

PE1594/C

29 January 2016

Michael McMahon MSP
Convener of the Public Petitions Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

Dear Convener,

Petition 1594

Thank you for your letter of 13 January 2016 asking us to comment on Petition 1594.

The petition asks for the Crossman catalogue to be added to our legislation and “lying” to be added to this as part of that (the Crossman) definition of maladministration. As has been pointed out, maladministration is not defined in our legislation. This is the same for all public service ombudsmen throughout the UK. The risk with putting a definition in statute is that it can become restrictive. The Crossman catalogue dates back to 1967. While it remains a good introduction to the concept and one we still use as a basic guide, it is worth noting that it was very open-ended and only ever meant to be exemplary rather than definitive. As Lord Denning noted in 1979 the ‘and so on would be a long and interesting list, clearly open-ended, covering the manner in which a decision is reached or discretion is exercised ...’.

The “and so on” is not only a potentially long list, it is subject to change as the standards we expect from public organisations and what we would regard as good administration evolves. Indeed, in 1993, an Ombudsman who headed the organisation which preceded mine said “maladministration would include an: “Unwillingness to treat the complainant as a person with rights”¹.

The importance of and discourse around rights in public administration has been a growing development over the last few years. The Parliamentary Assembly of the Council of Europe has commented on the evolving link between Ombudsmen and human rights. In 2003 they said: “the development of methods of human rights is now included in the standards to be respected by good administration, on the basis

¹ Parliamentary Commissioner for Administration, *Third Report 1993-94*, 3-4

that administrative actions which do not respect human rights cannot be lawful”². In 2013 they reaffirmed: that ombudsman institutions, which have the responsibility of protecting citizens against maladministration, play a crucial role in consolidating democracy, the rule of law and human rights.³

The Northern Irish Ombudsman has recently undertaken a significant project on embedding human rights concepts in their work and that is a project we have been watching with close interest, particularly in the light of the Scottish National Action Plan for Human Rights.

The increasing profile and the growing awareness of the significance of rights in day to day public administration is one example of a gradual shift over a number of years which can become reflected in the concept of maladministration and demonstrates the benefit of keeping this an open concept. It is our view that a definition of maladministration set in legislation would be unduly restrictive. Public Services Ombudsmen have operated throughout the UK for over 40 years without one and we consider any change to this would require a compelling case which we do not think has been made. However, if it is felt a definition of maladministration should be included, while Crossman could be a good starting place it would not now, in our view, be definitive and we would suggest that there should be a public consultation to define what it is we now expect of our public organisations. We would also suggest that the definition would require explicit, regular review to ensure that it kept pace with changing expectations.

With reference to the second aspect of the petition, even if such a list was to be created, we would oppose the specific inclusion of the word “lying”. We also note you have also received some further written correspondence which refers to “wilful maladministration” as a way of describing this. We think it is already clear that both concepts are already included in the concept of maladministration. They are self-evidently wrong. We clearly do not support either act and would have concerns about any public organisation or individual member of staff indulging in such activities. We would not be the only organisation who would have concerns. It would be of concern to politicians, regulators, professional bodies and, in some instances, the police and prosecution services.

It should be noted that both those ways of expressing the behaviour – “lying” or “wilful administration” include intent which can be hard to prove and, while that may be necessary to evidence a prosecution for corrupt behaviour, we would regard as not required for us to uphold a complaint of maladministration. They, therefore, set a higher standard than the one we currently use which does not require intent.

The petitioner has referred to correspondence with us and said that our response to him did not answer his points. We note that he did not include this correspondence and, while we are disappointed he did not consider it covered the points he raised, we feel it still sets out our position well and we have included our email, in full, with personal information redacted as an annex to this letter. You will note in that email that we referred to similar issues being raised in early 2015 with the Local Government and Regeneration Committee.

² S3, PACE Recommendation 1615 [2003]

³ S1 PACE Resolution 1959 [2013]

We received no further correspondence from the petitioner other than an email which thanked us for this response.

While we note that the petitioner was not, as we had initially hoped, reassured by this correspondence, we hope that the Committee are reassured that that we are not prevented from and do criticise organisations or individuals through those organisations who do not provide us with accurate information, whether deliberately or not.

Sincerely,

Jim Martin
Ombudsman

Annex

Content of email of 7 August 2015 sent to the petitioner [personal information redacted]

Thank you for your email. In response, we would like to highlight replies we gave to two questions lodged with the Local Government and Regeneration Committee in response to their call for questions from the public on our annual report which may provide some reassurance. One was about the provision of inaccurate information (question 13) and question 19 was about deliberate malpractice or corruption. I have extracted our response to these below. As you will see from our written response to question 13, we make it clear we can and will criticise organisations that provide inaccurate or false information. Mr Martin's oral response to question 19 is relevant as it shows that the example he gave of malpractice was a case where we were provided with false information. You will see we clearly considered we could be critical of someone who deliberately provided inaccurate information and we described this as malpractice.

We also have information published on our website which makes it clear that the Crossman definition of maladministration is not exhaustive and does not cover all matters which we can and do criticise. <http://www.spsso.org.uk/what-does-maladministration-mean>

I hope this information provides you with the reassurance that we are not prevented from and do criticise organisations or individuals through those organisations who do not provide us with accurate information, whether deliberately or not.

Sincerely,

[Information redacted]

From Oral evidence

Cameron Buchanan: Question 19 is: "How many cases in the year involved corruption or deliberate malpractice" and do you have any examples of that? Jim Martin: Corruption is a criminal offence. Cameron Buchanan: Perhaps you could emphasise malpractice. Jim Martin: Yes. What lies behind the question is a question about how often we see deliberate actions of that type. I am pleased to say that they are quite rare, although we have seen some. For example, in a particularly difficult health board case it was suggested that the national guidance on how to deal with a specific condition had not been followed because the health board had a local protocol in place. Rather than just accept that, we pressed and pressed until we found out that there was no local protocol, and that a clinician who had been involved in the original complaint had signed off that there was such a protocol. I argue that that was deliberate malpractice. I am pleased to say that we see such cases rarely. - See more at:

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9710#sthash.VQ089uKO.dpuf>

Written evidence.

Question 13

When a public body gives information which is shown by other evidence to be inaccurate or misleading do you criticise the public body for this in order to encourage accurate responses and increase the likelihood of fair and correct decisions in the future?

Yes, we would criticise a body who provided inaccurate or misleading information. It is worth noting that the simple fact we disagree with their decision and uphold a complaint does not mean that the organisation has been seeking to mislead or provided inaccurate information.