Northern Ireland Assembly

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FROM: Kathy O'Hanlon - Clerk to the Committee for the Office of the First Minister and deputy First Minister

DATE: 16 June 2015

TO: Clare McCanny – Senior Assistant Clerk – AdHoc Committee on Ombudsperson Bill

SUBJECT: Public Services Ombudsperson Bill

At its meeting of 10 June 2015 this Committee noted correspondence from the current Northern Ireland Ombudsman providing information on how he defines the term 'maladministration' that he uses when dealing with complaints about public services. The Committee also noted an Assembly Research paper outlining the etymology of the term 'Ombudsman'.

The Committee agreed to share this information with your Committee for information.

I would be grateful if you could bring this to the attention of your Committee.

Regards

Kathy O'Hanlon
Committee Clerk

Enc

What is maladministration?

The term 'maladministration' is not defined in any UK ombudsmen legislation. Currently the word is not defined in the Ombudsman (NI) Order 1996 or in Commissioner for Complaints (NI) Order 1996 (1996 Orders). The 1996 Orders repeal and replace the Parliamentary Commissioner Act (NI) 1969 and the Commissioner for Complaints (NI) Act 1969. These 1969 Acts did not define 'maladministration' and were based on the Parliamentary Commissioner Act 1967 which created the first Ombudsman's office in the United Kingdom. During the debate over the Parliamentary Commissioner Bill at Westminster, the Leader of the House of Commons, Richard Crossman, made it clear that maladministration did not extend to policy, which was a matter for Parliament, neither did the Parliamentary Commissioner's role extend to the investigation of discretionary decisions. He speculated on what might constitute maladministration in what became known as the 'Crossman catalogue':

'A positive definition of maladministration is far more difficult to achieve. We might have made an attempt in this Clause to define, by catalogue, all of the qualities which make up maladministration, which might count for maladministration by a civil servant. It would be a wonderful exercise – bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness, and so on. It would be a long and interesting list.'

The list is an open-ended one. Crossman also explained that the meaning of 'maladministration' should be filled out by the experience of case work. In his 1993 Annual Report as parliamentary Ombudsman, Sir William Reid sought to expand upon the Crossman catalogue to emphasise that 'maladministration' should not be interpreted restrictively. Reid specifically added an '*unwillingness to treat the complainant as a person with rights; refusal to answer reasonable questions; knowingly giving advice which is misleading or inadequate; offering no redress or manifestly disproportionate redress; and partiality'* to the possible examples of maladministration.

In the absence of a definition, the Northern Ireland Ombudsman considers whether the actions of a body in his jurisdiction fall short of the standards set by the Principles of Good

Administration which were consulted upon and developed by the former Parliamentary Ombudsman, Ms Ann Abraham:

1. Getting it Right
2. Being customer focussed
3. Being open and accountable
4. Acting fairly and proportionately
5. Putting things rights
6. Seeking Continuous Improvement

As such these principles are intended to clarify for public bodies the nature of the behaviour and service standards that the public can expect and are also the tests to be applied when deciding if maladministration has occurred.[1] These principles are not a checklist and not to be applied mechanically by public bodies.

The principle based approach to maladministration does provide for a degree of flexibility which can be useful given the Ombudsman's broad jurisdiction in relation to a diverse range of public services activity in the areas such as education, health and social care, housing and planning spanning both central and local government activity. The lack of a statutory definition has not prevented the Northern Ireland Ombudsman form deciding if the actions of a body constitute maladministration to date and it is important to maintain this flexibility so as to allow the Ombudsman to interpret each set of facts in context to decide if there has been maladministration. The following are examples of maladministration found by the Northern Ireland Ombudsman:

1. A failure to take enforcement action by the DOE Planning Service in relation to the actions of a developer in removing stone from a quarry
2. A Council applying a charge for the disposal of household waste without lawful authority
3. Failures by the Roads Service with regard to information provided in a Property Certificate
4. The Enforcement of Judgements Office accepting the keys of a complainant's property when it had no authority to do so

[1] Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice,* (Ashgate 2011) p.31

5. Inadequate record keeping by NIHE in relation to a decision relating to a request for a temporary transfer

It is important to maintain this flexibility in deciding whether or not there has been maladministration on the particular facts of the case.

