



HOUSES OF PARLIAMENT

## Joint Committee on Human Rights

Oral evidence: [Human Rights Ombudsperson](#), HC 222

Wednesday 29 June 2022

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Members present: Joanna Cherry MP (In the Chair); Baroness Chisholm of Owlpen; Lord Dubs; Florence Eshalomi MP; Lord Henley; Baroness Ludford; Baroness Massey of Darwen; David Simmonds MP; Lord Singh of Wimbledon.

Questions 10 - 14

Witnesses

[II](#): Dr Richard Kirkham, Senior Lecturer, University of Sheffield; Professor Robert Thomas, Professor of Public Law, University of Manchester.

## Examination of witnesses

Dr Richard Kirkham and Professor Robert Thomas.

Q10 **Chair:** I shall introduce the witnesses for our second session, both of whom are joining us online. First, we have Professor Richard Thomas, who is a professor of public law at the University of Manchester. His research interests include law and administrative organisations, administrative tribunals and other redress mechanisms. We are delighted to have you join us.

Next we have Dr Richard Kirkham, who is a senior lecturer at the University of Sheffield School of Law. His main research interest is administrative justice, with a particular specialism in the work of ombudsmen. He is the current holder of an 18-month Nuffield Foundation grant examining procedural fairness in ombuds scheme. We are delighted to have you with us.

I will fire off the first question. Bearing in mind our scope as a committee about human rights, my question is this. What barriers do individuals currently face when trying to access redress out of court settings for breaches of their human rights? Outwith litigation, what barriers do people face when trying to access redress for breaches of their human rights?

**Professor Robert Thomas:** Thank you for inviting me to give evidence to your committee. The problems fall into a number of categories. There are those relating to individuals' lack of knowledge about their position, about human rights, about what a human rights issue is and what a non-human rights issue is. Complaints do not come neatly packaged and divided in that way from the outset. There is a need for advice. However, the advice sector services have been under real pressure in recent years and there have been reductions in legal aid. So there are issues to do with the position of the person themselves and there is a whole set of issues about the complexity of the complaints processes that they have to go through. You have heard a lot about that from your previous witnesses, and I agree with almost everything they said.

I highlight the point that people cannot go directly to an ombudsman; they have to complain to the relevant public body first, and it can take some time and effort to go through that. There may even be two or three stages involved in the internal complaint handling within the public body.

The lack of knowledge also extends into public bodies, because awareness of human rights standards in bodies such as public schools or public services can be variable. The quality of the initial handling of complaints by public bodies is quite uneven, and ombudsmen recognise that themselves. That is in addition to other matters such as the "MP filter". So there are issues to do with the position of complainants as well as non-complainants—the people who never enter the complaints

system—and issues to do with how complaints are considered in public bodies. Those are the two main issues.

**Dr Richard Kirkham:** I echo most of that. To add to the message, as we also heard in the earlier session, there may be problems with gaps. We heard from Evan that there is a bit of a gap in the process for schools, for instance, plus a genuine fear when making a complaint about facing a body that you might rely upon. From the point of view of the citizen wanting to complain, there is the problem of confidence that they will be taken seriously.

There is also an issue about resources, partly of the complainant but also of the organisation charged with handling these complaints. You have just spoken to Robert Behrens, whose office is quite well resourced and has good support from Parliament, but some of the other ombuds schemes do not have that kind of strong support, so their budgets may well be coming under pressure as well. That is an issue of concern.

Also, once a complainant is in the process, to what extent are they being adequately communicated with and informed of progress? They can get a bit lost and disillusioned. Robert alluded to the potential of complainant fatigue: you feel like you complain at one level, get rejected, so go up to the next level and eventually get to an ombuds. This can increasingly become a trap for a complainant, which leads to all sorts of challenges.

