking into any situation, they may ask, that this remedy will work in those circumstances? One of the cornerstones of an Ombudsman's mandate is that she or he does not decide anything in advance of investigating the facts. This is to ensure that there is no appearance of partiality or bias. It is very important, therefore, that the determination of whether or not a remedy falls within the meaning of subsec. 13(c) properly falls to the Ombudsman and not solely at the urging of the public body and that it is an assessment that scrutinizes the adequacy of the remedy adequately. It remains open at all times for complainants to return to the Ombudsman to complain about their original concern and to complain that the remedy to which they were referred was not adequate and itself ought also to be investigated. While this will inevitably occur on occasion, adequate assessment of the remedy in advance, and of the complaint on intake ought to guard against this being a frequent occurrence. If the complaints about the so-called available and adequate remedy escalate and the Ombudsman fails to discontinue making referrals under subsec. 13(c) this will bring the Ombudsman's Office itself into disrepute.

The ability of an Ombudsman to refer complainants to other complaints mechanisms in appropriate cases is a very important discretionary provision for managing the volume of complaints to the Ombudsman. During the proclamation of in excess of 2,800 new authorities listed in the Schedule of the **Ombudsman Act** in BC, considerable attention was devoted to harmonizing all public bodies' attempts to establish appeal, review and complaints mechanisms and the Ombudsman's subsec. 13(c), **available and adequate remedy** threshold. The goal, however, was not to whisk away complaints from the Ombudsman to someone else within government to deal with but to urge public bodies to be **fair first** and to do so by meeting the challenge of subsec. 13(c). Clearly the governing Ombudsman statute contemplates that government should be in a position to manage its own complaints. Subsection 13(c) reflects that possibility in a clear and important way. Ombudsman investigations should always be a last resort. Public bodies should take responsibility in the first instance for the complaints and concerns raised about their work or service.

What are the factors to consider in determining whether or not a remedy is **adequate** in the circumstances? Does the WCBO meet the test? Does the test differ if the adequate remedy professes to be an Executive Ombudsman office?

As the Guiding Principles in the first chapter of this Report outline, several criteria can be used to assess the adequacy of an existing remedy. These can be referred to



as the ***Ombudsman Checklist for an Adequate Remedy***. In the first chapter of this Report, I recommended the name change to the "WCB Fair Practices Commissioner" if the recommendations regarding the WCBO are not implemented. Regardless, I have concluded that, as now constituted, the WCBO is an available remedy that may be adequate in the circumstances and is properly designated as a potential subsec. 13(c) remedy under the policies of the British Columbia Ombudsman's Office. The establishment of the WCBO is a clear indication that WCB will continue to strive to be ***fair first*** to the people it serves.

***Recommendations:***

- 9-1 ***I recommend that the WCBO continue to receive referrals from the Office of the Ombudsman for the Province of British Columbia as a remedy adequate in appropriate circumstances.***
- 9-2 ***I recommend that the WCBO continuously review and audit his or her own policies, practices and procedures to ensure compliance with the Ombudsman Checklist for an Adequate Remedy, which reads:***
  - a. ***A clearly articulated mandate provided for in law or in an existing administrative procedure;***
  - b. ***Policies, procedures and practices that demonstrate a respect for and are consistent with its legislative authority or administrative procedure;***
  - c. ***Absence of bias;***
  - d. ***Competence and capacity to receive complaints and conduct thorough reviews, investigations or appeals;***
  - e. ***Power to order or recommend corrective action to the public body;***
  - f. ***Commitment to the principles of administrative fairness and the rules of natural justice.***

## 9.2 Administrative Fairness

The Classical Ombudsman's Office must also retain a role in addition to monitoring the adequacy of that remedy and the use of the title. That is, whether the remedy itself is practicing administrative fairness. This holds true particularly where the available remedy holds itself out to be an Executive Ombudsman office. One person reminded me during the OmbudsAudit that individuals have come to rely on the services of the Provincial Ombudsman's Office as the only protection that some individuals who are disempowered have to ensure that they receive fair treatment from such large monolithic organizations as the WCB. This reliance places a continuing responsibility on the Classical Ombudsman when new models for handling complaints are put in place and need to be tested, especially in organizations where complaints are commonplace and many. This becomes even more important when the body is within the jurisdiction of the Classical Ombudsman. Therefore, an Executive Ombudsman, close but at arm's length from an organization such as WCB, must be able to withstand close scrutiny, meet the test as a form of meaningful redress and by its own conduct attract no claim of maladministration.

### 9.2.1 Practising Administrative Fairness

The degree to which the WCBO must demonstrate adherence to the rules of natural justice and the principles of administrative fairness must be considered in the context of his or her intended role and the environment in which his or her business is conducted.

The WCB articulates its own mandate as:

*The Workers' Compensation Board is an administrative agency that operates under the authority of the **Workers' Compensation Act**. The WCB is dedicated to the safety, protection and good health of workers. Its 2,400 employees:*

- *Monitor and promote occupational safety and health practices through regulation, inspection, education and consultation*
- *Provide rehabilitation and compensation, as well as vocational training to workers who are injured or suffer from an occupational disease*
- *Provide compensation to dependants of workers who have died as the result of a work-related injury or occupational disease.*

*(Source: WCB Website Homepage)*

It is, in my opinion, therefore, appropriate to demand a very high level of procedural protection where the interests of injured workers, workers, their families and employers are at stake. The mandate of the WCBO includes all divisions of the WCB but is primarily in the areas of compensation and prevention, and therefore, the interests at stake for those affected by the administration of WCB are critically important.

**Recommendation:**

**9-3 I recommend that the WCBO demonstrate adherence to the following principles and rules of fair practice for the work of his or her office:**

- a. Timeliness in responding to the complaints received;**
- b. Notice to all parties potentially adversely affected during the course of an investigation;**
- c. Giving parties the chance to be heard and make representations before an investigation is completed;**
- d. Consideration of all relevant evidence related to the complaint;**
- e. Giving full, adequate and appropriate reasons for a decision;**
- f. Making findings known to those adversely affected and giving them the opportunity to respond;**
- g. Proposing recommendations that are systemic, remedial and appropriate;**
- h. Reporting to the public on the work of the office;**
- i. Commitment to operate on the basis of clearly articulated principles that will include the following:**
  - i. Treating everyone with courtesy, dignity and respect**
  - ii. Being independent, impartial and honest**
  - iii. Using cooperation, empathy and good will in all work**
  - iv. Promoting equality, inclusion and access for all persons.**

## **9.2.2 Promoting Administrative Fairness**

One of the key benefits of an Executive Ombudsman is the potential to promote administrative fairness within its host organization. Every Ombudsman, either Classical or Executive, aspires to promote fair administrative policies and practices for the organization(s) within its jurisdiction. This objective can be achieved in many ways, not the least of which is to emulate fair practice and to be a clear role model.

The challenge confronting a Classical Ombudsman in promoting administrative fairness in this way is that these activities are diffused among the many organizations within the Office's jurisdiction. In British Columbia, special initiatives that my Office can take to promote administrative fairness within any given organization are limited to the extent that my jurisdiction extends to so many diverse public bodies within this province. Careful marshalling of resources still enables my Office to initiate measures to promote administrative fairness within specific organizations or subject areas.

The challenge faced by an Executive Ombudsman is to be able to urge its host agency to practice administrative fairness on the one hand, while maintaining its arm's length independent position, on the other. Executive OmbudsOffices will inevitably have greater expertise in the issues and policies relevant to the host agency and are often referred to as specialty, single-purpose or organizational ombudsman.

Whereas a Classical OmbudsOffice must cope with a wide range of subject matter and relationships, an Executive OmbudsOffice has a much more specialized focus. This focus enables an Executive Ombudsman to obtain an informed perspective on issues of ongoing significance to the organization. The extent to which the office of the WCBO can keep current with important developments and trends affecting service delivery within the organization was viewed favourably by a number of WCB Management surveyed during the investigation.

---

The WCB Ombudsman should keep the organization apprised of trend lines/ issues/opportunities, etc.

---

I'd like more demographic background of complainants. Are they repeat complainants? How satisfactory were resolutions to them?

---

I would like to see a verbal report with open discussion on any trends identified.