Injustice

In the UK the Ombudsman investigates complaints of 'injustice' in consequence of maladministration. Like 'maladministration', 'injustice' was left undefined in the Act. Crossman did not want to give the word a legalistic overtone that could exclude '*the sense of outrage aroused by unfair or incompetent administration, even where the complainant has suffered no actual loss*es.' Generally injustice can be an adverse effect on the individual and include upset, inconvenience or loss of opportunity.

Maladministration and Unlawfulness

Since the introduction of the Ombudsman concept to the UK, it has been made clear by the Courts that maladministration and unlawfulness are different. There has been an acknowledgement that there is no reason why the considerations determining maladministration should be the same as those determining unlawfulness. In R v Local Commissioner for Administration, ex p Liverpool City Council [2001] I ALL ER 462 (CA), Chadwick LJ noted that in investigating complaints of maladministration the Ombudsman need not be '*constrained by the legal principles which would be applicable if he were carrying out the different task (for which he has no mandate) of determining whether conduct has been unlawful*'.[2]

The main statements of principle about what is meant by 'maladministration' made by the courts are that the concept of maladministration is fluid rather than fixed, and it is for ombudsmen, not the courts, to decide whether a given set of facts amounts to maladministration. The idea that it was for the Ombudsman to develop expertise through case handling in the area of defining maladministration was noted by Denning MR in R v Local Commissioner for Administration ex p Bradford Metropolitan City Council[3] highlighting

[2] Para. 47
[3] [1979] 1 QB 287 at 311

that Parliament did not define 'maladministration' but rather it deliberately left it to the ombudsman to interpret the word as best he could and do it by building up a body of case law on the subject.

Alternative Models

Although as recognised by leading academics, in the UK there is no detailed definition in legislation or case law of ‘maladministration’, there are alternative models around the world. In Ireland, section 4(2)(b) of the Ombudsman Act 1980 (Ireland) the ombudsman investigates actions to establish whether they have been:

i. Taken without proper authority
ii. Taken on irrelevant grounds
iii. The result of negligence or carelessness
iv. Based on erroneous or incomplete information
v. Improperly discriminatory
vi. Based on undesirable administrative practice, or
vii. Otherwise contrary to fair or sound administration

In section 26 of the Ombudsman Act 1974 for New South Wales, the legislation outlines the questions that the ombudsman is asking of bodies in jurisdiction:

(a) Contrary to law;
(b) Unreasonable, unjust, oppressive or improperly discriminatory;
(c) In accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory;
(d) Based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations;
(e) Based wholly or partly on a mistake of law or fact;
(f) Conduct for which reasons should be given but are not given; and
(g) Otherwise wrong.....

There is some overlap and similarities between these two pieces of legislation. However although the extended categories of maladministration in the above examples do provide

some helpful substance on the Ombudsman role, neither can be said to be a definitive explanation of what can constitute maladministration. It is noteworthy that Buck, Kirkham and Thompson in their work on the Ombudsman Enterprise and Administrative Justice at page 109 conclude that:

'*Nor it is clear that providing a fuller legislative definition of maladministration would better inform complainants and public bodies as to the purpose of the ombudsman's work. The ombudsman would still retain full discretion as to any test's meaning and application, as it relates to individual complaints and more generally*.'

Who decides if there is maladministration?

The case law is clear that it is a matter for the Ombudsman or Commissioner to decide on any given set of facts whether there is maladministration. This viewpoint has been echoed by Sedley J in R v Parliamentary Commissioner for Administration ex p Balchin (No. 1)[4] who commented that '*so far as a court of judicial review is concerned the question is not how maladministration should be defined but only whether the Commissioner's decision is within the range of meaning which the English language and the statutory purpose together make possible. For the rest, the question of whether any given set of facts amounts to maladministration or by parity or reasoning, to injustice is for the Commissioner alone*.'

The courts have given the Ombudsmen considerable latitude in interpreting what amounts to maladministration in the particular circumstances of a case. This latitude has meant that Courts have generally in the past shown '*a healthy degree of respect towards [ombudsmen] decision making*' (Buck, Kirkham & Thompson, 2011, p.216).

Similarly, the courts have shown similar restraint to the concept of injustice in recognition of the fact that it is different to the legal remedies available. The parliamentary intent to ensure that the Ombudsman's remedies should not be overshadowed by existing legal remedies was clearly communicated by Richard Crossman MP, in the debate on the 1966 Bill stating that:

[4] [1997] JPL 917

'*We have not tried to define injustice by using such terms as 'loss or damage'. These may have legal overtones which could be held to exclude one thing which I am particularly anxious shall remain- the sense of outrage aroused by unfair or incompetent administration, even where the complainant has suffered no actual loss. We intend that the outraged citizen shall have the right to an investigation, even where he has suffered no loss or damage in the legal sense of those terms, but is simply a good citizen who has nothing to lose and wishes to clear up a sense of outrage and indignation at what he believes to be maladministration*.'

