



Parliamentary
and Health Service
Ombudsman

Intro to Investigations : What is maladministration?



Expectations from this session

Do not expect

- A definitive answer, or list to take away on what maladministration looks like
- A 'lecture' session

Do expect

- Discussion between yourselves on what maladministration/service failure and failure to provide a service looks like
- Guidance on what the Ombudsman does and how we approach cases

The Ombudsman model

- To act as an bridge between the need for mass application of administrative functions and the need for good practice and flexibility when dealing with individuals;
- Act as an extension to Parliament - help MPs in their role to bring forward disputes between individual and government and seek resolution
- Power to investigate, intervene and seek ways to resolve any disputes - to right individual wrongs - a concept of `Administrative Justice`
- Independence from the Government Machinery. Further recourse if unsatisfied with internal complaints handling. More cost-efficient (and quicker?) than taking legal action

The basis for Maladministration: Parliamentary Commissioner for Administration Act 1967

Section 5 states

*“(1) Subject to the provisions of this section, the Commissioner may investigate any action taken by or on behalf of a government department or other authority to which this Act applies, being **action taken in the exercise of administrative functions of that department or authority**, in any case where:*

*(a) a written complaint is duly made...by a member of the public who **claims to have sustained injustice in consequence of maladministration in connection with the action so taken...**”*

Bureaucracy!

Administration may be seen as:

- The conversion of governmental policy (or action) into practical application – creation of rules, practices, local policies etc
- These in turn bring about `functions` - the actual product of making policy a reality that interacts with its citizens;
- Many administrative functions evolve from legislation;
- For example...

Jobseeker's Allowance

- Unemployment benefit has been codified for a long time;
- Jobseekers Act 1995 – creation of Jobseeker's Allowance (JSA) – sets out who would be entitled to this benefit and under what conditions;
- Other primary and secondary legislation (i.e. statutory instruments/regulations) give more 'flesh' to the process along the way...
- Jobcentre Plus – tasked with design and delivery of the following administrative functions:

Jobseeker's Allowance

- Creation of a system that allows people to claim JSA;
- Communication (1) - notifying people of the existence of JSA;
- Communication (2) - notifying people of the entitlement conditions for JSA (giving advice)
- Devising effective ways to ensure appropriate information is collated and used;
- Creation of a fair and reflective decision making process - including an appeals process;
- Communication (3) - keeping people informed, notifying them of decisions
- A fair and comprehensive system for paying customers regularly and accurately
- Communication (4) - notifying people of changes

Other things that can be seen as administrative functions

Practical things that support the main administrative function - especially the handling and processing of outgoing and ingoing information

(the following is not exhaustive):

- Records Management - accurate upkeep and storage of files
- Service delivery - how the product is delivered: speed, accuracy, accessibility and proportionality (esp. to the law and its own guidance/service standards etc)
- An effective complaints handling service
- How the administrative function handles individual circumstances - a flexible process;

But what about the NHS – service failure?

Section 3 of the Health Services Commissioner Act:

*“(1) On a complaint duly made to the Commissioner by or on behalf of a person that he has sustained **injustice or hardship** in consequence of:*

- a failure in a service provided by a health service body;*
- a failure of such a body to provide a service which it has a function of the body to provide; or*
- maladministration connected with any other action taken by or on behalf of such a body*
- the Commission may...investigate the alleged failure or other action.”*

Note: Failure in/to provide a service relates to clinical judgments. Poor service etc, still comes under Maladministration



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So back to the (original) Act...

“...action taken in the exercise of administrative functions of that department or authority, in any case where a written complaint is duly made...by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action so taken...”

10 Minutes in your groups:

- With what we know about administrative functions, what do you think would come under the term `maladministration`?
- Why do you think the PCA and HSC Act did not define `maladministration`?

Some attempts to broadly define maladministration

- Richard Crossman (responsible for piloting the PCA Bill through Parliament):

Agreed that it should not be defined, but gave some indication what he thought should be included:

“Bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness,”

Blast from the past

“The Department acted with complete moral turpitude in delegating such important responsibilities to staff who clearly displayed inaptitude to the tasks in hand...”