I think this is a general thing about administrative justice, full stop. I am not aware of anything special about human rights complaints. You heard a lot earlier about how most people probably perceive their complaint in terms of their relative's care in hospital, for example, rather than human rights issues specifically. Those sorts of challenges are there throughout the system.

The specific barriers for human rights are that people might not know that some of these ombuds schemes have the potential to look into human rights issues. There might be value in making that more transparent by amending the legislation somehow to make this clearer in their remit. You have heard a lot of quite similar messages on that from the previous witnesses.

**Q11 Florence Eshalomi:** I am the Member of Parliament for Vauxhall, and I apologise for my lateness to the meeting and that the lighting in my office is not very good.

You have both touched on why it could be good to have a human rights ombudsman. Do you think that introducing one could help to improve the ability of individuals to enforce and vindicate their human rights outside court? You have touched on the many complexities and challenges that people face in accessing the complaints process. Do you think this would be a good way to help people outside court?

**Professor Robert Thomas:** The proposal is very well intentioned. It has the best of intentions behind it, but there is a multitude of different public service ombudsmen in the UK. The challenge is that the ordinary person

is already unclear about ombudsmen and there is very low public awareness of them. The risk is that if we add an additional human rights ombudsperson into that mix, it is likely to exacerbate the problems there. There is a risk just of confusion of the public.

In a way, ombudsmen already deal with human rights issues. The best way forward would be to draw together the institutions that we already have and engage with that reform of public sector ombudsmen, rather than to say, "Right, we have a set of ombudsmen for traditional maladministration and healthcare issues, and then a separate ombudsman specifically for human rights". The risk already exists in how ombudsmen work currently, and it is about getting the complaints in the right place. As Rob Behrens said, his caseworkers spend a lot of time simply advising people on where to complain to, because they have not entered the system at the right point. There is a risk of confusion of the public from having a separate ombudsman, and a risk that complaints do not end up in the right place.

**Dr Richard Kirkham:** I was a bit unclear on this aspect of the call for evidence in this inquiry, although I might be overinterpreting what the call for evidence did. The word "enforcement" seems inappropriate to me for the work of an ombudsman. The one thing that we know ombuds do not do is enforce legal rights. I am doubtful that the model of any human rights ombudsperson that could depart from this basic idea could be implemented.

Ombuds may well facilitate a process through which legal rights are honoured and realised. They may, through the force of their investigations and reports, persuade public bodies to change their decisions and policies to bring them into line with the law. They may many more times than not be very successful at arriving at solutions that provide complainants with redress, but ombuds do not enforce the law or have that as their primary remit. Certainly ombudsmen do not give definitive rulings on the Human Rights Act or any item of law should they need to be interpreted in circumstances where it is generally unclear.

So instead of enhancing the enforcement or vindication, I would have thought that the introduction of a human rights ombudsperson would provide the aggrieved party with a clear choice: either attempt to enforce the legal right through the courts under the HRA or any new legislation that might be introduced, or complain to the human rights ombudsperson, who would then attempt to resolve the complaint and underlying grievance through a softer investigatory method. In my view, talk of enforcement or vindication misses the point of the kind of work that goes on in alternative dispute resolution processes. To be honest, I was a bit confused about that particular reference in the call for evidence.

**Chair:** I am hearing pretty clearly from both of you that you would not recommend a separate human rights ombudsperson. That it is not a path you would go down. However, there may be wider issues of reform in relation to the human rights aspects of the work of the public services ombudsman that we could ask you about.

**Q12 Lord Dubs:** My name is Alf Dubs and I am a Labour Member of the Lords. I turn to the devolved Administrations. How does the model for ombuds men and women adopted in England, where they cover specific sectors such as healthcare and social care, compare to the models in Scotland, Wales and Northern Ireland, where there are public services ombuds? In your view, which is preferable, and why? You have a lot of experience of both these approaches. Which do you go for?