Elaborating on the principles that maladministration and injustice are distinct from unlawfulness and available legal remedies respectively, Burnett J noted in R (Attwood) v Health Service Commissioner:

'The purpose of the Health Service Commissioner …is to adjudicate over the complaint and provide redress by making findings and recommendations. It is in my judgment, clear that parliament was not seeking to create a parallel jurisdiction to courts and tribunals, which jurisdiction should apply the same principles by reading over established legal concepts into the language of the various acts governing the jurisdiction of the Ombudsmen. The authorities show that the concepts of 'maladministration' and 'injustice', for the purposes of this area of the legislation, do not stick like glue to notions of illegality and loss in the common law. It seems to me, similarly, failure in a service' does not necessarily import culpability in the sense required in an action for damages founded in negligence. There is any number of areas in which the public deals as consumer where a 'failure in the service' provided, is quite unconnected with culpability. Sometimes redress of some sort is available (for example, in air travel) and sometimes not. As a matter of principle, it is for the Ombudsman to decide and explain what standard she applies before making a finding of a failure in a service. That standard as defined will not be interfered with by a reviewing court unless it reflects an unreasonable approach...

In my judgment, the Ombudsman would be entitled to approach the question of failure in service, even in the context of clinical judgment, from a point of view that is different from the approach of the courts in negligence actions. It would, for example, be open to the Ombudsman to explain that whilst she recognised that a finding of negligence could not be

made, she would be disposed to make a finding of a failure in service if the clinical care fell below best practice within the NHS.' [5]

The Approach of the Courts

Authorities acknowledging the wide discretion invested in the Ombudsman in determining the proper outcome of an investigation including in deciding what recommendations should be made to remedy identified failures by the party subject to the complaint include R v Parliamentary Commissioner ex p Dyer.[6] Whilst the Court accepted that the Ombudsman was subject to judicial review, it indicated that the courts would not readily be convinced to interfere with the Ombudsman's broad discretion. This theme has been developed here in Northern Ireland and in JR 55[7] Mr Justice Treacy at paragraph 36 underscores this discretion as follows:

'*…The Courts have traditionally been reluctant to interfere with the exercise of a statutory discretion by an Ombudsman or Commissioner. This is a matter which was recently reviewed by this court in Re James Martins application [2012] NIQB 89 where after consideration of the relevant authorities the court concluded as follows:*

> *"Conclusion*
> *[39] As previously pointed out it is common case that the Police Ombudsman is subject to the supervisory jurisdiction of the High Court. However, he has a very wide discretion in respect of the exercise of his powers under Part VII of the 1998 Act. He is also the master of his own procedure. Accordingly, the circumstances in which it would be permissible for the Court to intervene will inevitably be extremely limited. The Court must be astute neither to abdicate its constitutional responsibility of supervisory review nor its constitutional duty not to trespass into forbidden territory. It is thus, for example, not the role of the Court to dictate to the Police Ombudsman how to carry out his functions."...'*

The courts have been clear that the question as to what amounts to maladministration is a question of fact for the Ombudsman to decide. In the High Court case of Metropolitan

[5] [2008] EWHC 2315 (Admin) at 27 and 29
[6] [1994] 1 WLR 621
[7] [2012] NIQB 108

Police Service v Hoar and the Pensions Ombudsman (9 February 2000) Mr Justice Neuberger said:

'*Whether or not a particular conduct amounts to maladministration in the context of an occupational pension scheme is essentially a question of fact for the ombudsman to decide. Parliament has decided that he is the sole body responsible for determining what standards of administration are to be expected within the pensions context. In the circumstances, whether or not a particular conduct amounts to maladministration is essentially a question of fact for the Ombudsman to decide and the court should be most reluctant to interfere with any of his findings on appeal....*'

Conclusion

In conclusion, it is important to retain the discretion of the Ombudsman to decide if the actions of a body amount to maladministration and the lack of a statutory definition in existing legislation and in the proposed NIPSO Bill will not prevent an Ombudsman from deciding on the issue. It is important to retain the flexibility of the ombudsman's use of the maladministration test by not defining the term.