---

By concentrating on one organization, an Executive OmbudsOffice is able to provide a wealth of feedback to the organization that it investigates. It also has unique opportunities to educate staff when investigations of complaints identify institutional problems. These opportunities are a direct result of its proximity to the organization being investigated. To incorporate administrative fairness as part of the organizational culture, an Executive OmbudsOffice can provide effective

complaint information to the organization. Executive OmbudsOffices may be better positioned to identify patterns and trends in complaints received than are Classical OmbudsOffices. Executive OmbudsOffices may also be able to monitor an organization's attempts to prevent future complaints.

The office of the WCBO has endorsed the Standards of Practice developed by an international organization, The Ombudsman Association. While these Standards do not align directly with those of a Classical Ombudsman, there is a recognition of the role that the Executive OmbudsOffice has in promoting administrative fairness within the organization that it monitors. One of the Standards of Practice included as the first page of the WCBO's first Annual Report reads as follows:

*We provide feedback on trends, issues, policies and practices without breaching confidentiality or anonymity. We identify new problems and we provide support for responsible systems change.*

From the following description of the role of the WCBO, it is clear that the WCB originally intended the WCBO to be a promoter of administrative fairness within the WCB.

---

**ROLE:**

The ombudsman is a facilitator or advocate for administrative fairness; intent on satisfying client complaints while having regard to the administrative integrity of the system.

(December 17, 1995 memo from the Director, Policy and Research Department WCB to Dale Parker, President and CEO of WCB).

---

The argument for utilizing complaints as useful feedback for an organization was outlined by the Ombudsman for the Government of Ireland in his study of Internal Complaints Systems in his 1997 Annual Report.

*I hope that public bodies will see internal complaints systems as an opportunity for feedback which will lead to improvements in the quality of services at the local level...*

*An internal complaints system should be seen in a positive light as an opportunity to get feedback on the quality of service provided and to rectify any defects in their administrative procedures.*

**(Chapter 4-Internal Complaints Systems, 1997 Annual Report of the Ombudsman for the Government of Ireland)**

The following description of the role of the British Parliamentary Commissioner

---

for Administration is interesting in that it captures the preventative approach to Ombudsmanship that I maintain should be an important function of an Executive Ombudsman.

*One fundamental choice that may have to be made is between the ombudsman as "fire-fighter" and "fire-watcher."... The former clears up the mess and tackles problems as they occur (responding to individual grievances), the latter looks to the future and attempts to prevent problems arising by improving administrative systems...*

*(Drewry and Harlow, "A 'Cutting Edge?' The Parliamentary Commissioner and MPs" (1990) 53 MLR 745 in A.P. Le Sueur and JW Herberg, **Constitutional and Administrative Law**, 1995, p. 148).*

Both roles are important. Without a capacity to address individual grievances, the classical role of the Ombudsman in redressing instances of maladministration is lost. However, an OmbudsOffice that investigates only individual complaints may miss an opportunity to be proactive. Under some circumstances, correction of systemic problems may have the potential to promote administrative fairness and directly improve service to many more people than that limited number who file individual complaints. Also, taking every opportunity to educate public bodies on how to be **fair first** is an important feature of an Ombudsman who is the promoter of administrative fairness.

This role of the Ombudsman to promote administrative fairness has been described by the Ontario Ombudsman as "preventative ombudsmanship."

*I continue to offer meetings with officials of ministries, boards, agencies, tribunals, and commissions to discuss in general terms the attributes which promote fairness, equity and justice in administrative policies, practices, and procedures. (The Ontario Ombudsman's Annual Report 1990-1991, p.6)*

The Commonwealth Ombudsman for Australia has contributed to the understanding of complaint-handling systems through her 1997 study entitled **A Good Practice Guide for Effective Complaint Handling**. In that Guide, she describes the essential elements of an effective complaint-handling system from a theoretical standpoint and then discusses how an agency could put these principles into practice. Of particular relevance to the present consideration of the role of the Executive OmbudsOffice as a promoter of administrative fairness within

an organization are the following observations regarding the commitment required to develop an effective complaint-handling system:

*Commitment...means developing an organisational culture where a client's right to complain is acknowledged and where complaints are recognised as providing valuable feedback on service quality and the effectiveness of programs and policies. Commitment requires ongoing effort from all levels of the organisation...*

*Management can demonstrate its commitment to the complaint system by:*

- *re-affirming the value of effective complaints handling procedures in statements to staff, for example, during orientation for new starters;*
- *using the information collected through the internal complaint system, for example, regularly reviewing complaint information to identify possible systemic weaknesses and opportunities for improvement;*
- *ensuring that complaint handling is built into the organisation's corporate and strategic plans and covered in annual reports;*
- *developing a Charter and Service Standards for the organisation;*
- *creating an environment where complaints are seen as opportunities to identify failures in services and systems and as a means to continuous improvement.*

This Guide provides an interesting set of standards by which an organization's commitment to its complaint-handling system can be measured. While not all of these standards may be imported directly to the context of the WCB in this province, they do provide a benchmark to measure the extent to which the office of the WCBO is valued as a promoter of administrative fairness for that organization.

### **9.2.3 The Experience of the WCBO**

The WCBO has made significant progress in providing valuable feedback on service quality in a format that is tailored to the expressed needs of WCB Managers and Directors. A discussion of complaint statistics received by the WCBO forms a standing agenda item in quarterly meetings with on-line WCB Managers. The WCBO often attends a portion of these meetings to note trends that he has been following.

The WCB Management Survey suggests that while the WCBO may be encountering some success in providing statistical data to WCB Managers, the

challenge may lie in moving this process away from an opportunity to hold WCB Managers accountable for specific cases. The interest that WCB Managers currently demonstrate in this process appears limited to whether they can explain their office's position regarding specific complaints lodged to the office of the WCBO. It appears that the office is not always viewed as an identifier of possible systemic weaknesses or a contributor to improving the overall administrative fairness practised at the WCB.

For example, only 22 % of WCB Management personnel surveyed were aware of any structural or systemic changes that had occurred as a result of an investigation by the office of the WCBO. Rather than being an indicator of actual or perceived structural changes initiated through investigations by the office of the WCBO, this lack of awareness may be a reflection of the reporting system utilized by that office. This statistic may be a reflection of the responsibilities of the sample group of WCB Management selected. Seventy-four per cent of WCB Management officials surveyed held the position of WCB Managers. However, I did hear feedback from representatives and WCB Management staff who observed that the involvement of the WCBO repeated services provided elsewhere and seldom led to a different outcome. Only 36 % of WCB Management surveyed reported that the WCBO had been instrumental in increasing staff awareness of principles of fairness. Many considered that there was no need for a promoter of fairness at the WCB, as they believed that ongoing initiatives at the WCB were satisfactory. Few of the complainants or representatives contacted during the OmbudsAudit shared that view.

Only a small percentage of the WCB Management personnel surveyed had ever consulted with the WCBO for advice about a complaint or matter of concern. Many of the management personnel seemed surprised that such a service could even be provided by the office of the WCBO and expressed interest in the possibility of utilizing this resource.

---

I haven't heard much if anything about the office of the WCBO attempting to provide guidance to Board staff regarding principles of fairness.....so far (I) wasn't aware that the WCBO had a broad mandate to provide guidance to WCB staff about principles of fairness.

---

Others believed that such input would be of little use. Those who had taken advantage of this service provided by the WCBO seemed satisfied and intended to use the service in the future. One WCB Director asked the WCBO questions about ethical issues and found the feedback thoughtful and instructive. That Director



also found it easier to access this source of input than to approach my Office for such input. Another Senior WCB official expressed respect for the incumbent WCBO's opinions and would not hesitate to ask him for advice on an issue of fairness if the need arose. Other representative feedback from WCB Management personnel surveyed was as follows:

---

Contact provided additional information that assisted my department in resolving the issue.

---

On a couple of occasions, I have spoken to the (WCB) Ombudsman for clarification of the issues to be resolved.

---

Input (received from the WCBO) provides an enhanced perspective of issues.

---

On some planned changes in procedures, I would discuss with WCBO to ensure things were appropriate prior to issuing formal changes.

