

Transcript of Radio Ombudsman #27: Joshua Rosenberg and Rob Behrens on barriers to justice

This podcast features an interview between journalist and lawyer Joshua Rozenberg and Ombudsman Rob Behrens. It was recorded at The art of an effective Ombudsman event which was held at Church House, Westminster in May 2022 to mark the launch of the Parliamentary and Health Service Ombudsman's new strategy.

In the podcast, Joshua and Rob discuss:

- how PHSO will be user-led and responsive to citizens
- how we will hold Government to account and support improvement to public services
- what powers we need to provide the most effective Ombudsman service.

Joshua Rosenberg: Thank you very much indeed. My name is Joshua Rosenberg. I'm an independent legal commentator. And Rob has asked me to pick up some of the points that he made in his address to you just now and ask you a few questions. And I want to start with something you said about public satisfaction in the National Health Service. You said it's reported to be at its lowest since 1997.

You'll have seen a report in the Sunday Times yesterday, that the North East Ambulance Service is said to have withheld evidence from the coroner in order to hide failings by paramedics. Now, I'm not expecting you to comment on that particular report. This isn't a case that you've had anything to do with. But perhaps you have some thoughts on whether misleading a judicial investigation is a serious matter. It certainly sounds pretty serious to me.

But what I really want to know is a broader question. I wonder whether you think that the health service, and the other public body, but let's start with the health service. Have they ever actually tried deliberately to pull the wool over your eyes? Have they actually

tried to mislead you? Have they actually withheld information that you need in order to judge a case?

Rob Behrens: Thank you for that question. The answer to that is yes. If you look at the case of Matthew Leahy, who took his own life, in a hospital in Essex, if you look at the case of Robbie Powell, who died 32 years ago, if you look at the case of Ben Condon, the baby who died in Bristol; these are examples of where there was distortion, lies and cover-ups taking place inside hospitals or parts of the NHS to prevent the truth about avoidable death and what happened, taking place.

And I can't speak about the generality of this, but it's not uncommon for us to see that this type of cover-up does take place, and it's not totally infrequent. So, I'm not surprised to read this report. I've not seen it in relation to a coroner's inquiry before, but it certainly takes place in the way in which NHS and government bodies occasionally deal with very serious issues that they don't want to be looked at.

Joshua Rosenberg: I mean, this is very serious, isn't it? This isn't just the fobbing off that you talked about in your interview with The Times which is reported today? I mean, is this what you were talking about when you said that there's a leadership deficit, that the government is falling short? I mean, is this something that comes from the top?

Rob Behrens: Look, there are too many examples of this for it just to be constituted as an isolated example. There is a cultural issue. And it's about the failure of leadership in departments to recognise the importance of telling the truth in difficult circumstances, and the priority of reputation management over redress, which takes place in lots of departments and health services. And until the leadership of those bodies, and the ministers who have responsibility for that leadership, understand that telling the truth is the most important thing, then that is not going to change. And you can't expect people in middle management or complaints teams to understand the importance of that unless they get leadership to address it.

Joshua Rosenberg: Can we talk about this this concept of 'safe space'? You mentioned that briefly. Not everybody here may know about it, but just tell me about the Healthcare Safety Investigation Branch and safe space. What is it?

Rob Behrens: So, the this is a steal from the airline industry, which has no Ombudsman in it at the moment. And what the government has done is to take root and branch the system of allowing private conversations between professionals and investigators to inform lessons about serious incidents without holding individuals to account. This, to me goes against the whole principle of learning and accountability, which should be at the heart of public administration.

I have no problem with HSIB or the colleagues in it, I do have a problem with safe space. And as the Venice Commission reported that there were four examples in Scandinavia, where the Ombudsman was included in safe space, and there's no problem with it. But we're excluded from it. And what the Venice Commission says is that the impact of that will be that people will say, "You don't have the necessary powers to be able to help us deal with the issues effectively". And that is reputational damage for us. And it's not acceptable.

Joshua Rosenberg: But if you were in the safe space, it wouldn't be a safe space. I mean, the whole point is these people can talk without any comeback.

Rob Behrens: No, that's not right. Because as Karl Banister has explained to me, and it's true, we have the duty not to disclose facts, which should not be put in the public interest. And we investigate in private. So, there is a possibility for us to be in this safe space to know what's

happening without necessarily publishing it. So that is an arduous duty put on us. But I'd rather know what's going on than not know what's going on and have somebody tell me something, which I don't know whether it's true or not.

Joshua Rosenberg: You say it's disgraceful. It's a very, very serious allegation that you're making. But nevertheless, it's surely the case that if you were the part of it, there is information which people in the health service simply wouldn't give, because they're worried about you knowing about it and it getting out, or breaches in your own system - after all, you are more and more willing to share cases with the public.

Rob Behrens: It's not an allegation, Joshua, it is the fact that we should have access not to blame individuals. Our opponents in the House of Lords said "Oh, well, the Ombudsman is about blame". That's nonsense. That's not true. That is a distortion. That is a convenient political use to try and justify a safe space. We don't blame individuals. What we do is we hold public bodies to account for what has happened and that is different. So, it's learning and it's accountability. It's not blame.