(...you probably wouldn't see that in a report today...)

Sir William Reid

“To Define Maladministration is to limit it. Such a limitation could work to the disadvantage of individual complainants with justified grievances which did not fit within a given definition...”

Yet...he did give some indication as to what he thought it would encompass...

Sir William Reid

- *rudeness (though that is a matter of degree);*
- *unwillingness to treat the complainant as a person with rights;*
- *refusal to answer reasonable questions;*
- *neglecting to inform a complainant on request of his or her rights or entitlement;*
- *knowingly giving advice which is misleading or inadequate;*
- *ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler;*

Sir William Reid

- *offering no redress or manifestly disproportionate redress;*
- *showing bias whether because of colour, sex, or any other grounds;*
- *omission to notify those who thereby lose a right of appeal;*
- *refusal to inform adequately of the right of appeal;*
- *faulty procedures;*
- *failure by management to monitor compliance with adequate procedures;*
- *cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service;*
- *partiality; and*
- *failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment.'*

Points to remember

- Relationship between executive and citizen is ever-changing;
- These definitions can be useful as they help give broad parameters. But remember each case is different - with its own set of circumstances.
- What we have said may be maladministrative before doesn't strictly mean it will be again in the next complaint due to the circumstances.
- Remember these are `negative` definitions - if followed we would work to a `closed book` prescriptive test - not in the spirit of the Ombudsman!
- Not having a defined set of what is maladministration gives us a very important tool - discretion. Your role is to ensure that our discretion is appropriately applied each time you consider a complaint

BREAK TIME!

Let's come back in five minutes



So how do we approach the thorny question of whether maladministration has occurred?

The classic approach:

- What happened?
- What should have happened?
- What are the gaps between the two?
- Is the gap sufficient enough to have caused significant detriment to the complainant?

What happened?

IMPORTANT, IMPORTANT, IMPORTANT!

Make sure you have all the facts at your disposal that you need to review the issues in hand;


- Make sure they are **checked and verified**.
- Make sure you know as much as you can about what happened.
- To include wrong or misleading information may damage the credibility of our investigation and affect our ability to persuade and influence

What should have happened?

- Check relevant standards and guidelines E.G
 - NICE
 - Regulations in contracts (GP removals)
 - Royal colleges
 - GMC – good medical practice guidance (also NMC/GDC etc)
 - ‘Established good practice’
- Seek appropriate advice – e.g legal or clinical
- Other cases may help you – precedent
- If not, discuss with your buddy or Investigation Manager

What Should Have Happened?

The Principles of Good Administration should be your first reference point !



Ombudsman's Principles

- 1 Getting it right
- 2 Being customer focused
- 3 Being open and accountable
- 4 Acting fairly and proportionately
- 5 Putting things right
- 6 Seeking continuous improvement

These principles are not a checklist to be applied mechanically. Public bodies should use their judgment to produce reasonable, fair and proportionate results in all the circumstances of the case. The Ombudsman will adopt a similar approach when considering the merits of complaints brought by public bodies in her jurisdiction.

Please refer to the Ombudsman's publications:
Principles of Good Administration
Principles of Good Complaints Handling
Principles for Remedy
www.ombudsman.org.uk

Alex Stubbins
Parliamentary and Health Service Ombudsman



Principles of Good Administration (PGA)

- We wish to be open and transparent with all stakeholders as to what kind of tests we apply when deciding whether maladministration has occurred;
- Devised a set of principles - broad parameters of behaviours we would expect to see from a `good practice` department/body/health service provider
- Positive descriptions - helps to broaden our discretion
- Based on 40 years of experience of complaints handling

Six Principles – But what do we think they mean? Over to you

Have you read the PGA yet? Can you outline what you think would come under the Six Principles:

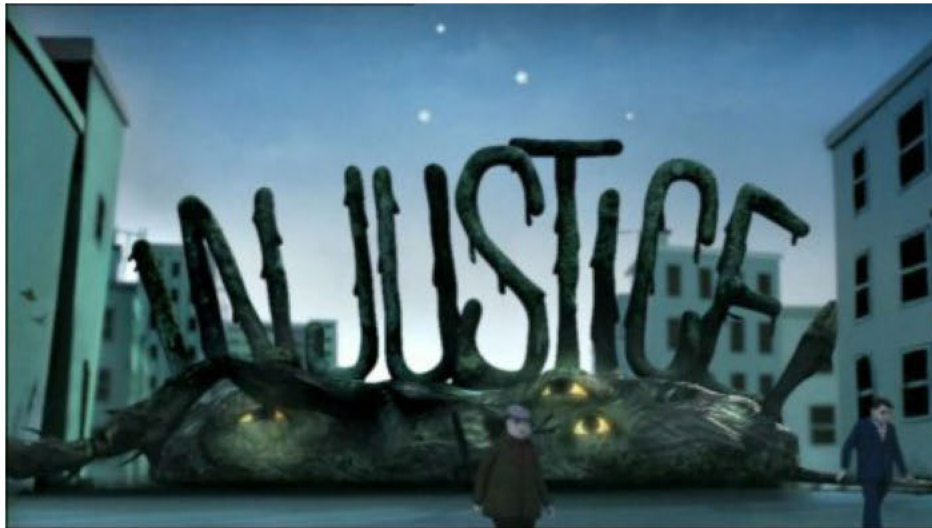
- Getting it right
- Being Customer Focused
- Being Open and Accountable
- Acting Fairly and Proportionately
- Putting Things Right
- Seeking Continuous Improvement

How to use the Principles of Good Administration

- DO NOT use them as a check list. Read them, absorb the principles and parameters of good practice we would expect and then approach your complaints with these in mind
- Ask yourself the question: what did happen and what do I think should have happened. Apply the PGA fairly and proportionately
- Always use in conjunction with other material: e.g. the department/body's established practice/guidance/rules etc. Also - Statutory Duties may limit the way things can be done
- Remember always that we are not looking for perfection or a `gold standard` - bear in mind that public services have finite resources (but that is not a validation for poor service)

A Quick Question

“Why does the act frame the parameters of a potential investigation by saying that the complainant must claim to have “suffered injustice in consequence of maladministration”?”



Answer!

- Recognition that everyday administration will mean that decisions are made, actions occur that people, being people, just simply will not like.
- If we were to investigate all complaints that something was maladministrative, we could potentially investigate every decision/action seen – regardless of what effect it had on an individual;
- Originally known as the ‘maladministration filter’
- Remember – always ask yourselves: what injustice is being claimed here?

And so, what is injustice?

Discussion - what can injustice encompass?



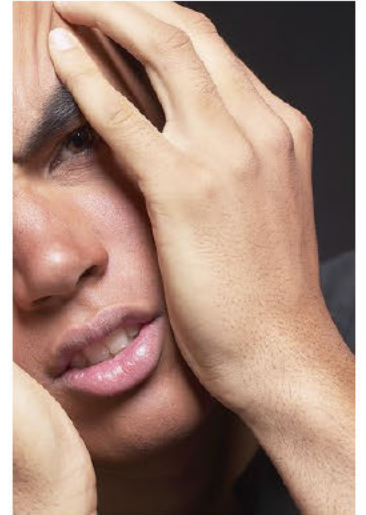
Injustice

It is about being in a worse position - a negative experience

Intangible and tangible injustice:

Covering loss and damage -

- emotional, physical, monetary loss
- The list is never exhaustive - each case on its own merits.



Principles for Remedy

- Again, what we would expect from a good performing organisation when considering how best to put things right for an individual.
- Same `headline` Principles - but with different connotations. Again, take your time to familiarise yourself with them.
- As with Principles of Good Administration - start off by asking:
 - What happened?
 - What should have happened?
 - Is there a `gap` - does it mean a significant injustice has occurred?
 - What is needed to put that person back in the position they would have been in - had the maladministration not occurred?
 - And has that happened already?

Putting things right

KEY - we are trying as far as possible to put the person back in the position they would have been if the maladministration or service failure had not occurred.

What can we do?