---

Few WCB Management personnel were aware of requests from the office of the WCBO to provide input into the training programs of their unit or department. Slightly more reported that the office of the WCBO had asked their unit or department to ensure that public information was sufficiently detailed, understandable and readily available. The WCBO has asked WCB Management to incorporate specific reviews of complaints as an educative tool in its staff training and development meetings. Such initiatives indicate that the WCBO recognizes that he can and should have a role in educating the WCB about the lessons learned through its reviews of complaints. However, the office of the WCBO may not currently have adequate resources to make this effective link between its investigations of complaints and the promotion of administrative fairness within the WCB.

If the office of the WCBO were resourced to take more effective advantage of the complaint information it receives, then examples such as the following one may have been utilized as an opportunity to educate WCB staff and management. Instead, the following complaint was treated as an individual case, investigated on that basis and closed immediately following referral. This is a good example of an educational opportunity that could have been pursued by the WCBO.

---

The office of the WCBO was alerted to a situation in which a WCB employee had allegedly discussed the details of another worker's claim to demonstrate

---

that the other worker should have qualified for retraining while the claimant should not have qualified for such retraining. As the WCBO was concerned that there may have been a breach of confidentiality, he approached the WCB Manager responsible for the employee in question. He asked that the Manager follow up with the complainant and the WCB employee. Although his fax also asked that the WCB Manager follow up with the office of the WCBO within two days, no such follow-up occurred. As the WCBO docket was immediately closed upon sending the fax to the WCB Manager, there is no record of any follow-up by the office of the WCBO on this important matter.

---

**Recommendation:**

**9-4 I recommend that the WCBO develop a strategic plan that specifically includes a commitment to the rules of natural justice and the principles of administrative fairness and a goal to promote administrative fairness throughout the WCB.**

### **9.2.4 Is the WCB Fertile Ground for a Promoter of Fairness?**

The WCBO has limited resources for activities to promote administrative fairness within the WCB. From the comments provided by WCB Managers, it would seem that many view their activities as administratively fair. No one likes to think of his or her decisions, activities or practices as being administratively unfair. It is not surprising then that there has been no groundswell of support within WCB for input from an office that may call into question this set of assumptions. This sentiment was described by a number of WCB Management officials who participated in the investigation. The following observations from WCB Management reflected the view within the WCB that the office of the WCBO played a useful if limited role as a complaints bureau where dissatisfied people can be sent.

---

The WCBO is an internal court of last resort and a complaints department.

---

The office of the WCBO is a complaints bureau. I'd like to hear from the office of the WCBO to determine if complaints are being deflected adequately by that office.

---

The WCBO deflects some complainants with an interpretation of policies, etc.

---

I should also note that there were others within WCB Management who were not willing to accept the office of the WCBO even in the limited role of a complaints

bureau. One experienced WCB Management official noted, "WCB people are generally defensive when their decisions are questioned by anyone, including the WCBO." One respondent to the WCB Management Survey saw the WCB Ombudsman's involvement on occasion "as an intrusion into the queue system—the squeaky wheel!" Another respondent claimed that WCB Managers often viewed the WCBO as a "nuisance." These sentiments seemed shared by the respondent to the WCB Management Survey who described the WCBO's role in the following terms:

---

One more level of complaint resolution. In my experience had the worker come to the manager this issue could have been resolved without the Ombudsman's intervention.

---

One Manager confided that he co-operated with the office of the WCBO because he was compelled to do so by Senior Management, an admission that acted as a preamble to this Manager's recommendation that the WCBO be abolished. A few other surveys completed by WCB Management offered similar advice.

There were others within WCB Management who were critical of the way representatives of the office of the WCBO were treated by their colleagues.

---

The office of the WCBO is not getting the level of respect and co-operation it deserves...The WCB has not internally promoted this office...Colleagues speak lightly of the office of the WCBO and ask why that office is poking its nose into issues.

---

During the OmbudsAudit, a number of WCB Managers, Directors and Senior Executives made this distinction between a complaints bureau and the preventative and educative approach ideally taken by a fully resourced and operational Executive OmbudsOffice. One member of WCB Management described this distinction in the following terms:

---

The office of the WCBO is not resourced to be anything but a 'Complaints Department' and is operating as that to an extent...If the office (of the WCBO) is only a 'Complaints Department', then don't call it an Ombudsman; change its mandate.

---

It would appear that at this stage in the evolution of the office of the WCBO, the office must conduct its activities in an environment that does not yet view complaints as opportunities for improvement and as a means to identify weaknesses in services and systems.

The WCB may face a formidable challenge in shifting the perception that an Executive Ombudsman should be no more than a complaints bureau. I am optimistic that WCB can meet this challenge to support the office of the WCBO as a genuine promoter of administrative fairness within that organization. This shift may facilitate an institutional commitment to practising administrative fairness at all levels.

**Recommendation:**

**9-5** *I recommend that the WCB initiate a review to ensure that the promotion of administrative fairness is recognized throughout the organization as an important role of the WCBO.*

### **9.2.5 Educative and Preventative Role Regarding Administrative Fairness Issues**

While the WCBO has identified some opportunities to engage WCB Managers in a wider discussion of issues involving administrative fairness, resourcing constraints have led to minimal activity in this important area.

From the WCBO's 1998 Business Plan there are indicators that the WCBO attaches importance to his responsibilities to educate, communicate and identify trends. In that Business Plan, the three objectives of the WCBO were listed as follows:

**Objective 1:** *Provide timely service to clients.*

*Strategy:* *To improve our service response time.*

**Objective 2:** *Educate and communicate with the communities on the role and function of the office.*

*Strategy:* *To be available for in-person presentations, as time permits.*

**Objective 3:** *Provide usable information to the WCB administration.*

*Strategy:* *To improve the statistical database and to collect information relevant to the needs, goals and strategies of the operational divisions.*

However, meeting the second of these important objectives is qualified by the availability of time to participate in such activities. Some WCB Management

recommended that the office of the WCBO adopt a higher profile and become a more active promoter of administrative fairness at the WCB. I received the following feedback in the WCB Management Survey regarding the future role of the office of the WCBO.

---

(a) greater role in internal communication in educating staff and management about the nature of complaints and concerns.

---

Be proactive—use data/info to recognize trends to be able to communicate with line divisions.

---

Higher profile so support is more readily available. If the office dealt with causes instead of symptoms, the overall system would benefit.

---

More communication on what in fact they are doing in the area of trend analysis for problem areas so we as managers can address through training/education.

---

Increase their presence and have them do ongoing education so we have some idea as to how they are doing with referrals, etc.

---

Additional staff to become more involved in educational activities.

---

This feedback came from all levels of those surveyed at the WCB. There was also evidence of support for increased activity in this area in other sections of the WCB Management Survey. A very high percentage of WCB Management surveyed believed that the WCBO should attach more importance to its educative and preventative roles in the future.

Survey results indicate that many within Management at WCB would support such a role. It would appear that over the first two and a half years of its operations, the WCBO has created an appetite within the WCB for an increased educative and preventative role in promoting administrative fairness.

### **Recommendation:**

**9-6 I recommend that the respective Annual Reports issued by the WCB and the WCBO include an accounting of the activities undertaken to promote administrative fairness within the WCB.**

## ***10.0 Efficient and Effective***

As mentioned at the outset of this Report, the WCB should be commended for its willingness to introduce the Executive Ombudsman model as a means of responding to concerns about administrative fairness in the workers' compensation system. However, it appears to me that one of the reasons the office is not fully efficient or effective yet is that the resources assigned to the WCBO are insufficient to cope with the needs of that office. Throughout the investigation, it became apparent that the office of the WCBO as now constituted and resourced cannot provide the quality of service that complainants, WCB officials and my Office view as necessary. This lack of resources may become even more critical if the office is reconstituted in accordance with the recommendations in this Report and thereby moves closer to a true Executive Ombudsman model.

I would like to emphasize from the outset that the WCBO has been successful in implementing many positive changes to promote fairness within the WCB. The WCB should remain cognizant of the value added by the WCBO when considering the question of resources. Some of the changes have had a direct impact on the individuals who raised complaints about the handling of their claims. For example, after one worker approached the WCBO, WCB Management discovered that an adjudication issue had been overlooked. This resulted in a retroactive payment that covered a 28-month period. On another occasion, the office of the WCBO discovered that a clerical error had inadvertently resulted in the failure to implement a Workers' Compensation Review Board decision. When this error was identified, implementation of the decision proceeded, resulting in a payment to the worker in excess of \$40,000. Another complainant came to the office of the WCBO because she had received only wage loss benefits and no vocational rehabilitation or pension benefits a number of years after suffering a head injury. The WCBO's review of this matter led to the issuance of a cheque to the complainant. Although complaints to WCB Managers redress some individual disputes, no one else at WCB is situated to take the broad and systemic approach the WCBO can apply to issues.

