

Joint Committee on Human Rights Inquiry – Human Rights Ombudsperson

June 2022

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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Introduction

On 12 May 2022, the Joint Committee on Human Rights (JCHR) launched [an inquiry](#) to “explore whether a Human Rights Ombudsperson should be created, and whether this would improve how people enforce their rights out of court.” The inquiry follows the JCHR’s previous work on [enforcing human rights](#) and scrutiny of the UK Government’s current proposals to overhaul the Human Rights Act 1998, as set out in their [consultation paper](#) and subsequently the [Queen’s speech](#).

The Commission has provided [written](#) and oral evidence to the JCHR concurrent inquiry on reforming the Human Rights Act (HRA), in which we expressed grave concern about the regressive nature of the UK Government’s proposals and noted that they will water down human rights protections, erect additional barriers to accessing justice, and equivocate on compliance with decisions of the European Court of Human Rights. In terms of access to justice, the proposals would add hurdles to accessing justice, compounding existing barriers related to the complexity of law and procedure, the cost of securing legal advice and the lack of legal aid.

The JCHR has produced its [own report](#) responding to these proposals, concluding, among other things “that more could be done to improve how human rights are enforced without the need to take legal action.” We understand that the question of creating a human rights ombudsperson has arisen as one potential reform that has been suggested as a measure that could partially address long standing problems in access to justice which are likely to be exacerbated by the proposed HRA reforms.

While the Commission has not carried out a full analysis of the questions posed by the JCHR, we would like to take this opportunity to draw the JCHR’s attention to some questions we consider it will be important to incorporate into its analysis.

Human Rights and Access to Justice

In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold

decision-makers accountable. Therefore, under international human rights law, states have an obligation to ensure access to justice in law and in fact, for all without discrimination of any kind.

Under international human rights law, States must ensure the existence of remedies that are *accessible, affordable, timely, and effective*. This is known as the AATE framework. The AATE framework requires remedies that are:

- a) **accessible:** they must be transparent, simple, ensure legal advice, and ensure the possibility of public interest litigation.
- b) **affordable:** they must not be costly (ideally they should be free), and sufficient legal aid must be ensured.
- c) **prompt:** there must be no unwarranted delays, and must include mechanisms that can urgently prevent the materialisation of an irreparable harm.
- d) **effective:** they must, among other things, guarantee the existence of both administrative and judicial procedures, which can be challenged if necessary. They must also provide the possibility of collective litigation, where the findings and benefits are generalised beyond the actual litigants. Remedies cannot be illusory, and therefore, consequences for non-enforcement must exist. The effectiveness of remedies is also measured by the appropriateness of the reparations ordered, and therefore, orders of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, need to be ensured.

The right to an effective remedy is also specifically enshrined in Article 13 of the European Convention on Human Rights (ECHR). European Court of Human Rights jurisprudence confirms that a remedy in relation to ECHR rights is only effective if it is available and sufficient. It must be sufficiently certain not only in theory but also in practice, and must be effective in practice as well as in law, having regard to the individual circumstances of the case. The state may discharge the Article 13 duty through a combination of judicial and extra-judicial processes, provided the other requirements are satisfied.

The creation of a Human Rights Ombudsperson could constitute a step towards fuller compliance with these international and regional human rights requirements, by making available an administrative route to remedy, alongside the existing judicial route, in appropriate cases.

However, care would need to be taken to ensure that the administrative route complied with the other AATE requirements of accessibility, affordability, timeliness and effectiveness. It would also be essential to carefully consider any impact the creation of a Human Rights Ombudsperson could have on satisfaction of AATE in terms of the broader landscape of routes to remedy.

While each element of the framework requires careful consideration, below we have outlined some particular issues arising in connection with accessibility, effectiveness and the devolved context in Scotland.

Accessibility

Complaints to Ombudspersons are often thought to be more accessible than judicial remedies. While the particular rules and procedures followed by ombudspersons will vary they will typically be less formal and more administrative than courts, reducing the need for legal representation.