**Professor Robert Thomas:** The big difference is that in Wales, Scotland and Northern Ireland there is a single public services ombudsman that deals with all public sector complaints. There is no division between local government and central government. A big part of the work of the parliamentary ombudsman is healthcare; it is about 80% of its work. In England, you have two separate institutions. Of course, it becomes complicated because it is not just England but also the UK. That is one major point: in the devolved Administrations, in that context, you have one ombudsman body.

Secondly, those institutions have been established relatively recently. The PHSO was established in the late 1960s, but the devolved ombudsmen have been reformed and brought up to date, so they have powers and tools that the parliamentary ombudsman and the Local Government Ombudsman do not. For example, in Northern Ireland and Wales, the public services ombudsmen have their own initiative powers, and all three of the devolved ombudsmen have Complaints Standards Authority powers. They are there to set standards and frameworks for how government and public bodies handle initial complaints.

This is really important. Ombudsmen only ever handle a relatively small proportion of all complaints. All complaints start initially with government and then filter through. A smaller proportion end up with ombudsmen. So what is important is having the ability to ensure that, when complaints are initially handled, there is a good framework of standards for that.

Those are the two main differences. I would have a single public services ombudsman but with additional features, such as the ability to proactively investigate matters that it knows are problematic. We have seen examples of that. In Wales, the public services ombudsman did an own-initiative investigation into how local authorities in Wales deal with homelessness applications. Last year, the Northern Ireland ombudsman produced a very detailed report on how disability benefits and personal independence payments assessments are made in Northern Ireland.

Not a single person complained about that. The ombudsman saw that it was an issue—an area of potential systemic maladministration—and acted. It went in and investigated. Those are the two main differences that I would highlight.

**Dr Richard Kirkham:** Again, I am afraid you will find that there is a lot of agreement in the room. I am just remembering what Robert Behrens said at the end of the previous session. There may be some localised good reasons for specialisation in certain areas, so I would advocate for a

wholesale merger model en bloc straightaway, but the time has definitely come to think more seriously about integrating some of the ombuds schemes.

This debate has been around for at least 20 or 25 years. Most people in the sector, even in government, have agreed at various times on the merits of moving to the sort of model that they have in Northern Ireland, Scotland and Wales. However, the big stumbling blocks when it has got to the edge have been the question of whether Whitehall really wants to support such a model and the issue of finding parliamentary time. I think most people in the sector accept that it is time to tidy up the operation of the ombudsman sector.

Robert also talked about the potential to use it to enhance some of the office's powers as well. Having a more focused ombudsman in a system might allow for enhanced awareness and, to be honest, accountability. Following this discussion, for instance, I would very much like to see your committee invite ombuds to appear before you on a fairly regular basis so that you can ask them how much work they are doing to promote human rights issues. That would be much easier to organise if we had a more integrated body that brought some of these functions together.

On balance, I would be very much in favour of a staged, bit-by-bit merging of institutions and ombuds out there that clearly have crossover functions, such as local government, social care and the health sector, for starters.

**Lord Dubs:** We have a lot of food for thought there.

Q13 **Chair:** We sure do. On the back of that answer, what do you both think the current ombuds could do better to ensure that they are being used for human rights claims? In the previous session, Rob talked about liaison and going out into communities to advertise what ombudsmen offer. That is one example, but what other things could they do to better ensure that they are being used for human rights claims?

**Dr Richard Kirkham:** I think what you are seeing is a bit of a learning process in the sector. If you go back about 10 years, there was a nervousness in the ombuds sector about using the phrase "human rights" at all in its work, because it might distract from the maladministration goal, which it mainly does. Over the past 10 years, bit by bit, ombuds have started to take on this agenda more and more. You heard reference to the Northern Ireland ombudsman's office. If you want to explore this more, get that office involved. It has a quite sophisticated internal manual, which integrates a number of factors but human rights considerations above all, to provide advice on how to handle complaints.