Despite limited resources and powers, the WCBO has also been surprisingly successful in finding ways to convince WCB Management to revise a number of its procedures and practices. For example, a review conducted by the office of the WCBO called into question the adequacy of the training that staff receive about evidentiary issues. As a result of the WCBO's identification of this problem, a new training module has been developed to address this shortcoming. On another

occasion, an investigation by the WCBO led to the issuance of a practice directive to all staff regarding the inappropriate disclosure of private, personal information to employers. Another investigation by the WCBO led to the correction of mail-handling practices that were leading to disclosure problems. Still another investigation conducted by the WCBO noted that irrelevant information was being placed on claim files in contravention of a practice directive to remove such information.

In reviewing the activities that led to the types of resolutions outlined above, it is clear that considerable progress has been made by the WCBO since that office was created. A significant foundation has been laid to resolve disputes and promote fairness within the WCB. The success that the WCBO has been able to achieve has occurred almost entirely as a result of the hard work and dedication of the incumbent WCBO and his staff. However, hard work and dedication cannot sustain a struggling organization over the long term without the necessary supporting infrastructure. It is now time to consider a range of supports that can build on the existing expertise and strengths of the WCBO.

## 10.1 Resourcing an Executive OmbudsOffice

The linkage between the adequacy of the resourcing of an OmbudsOffice (particularly staffing) and its ability to perform its function has attracted comment from many observers. For example, Professor Gregory stated that an ombudsman's office must be adequately staffed and funded, so that complaints may be effectively and expeditiously investigated and resolved (***Building an Ombudsman Scheme***, p. 86). These views were echoed by the United Kingdom Ombudsman Association (UKOA) in its 1993 study entitled the ***Criteria for the Use of the Term Ombudsman***. In that study, the UKOA noted that an ombudsman's office needs adequate funding and staffing in order to conduct timely and effective investigations of complaints. In his 1997 Annual Report, the Ombudsman for the Government of Ireland stressed that "speed and efficiency are among the essential characteristics underlying a good internal complaints system." Without adequate staffing, speed and efficiency in complaint handling are impossible. I would suggest that when an Executive OmbudsOffice performs this role, these essential characteristics may become even more critical.

A certain method of minimizing the impact and overall effectiveness of an OmbudsOffice is to limit that office's funding and resources. For the Classical Ombudsman, there is a point where lack of resources renders that office unable to perform its statutory mandate. For Classical Ombudsman operating in a parliamentary democracy, a statutory mechanism exists whereby an Ombudsman confronted with such circumstances can bring her or his concerns to the attention of the Legislative Assembly and the public through a special report.

Although there is no similar legislative protection for most Executive OmbudsOffices, the impact of an organization's failure to provide adequate funding to an Executive OmbudsOffice, especially a newly established one, is no less devastating. If an Executive OmbudsOffice has limited resources from the outset, it may not have a proper opportunity to develop effective procedures and systems for conducting its business. As a management mechanism, it may be required to cut corners on service delivery and restrict its view of its function and jurisdiction. It may not be able to manage the incoming caseload and at the same time develop effective communication and education strategies to promote fairness within the organization it investigates. Perhaps most important, it may not have an opportunity to reflect upon what it is learning as an Executive OmbudsOffice and to make adjustments accordingly.



Many of the issues that come to the attention of an Executive OmbudsOffice are about delays or communication problems. This is a particular feature of the office of the WCBO because of the multiple levels of appeals in the existing workers' compensation system. For that reason, the old adage that "justice delayed is justice denied" takes on new meaning. On this issue, Professor Gregory commented that "delay in dealing with complaints serves only to aggravate complainants' original sense of grievance."

## **10.2 Investigations of WCB Complaints by the Ombudsman for the Province of BC**

Many of the complaints that come to our Office concerning the WCB involve delay or communication issues. Frequently, these complaints are related to the initial adjudication of claims or the implementation of appeal decisions. Others come to our Office because they disagree with the outcome of final appeal decisions. For a number of years preceding the establishment of the office of the WCBO, our Office referred complaints about delay and communication issues to a liaison person designated by the WCB. The referred complaints were distributed to the appropriate manager, who was to contact the complainant within two days. The manager reported the outcome in writing to the liaison person. At the time of the referral, we sent a letter to complainants advising them that they could contact us if they had not heard from the manager within a week of our letter, or if they remained dissatisfied after the manager's intervention. The liaison person prepared a quarterly report outlining the referrals processed. The executive of the WCB reviewed these statistics as part of their internal evaluation of client services.

Complaints regarding the WCB are of varying levels of complexity. Calls that involve one type of issue may sometimes be addressed quickly. However, in some cases a person may have more than one claim, may have a number of decisions at various stages in the appeal process, and may complain about some matters that are not appealable. In some situations, appeals have been exhausted and the person remains dissatisfied. On other occasions, the contentious issues may involve complex legal or medical disputes.

Complaints against the WCB have generated considerable work for the Provincial Ombudsman through the years. The resources dedicated by my Office were referred to when the Ombudsman issued **Workers' Compensation System Study, Public Report No. 7** in 1987, as discussed in Chapter 2. Prior to the issuance of that Public Report, an entire investigative team of up to seven staff was assigned to complaints about the workers' compensation system. The purpose of that study was to make recommendations for structural and systemic change in the governance and administration of the WCB. The impetus for the study was the high volume of complaints about the WCB coming to our Office, indicating a high level of dissatisfaction with the workers' compensation system.

Complaints to our Office about the WCB gradually decreased following the issuance of the **Workers' Compensation System Study** in 1987. Our Office

received 22 % fewer complaints about the WCB in 1992 than in 1987. Unfortunately, this trend did not continue and by 1994 our Office was receiving almost 19 % more complaints (1,101 in total) than it had in the previous peak year of 1987 when the ***Workers' Compensation System Study*** was issued. This was the context for the discussions that led to the creation of the WCBO.

### **10.3 Feedback Received Regarding Resourcing and Delays**

During this investigation complainants who have used the services of the office of the WCBO, representatives and advocates who are familiar with the workers' compensation system and WCB officials were asked for input on the question of resources. What we heard is growing cynicism and frustration with the existing overworked and under-resourced service that is now in place.

A frequent comment received from complainants interviewed during the OmbudsAudit was that the office of the WCBO had not responded to their concerns in a timely fashion and needed more resources to do so.

---

The WCBO needs to follow up faster and more thoroughly.

---

The WCBO should improve communications. They should get back to people more directly. It took many days for the WCBO to get in touch with me.

---

The WCBO needs more resources.

---

(The WCBO) needs more resources so that they can spend more time with concerns raised to them. They are overloaded as it is. Timeliness is an issue.

---

The WCBO needs more people working for it.

---

Comments similar to the following were heard from a wide range of advisors, advocates and representatives:

---

Clients need to be treated fairly with an adequate and timely investigation. Timeliness could be improved.

---

It takes too long to get information back to complainants...The WCBO does not have enough resources; it needs more bodies... That office needs to be supported and then they would have a useful role.

---

The office of the WCBO is doing as well as it can under the circumstances. WCB Management is not very supportive of requests for resources.

---

---

The WCBO needs enough staff. Advisors don't hear back from that office for days. If it's a difficult case, even longer delays are experienced.

---

As noted below, concerns about delays and the resources available to the office of the WCBO were mentioned by respondents to the WCB Management Survey as well. The following examples make this point:

---

The office of the WCBO is inadequately resourced; staffing needs reviewing.

---

We have a lot to learn about the WCBO. We need to position it so that communications are more effective; perhaps we need another FTE (Full-time Equivalent staff person) to tell people about that office... We should look at the possibility of staffing it up for a few years.

---

Timeliness is affected by the resources available; delays in service occur as a result. This is difficult to cope with. Resources are a problem...What is an appropriate staffing level? There are a lot fewer people at WCB doing this function than elsewhere.

---

Additional staff (are recommended) to become more involved in educational activities.