- Should we get the body to consider the complaint or issues again because they did not do a good enough job last time? (Further work required).
- Is there scope to negotiate with the body to provide a remedy? (Mediated outcome). Usually in cases where there is a clear and straight forward remedy to the complaint.

E.G Compensation for clear or admitted errors;
apologies; and
getting a delayed claim, appeal or application
progressed.

Investigation outcomes

Not upheld complaints

- We have seen no evidence of maladministration or service failure.
- We have seen evidence of maladministration and or service failure but are satisfied that the body has already taken action to put that right.

Investigation outcomes – cont'd?

Partly upheld complaint:

- We have identified maladministration / service failure but the injustice suffered was not the one claimed by the complainant.
- We have identified maladministration / service failure but no injustice for the aggrieved. What we have seen, however, is a wider issue in terms of the organisation and we use this code so that we can make recommendations for systemic improvements

Investigation outcomes – cont'd?

Partly upheld – cont'd

- Failings found but the injustice identified is not as great as the injustice claimed
- Failings leading to an injustice found but in the context of a multi body complaint. There are not failings and an injustice found in all aspects of the complaint.

Investigation outcomes – cont'd?

Upheld - failings identified leading to an injustice

Discontinued - investigation started but can see no reasons to bring to a conclusion

Other - when nothing else fits - you will **NEVER** use this in Health cases!

The 'why?' factors

- Need to consider how the maladministration or service failure was able to happen in the first place.
- Was there something that could have been in place to stop that happening?
- If so, perhaps wider systemic recommendations should be considered.

Over to you!

“Mr A complained to the Ombudsman that it took him 7 months to get an unsatisfactory response to his complaint about the way JobCentre Plus arrived at their decision that he was not entitled to income support.”

What possible aspects of Maladministration are there? What might we want to ask?

Cont'd

"Mr A said that while he did get numerous update letters throughout the seven months, this was not enough and it was wrong to keep him waiting for so long"

Anything different now?

Cont'd

“JobCentre Plus had informed Mr A that they did originally receive his complaint, but that they had misplaced it...”

What would we be thinking now?

Cont'd

“Mr A said that the reason he would not provide JobCentre Plus with further details as to his complaint is that he believed that they had all the information to hand already.”

What now? Does this affect how we should consider this complaint?

The Full Story: So is there Maladministration/Injustice?

- *“JCP confirmed that Mr A had made a claim for income support. The original decision was processed within 4 weeks, but it was negative for Mr A. Mr A appealed against the decision to a tribunal and also complained to JCP that his actual claim was poorly handled.*
- *two months later, the tribunal confirmed that the original decision was correct.*
- *JCP received the complaint and acknowledged it. They then lost the complaint file soon after. JCP were aware of this and contacted Mr A within a month to apologise and ask if he could provide them with further details. He refused. JCP wrote back to him several times to see if they could further his complaint. Mr A eventually gave details as to his complaint (some six months later). JCP wrote back a month later to say that as the tribunal had upheld their decision, there was no evidence of poor administration.*

Use your noggin...

Remember That There Is No Clear Right Or Wrong Answer



Be prepared to argue your convictions - make sure that they are backed up with the evidence and are persuasive, appropriate and mindful of the PGA, PfR and other PHSO parameters.

Thanks for being so patient – Conclusions (1)

- We do not wish to limit our definition of maladministration by trying to define it – it is what gives us our greatest tool: discretion
- Absorb the Principles Documents – particularly the PGA. Let them become second nature in your analysis to avoid them becoming a check list.
- Discretion is a big responsibility! That is why casework is a corporate affair at PHSO. Yet you have opportunity to utilise our discretion to achieve our strategic objectives. Look to being persuasive and influential via correct application/analysis of the evidence and your own judgment
- Always remember: What happened? What should have happened? What are the gaps? (What would have happened, if what should have happened, had happened?)
- Injustice is also defined widely. Always consider each individual case on its own circumstances

Thanks for being so patient – Conclusions (2)

- PHSO uses a **lot** of jargon
- In your writing...
 use **plain English!!!**

Questions????