You can also see that in how offices do not communicate their messages to the bodies with which they work. The Welsh office has a digest of general cases and other specialities, and a digest specifically on human rights. You can see what the office is doing and integrate that more into its messages to the general public. I can probably say this because

Robert Behrens is not in the room, but I think the PHSO has been a bit slower in going in that direction. I think it is going in that direction now, because they are learning from each other about how to do better.

The rather banal answer to your question is to carry on the learning process that they are taking, I hope with the encouragement of committees such as this.

Another thought I had is whether you could amend the legislation specifically to reference human rights as a factor. I do not know and have mixed views on that, but, generally speaking, maladministration or service failure is not defined in the legislation or in the case law. It is deliberately left to the ombudsman sector to get on with playing around with it, as it thinks. You might feel it necessary to give it a nudge by putting it in there. That is a thought.

Going back to the previous question, might you also give the ombuds the power to refer particular legal questions to the court if it felt fit? Again, it would be nervous about that, because it could suddenly be pressurised. We had the example of South Africa and too much money being spent on legal resources, but it might be a reserve power that you want. Alternatively, it could connect with the EHRC and say, "We've found all this. Could you run off and play with it?" There are a number of things they could do. Mostly, you are seeing a learning process. They are getting better at this, and it is more obvious in the reports, every year.

**Professor Robert Thomas:** I completely agree with Richard. I highlight that ombudsmen are traditionally defined in terms of maladministration, but the more modern ombudsman is about promoting good administration. One aspect of good administration is following the law and following guidance, and ensuring that public bodies take the law and guidance into account. The Local Government and Social Care Ombudsman has increasingly been referencing the Human Rights Act in its recent decisions. When elderly couples have been split up in care settings, Article 8, the right to family and private life, has been referenced. Delays by local authorities in doing deprivation of liberty safeguard assessments potentially come under Article 5, the right to liberty. A major area of the local government ombudsman's casework is on special educational needs, which is a system in very deep trouble, with lots of problems, delays and so on, and the right to education is in the first protocol to the convention. A recent report by the local government ombudsman concerning Cambridgeshire County Council, where a boy with special educational needs was left without education for 14 months, raised the right to education.

The point I am making is that ombudsmen can reference human rights standards more explicitly. The whole purpose of doing this is to ensure feedback into public bodies, because I am pretty certain that knowledge and awareness of human rights standards can be uneven in public bodies. Yes, when the lawyers are involved, they will know about human rights law, but how conscious and aware are ordinary staff and officials in public bodies about human rights standards? Ombudsman decisions are a major

and important way of setting out standards for public service delivery and public administration, so I encourage ombudsmen to be more explicit in referencing human rights in their decisions, guidance and focus reports.

Q14 **Chair:** I will ask one final, fairly tight question. Both of you are clear that you would not recommend that we recommend a separate human rights ombudsperson. For completeness, I am looking to international practice and wondering whether there are any examples of purely human rights ombudspersons in other countries that you could point us to.

**Professor Robert Thomas:** There are examples. Very often they have occurred in response to a specific issue in that country or as part of a wider issue of restorative justice. For example, there is a human rights ombudsman in Bosnia-Herzegovina, as there are in similar countries. So there are examples, but they generally arise because of the history and developments in that country and its background history.

**Dr Richard Kirkham:** I would say the same thing. When they introduced the ombuds method in South America and the Iberian peninsula, it often came with the label of human rights to address specific grievances and human rights abuses. Plus, as I understand it, there was a distrust of the courts in those sorts of countries, which is why they went down this route. Those contexts tend to be very different from the ones that we are talking about.

I am thinking of the example of the equivalent office across the channel in France. That merged two or three schemes into one, where receiving the human rights complaints remit came alongside the equivalent of the parliamentary ombudsman. In other places, the human rights brand is certainly clearer than in the UK.

**Chair:** Thank you very much. You have given us clear evidence and a clear steer on how we should approach this issue, which fits with that of our previous witnesses. I thank you very much for joining us.