---

Investigative work is off-loaded by the WCBO to the line-staff. The office of the WCBO is not resourced to conduct investigations...Two people are not enough; it doesn't have resources to take on a wider role yet.

---

The Docket Review provided a similar perspective. We found too many situations where the delays involved in obtaining a review by the office of the WCBO rendered the eventual review irrelevant. The following examples illustrate this concern:

---

A complainant approached the office of the WCBO because she was concerned that she had received no decision from the WCB regarding her pension. The matter had been with WCB's Disability Awards Department for almost two years. It took the office of the WCBO over four months to review the electronic file. At that time, it was discovered that the pension issue had been resolved that day and the pension had been issued.

Neither the WCB nor the complainant was ever contacted during this investigation. The docket was closed without confirming that the complainant's receipt of the pension resolved her concerns.

---

---

A worker approached the office of the WCBO because she was encountering what she believed were unreasonable delays in obtaining compensation following the issuance of an MRP certificate. She also claimed that her claims adjudicator wanted her to undergo a medical treatment that her doctor believed was unnecessary. She wanted to speak to someone about this request. The Medical Review Panel had confirmed that she had been partially disabled from the date of her injury several years earlier. She was now entitled to partial compensation from WCB. Although the decision had been rendered over four months ago, the WCB had not provided her with the partial compensation to which she was now entitled.

Another five and a half months passed before the office of the WCBO reviewed the WCB's electronic file. During that period, the disagreement over the proposed medical treatment was allowed to simmer for an additional five and a half months. Once the office of the WCBO realized that this woman had still not received compensation from the WCB in line with the now 10-month old MRP decision, it quickly brought this matter to the attention of the relevant WCB Manager. The office of the WCBO did not request an update on this situation from the WCB and the WCB Manager did not provide one. Following the initial intake of the complaint, the office of the WCBO did not contact the complainant again.

---

The complainant contacted the office of the WCBO because he was having difficulty obtaining his medical receipts back from WCB as the Board had refused to reimburse him. He also maintained that the WCB was not returning his calls and provided a tape that he wanted the office of the WCBO to hear. It took almost five months for the office of the WCBO to review this matter and immediately refer the dispute regarding the medical receipts to the relevant WCB Manager.

---

I find these situations troubling, in that I would expect an Executive Ombudsman's office to have the resources to handle straightforward requests concerning delay quickly and effectively. Rather than expediting WCB's handling of these implementation problems, seeking help from the office of the WCBO brought further delays. The OmbudsAudit identified many situations where the ability of the office of the WCBO to effectively address concerns was hampered by its limited resources. This is a particular problem for any case that requires review of the complainant's circumstances.

## 10.4 Resourcing the WCBO

Before the operations of the office of the WCBO began, the then Director of Policy and Research Development for the WCB produced a memo for the President of WCB in which he estimated the resources required to staff the office of the WCBO. In that memo, he utilized input from my Office, primarily quarterly reporting data from 1995. The Director advised the President of the WCB that he had "been led to believe that the staff assigned to WCB cases (2.5 FTEs) carry 200 active cases at any one time." The memo included a detailed statistical breakdown of his understanding of my Office's quarterly reports. These were broken down by various categories. From this analysis, the Director reached estimates as to the number of cases that he believed would "occupy the time of the ombudsman." To this figure was added a daily estimate of cases from other sources (for example, letters sent to MLAs over the previous year). The staffing model that was developed estimated that the WCBO would be contacted to review about 1,500 cases per year.

This complaint data was then compared to the estimate of my staff FTEs committed to the investigation of WCB complaints during 1995. At the conclusion of this process, it was recommended that the initial staffing model for the office of the WCBO should be one FTE for the ombudsman, one FTE for a deputy ombudsman, and one FTE for a complaints analyst/administrative specialist. The then President of WCB attempted to convince my Office to devote our resources to the office of the WCBO. This plan was not acceptable to me since my Office would continue to be the Office of last resort to investigate both the WCB and the WCBO as authorities. In addition, it is not the responsibility of the Provincial Ombudsman to resource on-site remedies. That my Office remain at arm's length was considered critical.

This suggested staffing level was not obtained initially. Instead, two FTEs were provided by the WCB to the newly established office of the WCBO. The former Director who had conducted the research into the desired staffing levels was appointed the WCBO. The other full-time position established when the office of the WCBO opened for business in April 1996 was for an administrative person. The office was also loaned a temporary staff member of WCB to assist with the input of data into an electronic file system. Over time, temporary placements were provided by other sections of WCB until it became apparent that the office needed more resources. By early 1997, an Assistant WCBO was part of the staffing complement of the office, but this position took the place of the previous full-time

administrative position. It was not until well into the second year of its operations that the WCBO received approval to fill the staff complement originally recommended. Although the WCBO was successful in obtaining temporary administrative assistance from various sources within WCB, it would appear that such developments were more a reflection of the WCBO's knowledge of the WCB system than any firm commitment by the WCB to make the Executive OmbudsOffice fully operational.

From the following response by the Minister responsible for the WCB at the time the office of the WCBO was created, it would seem that there was an expectation that the WCBO would ask for additional resources if he viewed such a request necessary.

---

**Hon. M Sihota:** Nobody at the Workers' Compensation board is interested in going through an exercise for the sake of optics. If there is going to be an internal ombudsperson appointed, as is the case, then it has to be done in a substantive way...I'm sure that [the incumbent], in designing that budget, will take into account workload issues. Given the nature of the office, if he is being frustrated, clearly he has the ability to get that message of frustration out, at which point there will have to be a reaction. (British Columbia, Legislative Assembly, **Debates of the Legislative Assembly**, Volume 2, Number 16 [August 8, 1996] at 1652)

---

The WCBO asked for limited additional staffing. He was able to obtain a third employee in November 1996, although this position was not included in his office's staffing complement until the fall of 1997. In his report to the then President of the WCB covering the first quarter of activity in 1997, the WCBO made the following comments regarding staffing levels:

---

...The FTE count for the office is two—one Ombudsman and one Assistant Ombudsman. However, workload and service trends have proved that one additional FTE is needed to provide clerical and receptionist telephone support... An increasing number of individuals are contacting other offices (e.g., President, Vice-Presidents and the Provincial Ombudsman) to voice complaints of delays. That problem will increase with time. When the reception position was staffed, telephone turnaround time was approximately four to five hours. At present, it may be up to seven days.

---

At that time, the WCBO reported to the then President that he was satisfied with the services that his office could provide with a third staff member attached to his office:



---

A fortuitous event also occurred in November 1996. A staff person ...was placed in the office as a secretary. This proved to be the optimal staffing for the office...The office is able to support its activities using three FTEs, configured as one secretary, one Assistant WCBO and one WCBO...

It is clear that the staffing model of three FTEs provides the optimum service to the clients of the Office of the WCBO. (February 14, 1997)

---

The WCBO believes that his office may still be able to operate effectively as a three or three and a half person operation. However, I believe this Report demonstrates otherwise and that the office requires additional staff to operate effectively.

Throughout the entire process of projecting workloads, the sole focus seemed to have been on arriving at an estimate of the complaint-handling requirements of the office of the WCBO. From the outset, the estimates were based on a limitation of the role of the office to that of a complaints bureau. With the benefit of two and a half years of experience with this Executive OmbudsOffice, it is now clear that the office requires resources for other functions as well as those associated with investigations. Some of these functions were not recognized when the office of the WCBO was established. For example, even though the office of the WCBO is a small agency, time is still required to perform many functions that are not directly related to individual files. Such functions would include:

- managing and maintaining the office
- monitoring the budget
- providing and receiving training
- designing and implementing procedures
- identifying and reporting complaint trends.

The WCBO has estimated that 25 % of his time is devoted to non-file related work. This estimate is based on his interpretation of his present jurisdiction and mandate. If the WCB were to implement the recommendations outlined in this Report, considerably more time would be required for non-file related work of that office. In addition, our investigation has identified many areas where the existing practices of the office of the WCBO need to be revised to provide service quality improvements. For example, many of the recommendations in the two chapters on communications would lead to a very different process of interaction and follow-up with complainants, representatives and WCB officials. The

recommendations regarding the reporting functions of the office of the WCBO would also require more resources.