They also tend to adopt an 'inquisitorial' approach to adjudication, investigating the matter brought to their attention, rather than following the adversarial approach typically applied in courts, where the burden is much more squarely on the party pursuing the claim, in terms of evidencing the breach and presenting the legal basis for their claim. The inquisitorial model can significantly decrease the burden on a rights holder and can provide a more accessible and affordable route to remedy.

However, human rights complaints concern matters of fundamental importance to individuals and society, and any process established to handle such claims must also be independent, transparent and authoritative. Currently ombudspersons in the UK tend to be established

to focus on maladministration or service failure, as is the case for the Scottish Public Services Ombudsman (SPSO).¹

It will therefore be important to carefully consider the particular structure, governance, procedure and powers a Human Rights Ombudsperson ought to have, which may require to be distinct from existing ombudspersons in the UK in order to comply with international and regional human rights standards.

Effectiveness

Of critical importance is that any institution that is created for human rights claims must offer a route to an effective remedy.

Whereas successful court actions provide binding and enforceable decisions, ombudspersons typically deliver 'recommendations,' which tend to be non-binding with any remedy for the individual contingent on acceptance by the body subject to the complaint. Where the recommendation is not complied with the ombudsperson tends to be given the power to refer the matter to parliament in order that it can scrutinise the government and hold them to account, as is the case for SPSO. It is the Commission's view that this is not likely to amount to an adequate and effective remedy for a breach of human rights in accordance with the AATE framework.

Careful consideration will therefore require to be given to the powers and authority of a Human Rights Ombudsperson to ensure a human rights compliant outcome.

This also requires to be considered with reference to the accessibility requirement discussed above. Unless a human rights Ombudsman can itself deliver the full range of necessary remedies - including appropriate reparations and orders of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, with direct consequences or sanctions for non-compliance - there is a risk that introducing a human rights ombudsman could further complicate an already complex

landscape of institutions with distinct jurisdiction, procedures and powers, introducing a further step in a long route to justice.

For example, in Scotland there is already a highly complex set of routes through which individuals may seek redress.² There are overlaps in remits. Some are sequential while others may run concurrently. Most are subject to differing time limits and several offer different forms of remedy. Some legal remedies are only available once other remedies are exhausted.

Careful consideration would also require to be given to the rules of prescription and limitation, or time-bar, to ensure that pursuing a human rights claim through an administrative route would not prevent the claim being raised in court thereafter should an appropriate remedy not be provided. The requirement to exhaust domestic routes to remedy before a matter can be taken before the European Court of Human Rights is a further important related consideration.

A further point to consider is that the existing structure of around 30 UK ombudspersons is sectoral, with the institutions designed to deal with complaints arising within a particular setting. Human rights violations may occur in any of the settings dealt with by these existing ombudspersons. Careful consideration would need to be given to the interrelationship between them.

Devolved context

Specific consideration would be required to be given to the devolved context. Given that observation and implementation of human rights is devolved under the Scotland Act, as is the administration of justice, the remit within Scotland of a new UK human rights ombudsperson needs careful consideration. Presumably it could cover human rights in relation to reserved matters, whereas including human rights in devolved matters would require the consent of the Scottish Parliament. The existence of the SPSO would need to be reviewed carefully in this context. We note that the remit and powers of the SPSO is considered in relation to the incorporation of a number of international human rights treaties into Scots law. Overall, there is a risk that Scottish rights-holders could be left with a still-more-complex landscape of routes to remedy.

Conclusion

Designing an effective human rights ombudsperson would require first mapping and measuring the extent to which existing routes to justice comply with the AATE framework, taking account of differences between devolved nations, identifying the particular shortcomings and then assessing the extent to which the creation of a human rights ombudsperson would remedy those gaps.

Such a review should inform the design of any new administrative body, so that the remit and functions provided to a new body were complementary and supportive, and furthered the aims of the AATE framework.

¹ See S.5 of [Scottish Public Services Ombudsman Act 2002](#)).

² [How to report a possible abuse of your human rights - mygov.scot](#)