I am well aware that the office of the WCBO cannot be expected to implement these and other recommendations without a commitment of additional resources. Based on the intensity of the feedback received during the OmbudsAudit, I believe that the inadequate resourcing of the office of the WCBO is having an impact on all areas of the operations of that office. In particular, the WCBO cannot provide the type of responses to complainants that are required in a time frame that is meaningful, especially in an institution such as the WCB. The OmbudsAudit has revealed situations where complainants have stopped using the services of the WCBO because of their frustration with the delays encountered at that office and an unwillingness or inability by that office to follow up to ensure that the Board has taken the action requested. Timely investigation and appropriate follow-up are critical to the effectiveness of an Executive OmbudsOffice.

**Recommendation:**

***10-1 I recommend that the Panel of Administrators of the WCB take all reasonable steps to resource the office of the WCBO to a level that permits it to deal in a timely fashion with complaints and investigations in accordance with the recommendations in this Report.***

## 11.0 Recommendations

Recommendations are listed here in the order in which they occur in the text. No priorities are assigned. The first digit of each recommendation number indicates the chapter where the recommendation is found. (For example, recommendation 6-4 is the fourth recommendation in Chapter 6).

### Chapter 1 Introduction

#### 1-1 I recommend that:

- a. the WCB commit to the recommendations in this Report within six months of publication of the Report;
- b. the WCB implement the recommendation respecting the designation of the title "Ombudsman" within twelve months of publication;
- c. if the WCB fails to reconstitute the WCBO in accordance with this Report and this recommendation, the title should be changed to the WCB Fair Practices Commissioner.

### Chapter 3 Structure, Mandate and Jurisdiction

#### 3-1 I recommend that the WCBO report directly to the Panel of Administrators.

#### 3-2 I recommend that all literature describing the structure of the office of the WCBO, including the organization charts of the WCB, be clarified to show that the WCBO reports directly to the Panel of Administrators.

#### 3-3 I recommend that the WCBO develop a new Mission Statement that clearly articulates the role of the office.

#### 3-4 I recommend that all existing and future public education materials be upgraded to clarify the role of the WCBO.

#### 3-5 I recommend that the Panel of Administrators create by-laws establishing the investigative powers of the WCBO to parallel as closely as possible the investigative powers provided to the Ombudsman in s. 15 of the **Ombudsman Act**.

- 3-6** I recommend that the by-laws created by the Panel of Administrators to establish the investigative powers of the WCBO include a mechanism whereby disputes regarding his or her investigative powers not be reliant on anyone within the WCB administration for enforcement purposes.
- 3-7** I recommend that the by-laws established by the panel of Administrators include the specific power for the WCBO to undertake an investigation "on her or his own initiative."
- 3-8** I recommend that the Panel of Administrators create by-laws outlining the jurisdiction and mandate of the WCBO, making them expansive, and congruent with the investigative role and fact-finding mandate of the Provincial Ombudsman.
- 3-9** I recommend that the Panel of Administrators include in the by-laws the grounds on which the WCBO makes findings, and the types of recommendations he or she may make, embodying the areas set out in the ***Ombudsman Act***.
- 3-10** I recommend that the Panel of Administrators adopt, in the by-laws governing the mandate of the WCBO, that he or she be entitled to recommend that the WCB or the Minister responsible reconsider matters of law, paralleling the scope of the ***Ombudsman Act***.
- 3-11** I recommend that the WCBO review the statements regarding the limitations of the office in reviewing factual matters, and revise all public information that he or she produces so that it accurately reflects the appropriate scope of the investigative jurisdiction of the office.
- 3-12** I recommend that the mandate of the WCBO include the power to consider and comment on the fairness of WCB policies, procedures and practices as a vital means of assessing and investigating complaints.
- 3-13** I recommend that the WCBO be given jurisdiction to make recommendations to reconsider laws and regulations, and that he or she investigate and make findings and recommendations about whether decisions, appellate or otherwise, and policies are contrary to law or unfair.
- 3-14** I recommend that the WCBO, in order to promote clarity, develop and publish guidelines regarding his or her involvement in dispute resolution activities when appeal rights exist.

- 3-15** I recommend that the WCBO commit to developing an ongoing process of outreach and education regarding his or her mandate and jurisdiction. This educational initiative should be targeted to inform WCB staff and management as well as those outside the WCB who work in the workers' compensation field.
- 3-16** I recommend that the WCB's Panel of Administrators utilize the extensive powers currently granted to it under the **Workers' Compensation Act** and enact by-laws to provide the WCBO with all the features listed here:
- a. A clearly articulated mandate that has legislative authority (constitution, statute, by-law, ordinance);
  - b. Clearly entrenched competence and capacity to conduct thorough and impartial investigations;
  - c. Capacity to investigate on its own initiative;
  - d. Independence and impartiality;
  - e. Guaranteed functional and political independence from the legislative body who appoints and the public body the Ombudsman reviews.  
Independence is evidenced by:
    - i. security of salary and tenure
    - ii. rigorous appointment, reappointment and removal process
    - iii. sufficient resources
    - iv. authority to recruit, manage and terminate staff
    - v. discretion to determine jurisdiction;
  - f. Protection to conduct investigations on a confidential basis and to shield the Ombudsman from release of all information obtained during the course of work as Ombudsman except in accordance with the law;
  - g. Duty to report to the governing body annually on the work of the office;
  - h. Power to report publicly on the work of the office, individual complaints and systemic investigations;
  - i. Commitment to educate the public body(ies) about the principles of administrative fairness and the rules of natural justice.

#### **Chapter 4 Independence and Impartiality**

- 4-1** I recommend that the government of British Columbia, and in particular the Attorney General, reconsider the **Ombudsman Act** with a view to an amendment similar in kind to the legislative provision in New Zealand, as follows:

Protection of name—No person, other than an Ombudsman appointed under this Act, may use the name “Ombudsman” in connection with any business, trade, or occupation or the provision of any service, whether for payment or otherwise, or hold himself, herself, or itself out to be an Ombudsman except pursuant to an Act or with the prior written consent of the Provincial Ombudsman.

- 4-2 I recommend that the WCBO and his or her staff avoid any practices or activities that could be perceived as placing them in the position of speaking on behalf of the WCB.
- 4-3 I recommend that the WCBO advise the WCB of each substantive complaint received about WCB services and obtain and document the WCB’s position regarding such complaints before he or she finalizes the handling of the complaints.
- 4-4 I recommend that the WCBO obtain explanations of WCB policies, procedures and practices from WCB representatives before referring complainants to the appropriate WCB official. If such explanations are unclear, the WCBO should investigate the lack of clarity of such explanations.
- 4-5 I recommend that the WCBO avoid providing information that could and should be provided by WCB officials who have the on-line responsibility to do so.
- 4-6 I recommend that in future an independent committee selected from the Panel of Administrators select and appoint the WCBO for a time certain.
- 4-7 I recommend that the Panel of Administrators prepare by-laws regarding the terms and conditions for the WCBO, including selection by committee, setting terms of office, termination for cause or incapacity, benefits and salary set and commensurate with responsibility, and power to appoint and remove staff for his or her office.
- 4-8 I recommend that the by-law creating the WCBO and his or her office include a section indicating that he or she must maintain strict confidentiality in respect to all information collected in the course of performing his or her functions.
- 4-9 I recommend that the WCB consider seeking an amendment to the **Workers’ Compensation Act** that would protect the confidentiality in all of the work of the WCBO; or in the alternative, I recommend that the Panel of

Administrators seek an amendment that the WCBO be excluded from the provisions of the ***Freedom of Information and Protection of Privacy Act***.

- 4-10** I recommend that the WCB and the WCBO clarify all information made available to the public regarding the confidentiality of the services provided by the WCBO.
- 4-11** I recommend that the WCB reestablish a liaison contact for the British Columbia Ombudsman's Office to ensure that requests for information or general inquiries pertaining to regular WCB administration be referred to appropriate line staff through the liaison contact.
- 4-12** I recommend that the WCB provide the WCBO with his or her own office space separate from any WCB-occupied property.
- 4-13** I recommend that the WCB develop strategies to reduce and eventually eliminate the reliance of the office of the WCBO on resources shared with the WCB, and, in particular, because of the need for confidentiality, systems data and legal research.
- 4-14** I recommend that the Panel of Administrators examine alternative methods of receiving a proposed budget and funding the WCBO in order to ensure the financial independence of the office.

## **Chapter 5 Visibility and Accessibility of the WCBO**

- 5-1** I recommend that the WCBO develop a procedure to establish a separate and increased profile of that office.
- 5-2** I recommend that the WCB provide the WCBO with adequate resources to conduct public information outreach and to cover the costs associated with increased demands on the service of the office.
- 5-3** I recommend that the WCBO engage in a dialogue with other similarly positioned organizations in British Columbia and elsewhere to seek methods of establishing an identity separate from that of the WCB.
- 5-4** I recommend that the WCBO take the necessary steps to ensure that the office is accessible, including alternate telephone service (TDD), multi-language brochures and in-person intake interviews, when appropriate, that may require the assistance of interpreters.

- 5-5** I recommend that the WCB, in consultation with the WCBO, take appropriate measures to clarify when and how WCB staff and management can refer potential complainants to the office of the WCBO.
- 5-6** I recommend that any decision about whether a matter falls within the mandate or jurisdiction of the WCBO be articulated in the by-laws and, thereafter, be determined solely within the discretion of the WCBO, subject to judicial review.

## **Chapter 6 Reporting and Accountability**

- 6-1** I recommend that the WCBO be provided with explicit authority, similar to that of the Ombudsman for the Province of British Columbia, to have the discretion to report details of investigations to the Panel of Administrators or the public.
- 6-2** I recommend that the WCBO prepare and be required to make public an Annual Report on the work of the office, independent of any Annual Report released by the WCB.
- 6-3** I recommend that the by-law establishing the office and powers of the WCBO delegate to him or her the power to disclose information when he or she determines that it is in the public interest to do so and that this provision would apply despite the confidentiality section of the by-law.
- 6-4** I recommend that the Annual Report of the WCBO include details, issues and outcomes regarding the cases that he or she has investigated, while still maintaining the confidentiality of the individuals involved.
- 6-5** I recommend that the Annual Report of the WCBO include, where applicable, a review of cases where he or she believes that the WCB has not taken appropriate action to address the recommendations made.
- 6-6** I recommend that the WCBO establish a procedure whereby the WCB is given his or her Annual Report in advance of publication, but that the WCB respect the independence and impartiality of the reporting process by having no role to require any changes.
- 6-7** I recommend that the office of the WCBO provide the person in WCB Management involved in a complaint investigated by that office with a report



of the outcome of the complaint, in a timely fashion, after the investigation has been concluded.

- 6-8 I recommend that the WCBO make more specific and detailed internal reports to the Managers and Senior Executives, as appropriate, of cases he or she has investigated and the outcomes obtained.
- 6-9 I recommend that the office of the WCBO revise its reporting system to reflect activity on all dockets closed within a given period of time rather than the present practice of all dockets opened and active within a given period.
- 6-10 I recommend that the office of the WCBO review and revise its system of closing categories to ensure that the system provides meaningful indicators of the work of the office to both internal and external audiences.
- 6-11 I recommend that the office of the WCBO not close dockets until it is satisfied with the response received to any Ombudfax or other request submitted to WCB Management and that no further work or follow-up is required by the office of the WCBO.
- 6-12 I recommend that the office of the WCBO reopen existing dockets or create new dockets if some time has passed and subsequent inquiries or investigatory work is done that should form part of the record.
- 6-13 I recommend that the office of the WCBO revise the category selected for the closing of a docket if the additional work on a reopened docket indicates that a change to the previous closing category is appropriate.
- 6-14 I recommend that the WCBO, in the course of the review of closing categories previously recommended, develop further categories in line with the closings of the Ombudsman for the Province of British Columbia; create a "Settled" or "Resolved" category; and that the closing category of "Resolved following consultation with staff" be specific in the by-laws developed by the Panel of Administrators.
- 6-15 I recommend that the Panel of Administrators include in the by-laws the criteria to be used in the closing category of "Discretion," similar to those in s. 13 of the *Ombudsman Act*.
- 6-16 I recommend that the WCBO develop and implement a system for recording the eventual outcome of all dockets in which recommendations have been

made to the WCB. This system should include documentation of how the recommendations were tracked and the reasons why the office has accepted the actions taken by the WCB in response to the recommendations made.

- 6-17** I recommend that when the WCBO has made recommendations to the WCB regarding matters that have arisen as a result of an investigation of an individual's complaint, a comprehensive and thorough report be provided to the complainant at the conclusion of the investigation of the matter, providing details of any recommendations made.
- 6-18** I recommend that the present practice whereby the WCBO submits business plans to a WCB official be discontinued immediately. Any such plan initiated by the WCBO can be issued in the annual or a public report, or to the Panel of Administrators, as required.
- 6-19** I recommend that a mechanism for direct budget approval be developed with the Panel of Administrators.
- 6-20** I recommend that no WCB official have any role in reviewing fiscal, human resources or other business plans issued by the WCBO.

## **Chapter 7 Communication with Complainants**

- 7-1** I recommend that the WCBO keep the complainant informed from time to time throughout the investigation as he or she considers appropriate.
- 7-2** I recommend that the WCBO develop his or her own set of guidelines to articulate how his or her discretion will be exercised to give a complaint priority.
- 7-3** I recommend that during the initial contact with the complainant the WCBO ensure that the complainant is provided with an adequate explanation of the role of the office.
- 7-4** I recommend that during the initial contact with the complainant the WCBO ensure that the complainant is provided with an adequate explanation of the procedure to be followed in reviewing his or her complaint and an estimate of the time that it will take to review the complaint.
- 7-5** I recommend that the WCBO ensure that complainants are given an adequate opportunity to provide all relevant evidence and to be heard, before he or she reaches conclusions about their complaints.

- 7-6 I recommend that the WCBO endeavour to provide every complainant who approaches the office with appropriate feedback including reasons, and a full and adequate explanation of the outcome of the complaint investigation.
- 7-7 I recommend that dockets of the WCBO not be closed until the office confirms that the WCB has taken the action that it has committed to take, or refused to take steps to address the situation in dispute; and that the WCBO communicate all appropriate information to a complainant in a timely fashion.
- 7-8 I recommend that the WCBO ensure that all complainants are notified specifically when their dockets are closed.
- 7-9 I recommend that the WCBO ensure that he or she completes an appropriate investigation of all important components of an individual's complaint, including complaints regarding customer service, before the investigative docket is closed.

## **Chapter 8 Communication with the WCB**

- 8-1 I recommend that the Ombudfax from the WCBO be revised to clearly set out the follow-up that the office expects to receive from the WCB official receiving the fax and that the language employed is plain and impartial, such as:

Could you please follow up directly with the complainant within the next couple of working days. Please advise the WCBO contact person when you have reviewed this matter and have been in touch with the complainant, or if you require more than two (2) days to address the issue. Alternatively, if you are unable to address the concerns of the complainant for any reason, please advise this office.

- 8-2 I recommend that the WCBO take measures to ensure that all relevant information that he or she obtains pertaining to complaints and investigations is retained in one easily accessible location and archived in accordance with provincial standards.
- 8-3 I recommend that the WCBO continue to develop and enhance a secure and independent system for retaining all records relevant to the work of the office that come into his or her possession.

- 8-4** I recommend that the WCB take steps to ensure that WCB Managers respond appropriately within the time frames stipulated by the WCBO when he or she requests information about a complaint.
- 8-5** I recommend that the WCBO endeavour to provide WCB officials with appropriate feedback including reasons, and a full and adequate explanation of the outcome of all complaints.
- 8-6** I recommend that the WCBO develop and implement a tracking system to follow up on commitments made by the WCB in response to resolutions and recommendations from the WCBO.

### **Chapter 9 Being Fair First**

- 9-1** I recommend that the WCBO continue to receive referrals from the Office of the Ombudsman for the Province of British Columbia as a remedy adequate in appropriate circumstances.
- 9-2** I recommend that the WCBO continuously review and audit his or her own policies, practices and procedures to ensure compliance with the ***Ombudsman Checklist for an Adequate Remedy***, which reads:
  - a. A clearly articulated mandate provided for in law or in an existing administrative procedure;
  - b. Policies, procedures and practices that demonstrate a respect for and are consistent with its legislative authority or administrative procedure;
  - c. Absence of bias;
  - d. Competence and capacity to receive complaints and to conduct thorough reviews, investigations or appeals;
  - e. Power to order or recommend corrective action to the public body;
  - f. Commitment to the principles of administrative fairness and the rules of natural justice.
- 9-3** I recommend that the WCBO demonstrate adherence to the following principles and rules of fair practice for the work of his or her office:
  - a. Timeliness in responding to the complaints received
  - b. Notice to all parties potentially adversely affected during the course of an investigation;
  - c. Giving parties the chance to be heard and make representations before an investigation is completed;
  - d. Consideration of all relevant evidence related to the complaint;

- e. Giving full, adequate and appropriate reasons for a decision;
- f. Making findings known to those adversely affected and giving them the opportunity to respond;
- g. Proposing recommendations that are systemic, remedial and appropriate;
- h. Reporting to the public on the work of the office;
- i. Commitment to operate on the basis of clearly articulated principles that will include the following:
  - i. Treating everyone with courtesy, dignity and respect
  - ii. Being independent, impartial and honest
  - iii. Using cooperation, empathy and good will in all work
  - iv. Promoting equality, inclusion and access for all persons.

**9-4** I recommend that the WCBO develop a strategic plan that specifically includes a commitment to the rules of natural justice and the principles of administrative fairness and a goal to promote administrative fairness throughout the WCB.

**9-5** I recommend that the WCB initiate a review to ensure that the promotion of administrative fairness is recognized throughout the organization as an important role of the WCBO.

**9-6** I recommend that the respective Annual Reports issued by the WCB and the WCBO include an accounting of the activities undertaken to promote administrative fairness within the WCB.

## **Chapter 10 Efficient and Effective**

**10-1** I recommend that the Panel of Administrators of the WCB take all reasonable steps to resource the office of the WCBO to a level that permits it to deal in a timely fashion with complaints and investigations in accordance with the recommendations in this report.



## **12.0 WCB Initial Response to “Fair First”**

The Workers' Compensation Board of BC (WCB) welcomes this report of the Provincial Ombudsman. As noted in her introduction and in her January 12, 1999 presentation to the Panel of Administrators, the WCB's initiative in establishing the Office of the WCB Ombudsman (WCBO) demonstrates its fundamental commitment to fairness.

The role of the WCBO is an evolving one. In taking the initiative to establish the Workers' Compensation Board Ombudsman, the WCB embarked on an experiment to create a position primarily dedicated to ensuring administrative fairness within its operational mandate. In a system that already has available Workers' and Employers' Advisors, the Workers' Compensation Review Board, Appeal Division and Medical Review Panels, the WCB agrees that there is still an essential role for this function. With few models and little precedent to guide the creation of such a position within workers' compensation systems, the WCB welcomed the guidance and suggestions of the Office of the Provincial Ombudsman in establishing this office in the first instance. The further insight and analysis contained in this report provides a clear context for the future development of the WCBO.

This report makes a compelling argument for the existence of such a role within the Board. The Board supports this recommendation and is committed to continuing this role into the future. Although the Policy and Regulation Development Bureau, the Appeal Division and the Administration bring policy recommendations to the Panel, the WCBO provides a unique connection and perspective for raising issues of fairness in policy formulation and design. The Board commits to maintaining the independent access of the WCBO to the Panel of Administrators to ensure this part of his mandate and role.

In providing the WCB an initial opportunity to review this report in light of the pending report of the Royal Commission on Workers' Compensation in British Columbia, the Provincial Ombudsman has acknowledged the complexity of the current environment. Her commitment to also review her recommendations after the release of the Royal Commission report will help the WCB to determine how best to respond to the specific recommendations of “Fair First.”

Many of the recommendations are already part of its current practice or part of

the current development of the WCBO. Substantive implementation of others will not be delayed. Once the Royal Commission report has been released, the Board commits to reviewing the OmbudsAudit recommendations and formally responding to the individual recommendations.

In the nearly three years since its inception, the WCBO has evolved from a concept to an important and accepted facet of the WCB system. The success of that evolution is due mainly to the incumbent WCBO, Peter Hopkins. We echo the Provincial Ombudsman's strong acknowledgement and high praise for his efforts in creating a role true to the spirit of Ombudmanship when the criteria for such a role were not yet defined.

The WCB commitment is not only to be "Fair First", but to be "Fair Always." In the spirit of fairness, with a commitment to equity and continuing adherence to sound business practices, the WCB commits to further developing the role of the WCBO.

Don Cott  
Chair, Panel of Administrators



## Bibliography

Anderson, K. ***"The Ombudsman as an Administrative Remedy."*** **Occasional Paper No. 41**, Edmonton: International Ombudsman Institute, 1987.

Caiden, G.E. and Valdes, D.A. ***"Maturation Issues for the Ombudsman."*** **The Ombudsman Journal**, Number 8, Edmonton: International Ombudsman Institute, 1989.

Commonwealth Ombudsman's Office for Australia, ***"A Good Practice Guide for Effective Complaint Handling."*** Canberra, 1997.

Friendly, Hon. H.J. ***"Some Kind of Hearing."*** **University of Pennsylvania Law Review**, Volume 123, 1975.

Gregory, R. ***"Building an Ombudsman Scheme: Statutory Provisions and Operating Practices."*** **The Ombudsman Journal**, Number 12, Edmonton: International Ombudsman Institute, 1994.

Gregory, R. and Hutchesson, P. ***The Parliamentary Ombudsman***, London: George Allen & Unwin, 1975.

Hill, L.B. ***"Reform, Justice and the Ombudsman."*** **Occasional Paper No. 1**, International Ombudsman Institute, July 1982.

Hydro Quebec, ***Report of Activities of the Corporate Ombudsman, 1997.***

Kimweri, M.G.J. ***"The Effectiveness of an Executive Ombudsman,"*** in Reif, L., Marshall, M., and Ferris, C., eds. ***The Ombudsman: Diversity and Development***, Edmonton: International Ombudsman Institute, 1993.

A.P. Le Sueur and J.W. Herberg, ***"Commissioners for Maladministration (Ombudsmen),"*** in ***Constitutional & Administrative Law***, London: Cavendish, 1995.

Lundvik, Ulf. ***"The Ombudsman as a Watchdog of Legality and Equity in the Administration."*** **Occasional Paper No. 9**, International Ombudsman Institute, 1980.

Office of the WCB Ombudsman, ***Procedures and Protocols Handbook***, January 20, 1998.

Office of the WCB Ombudsman, **1997 Annual Report**, Workers' Compensation Board of British Columbia, 1998.

Ombudsman for the Government of Ireland, **1997 Annual Report of the Ombudsman for the Government of Ireland**, Dublin, 1997.

Ombudsman for the Province of British Columbia, **Workers' Compensation System Study- Public Report No. 7**, 1987.

Ombudsman of Manitoba, **1989 Annual Report**, Winnipeg, 1989.

Ombudsman of Ontario, **The Ontario Ombudsman's Annual Report 1990-1991**, Toronto, 1991.

Revised Statutes of British Columbia, **Ombudsman Act** RSBC 1996.

Rowat, D.C. **The Ombudsman Plan**. Toronto: McClelland and Stewart, 1973.

Stacey, F. **Ombudsmen Compared**. Oxford: Clarendon Press, 1978.

United Kingdom Ombudsman Association, **Criteria for the Use of the Term Ombudsman**, 1993.

Weiss, I. "Comparing Legislative and Executive Ombudsman in the United States." **The Ombudsman Journal**, Number 7, Edmonton: International Ombudsman Institute, 1988.

Workers' Compensation Board of British Columbia, **1996 Annual Report**.

Workers' Compensation Board of Manitoba, **1997 Annual Report**.

Wyner, A., ed. **Executive Ombudsmen in the United States**. Berkeley: Institute of Governmental Studies, University of California, 1973.

In addition, an Internet Search of Web sites was conducted for Workers' Compensation agencies in all 50 states of the U.S.A. This search yielded material (Web site information and relevant legislation) relating to a range of "Ombudsman services" within the Workers' Compensation agencies in nine states. We also examined similar services provided through offices in other states (for example, Dispute Resolution Section in Wisconsin and New Hampshire, Advocate for Injured Workers in New York and Maine, Mediation Specialist Unit in Missouri).



**Ombudsman**  
**PROVINCE OF BRITISH COLUMBIA**