Joshua Rosenberg: Okay, can I just step back a bit because I'm old enough to remember the Parliamentary Commissioner Act 1967 being passed, although I was still in school doing my A-levels at the time, doing British Constitution A-level. Now that Act saddled you with the word maladministration. And later on, we learned that the Parliamentary Commissioner was really going to be called the Ombudsman. And these are words which are not very widely understood by the public are they? Is there anything that you can do about them as concepts, anything you want to do about them as concepts?

Rob Behrens: Yes, Perhaps Margaret Doyle could answer that question. She has almost single-handedly waged a campaign to say that the term

'Ombudsman' is unacceptable in British and European public administration, because it has gender bias. Now, there's an argument about that, and you can take one side or the other; what we know is that the term is not recognised by the public as meaningful. And therefore, it's a handicap for us to describe ourselves as Ombudsman, when people don't understand what the term is.

Joshua Rosenberg: So, what word would you put in its place?

Rob Behrens: Well, I mean, there's so many; Defender of Rights is used in France and in many European countries. Public Protector, I like that, is used in South Africa - I'd love to be the Public Protector. There are lots of different ways of dealing with this. Ombudsman is not universally used, and was not used in 1967, because the government was frightened of creating a Swedish system, which would give too much power to redress and take it away from the government. So, I have no problem with that. We need to change our name. Does anyone know what PHSO means outside of this building? Probably not. You know, we found a public recognition rate of 17% for us, which is pathetic really.

Joshua Rosenberg: I think, yeah, I don't suppose many people stopped you on the train here this morning and said, I've got a complaint against the health service, even with your picture in The Times.

Rob Behrens: Well, what did happen was I went to Sussex to visit a mental health service institution two years ago, I arrived at eight o'clock in the morning, and a guy in a dressing gown and pyjamas came up to me and he said, "Are you a lawyer?" And I said, "No." I said, "Why do you think I'm a lawyer?" He said, "Well, no one comes to this place at eight o'clock in the morning, dressed in a suit and tie, unless they're a lawyer." So, I said, "No, I'm not". So, he said, "Well, what are you then?" So, I said, "Well, actually, I'm the Health

Ombudsman”. And he said, in words, I will never forget, “What the bloody hell is that?” Exactly the type of person that we should be helping, who should know about us, and I should have empathy with.

Joshua Rosenberg: So, this is your strategy for the coming period, you've got nearly two years left in the job. And we may talk about the general issues, but one of the things you want you're saying is you want to be more transparent; you want to get your message across to the public, you want the public to recognise you and understand what you do.

Rob Behrens: Once they know about us, they use our service. And the scores that we get from measuring how we've done against our charter are decent, they're okay, not universally okay, but pretty good. So, the problem is not when people use our service, it's before. And it's in cases like Windrush, for example, where I met lots and lots of people as a result of Robert Thomas's excellent inquiry, who said, “If we'd only known about you, before we launched into redress, and we would have tried to come to you through our MP”, but they didn't. And they were frightened of going to their MPs, because they thought that the strategy would be supported by the MPs, and they wouldn't get through the system.

Joshua Rosenberg: Who's to blame for the fact that people don't know about you?

Rob Behrens: Who's to blame? Well, I think Richard Crossman is to blame, actually! No, but he was known as ‘Double Crossman’ in the Labour party.

Joshua Rosenberg: He was the minister at the time, in 67?

Rob Behrens: Yes. He was responsible for the Bill and the Crossman Catalogue. Look, it's not about blame. It's about us using all the resources and

imagination, and stakeholders at our disposal to try and get through to people who need our help.

We did a big survey with elderly people about why they don't use our service. And we found that elderly people are more likely to feel they will be victimised if they bring a complaint against us. The same with mental health complaints. They're heavily dependent upon their families. We found that their families didn't think it was worthwhile bringing a complaint and all the hassle associated with that.

So, we need reform. I've said that a million times. We do need reform. We can't stand still. But if we're not going to get the reform, then we will continue to be as imaginative and energetic as we can be to get ourselves better known.

Joshua Rosenberg: Another thing then you blame Richard Crossman for, and you've mentioned this in your opening remarks, is the MP filter. You said it's outdated, bureaucratic and confusing. And you want to get rid of it. It only applies obviously to part of your work, which is even more confusing. But nevertheless, that's the strange situation you've inherited. Any chance do you think of persuading parliament of that?

Rob Behrens: Well, probably not while I'm alive. I think the disappointing thing is that Bernard Jenkin ran a 10-year campaign to get rid of the MP filter. He called it pernicious. He called it unacceptable, and he nearly got through in 2016. His successor is less enthusiastic about getting rid of the MP filter.

Joshua Rosenberg: This is the Chair of the Public Administration and Constitutional Affairs Committee (PAC).

Rob Behrens: Yes, and Chair is an honourable man known in the newspapers as 'the baby-faced assassin', but he has what he calls legitimate

concerns about getting rid of the MP filter. We have to listen to those and try to persuade him that it's worth getting rid of and I'm sure we can do that.

Joshua Rosenberg: I mean, from the point of view of MPs it gives them a greater role and I suppose the disadvantage from your point of view is that some MPs are going to side with their constituents. And if you find against their constituents, if you reject the complaint as obviously you do in some cases, then you've got the burden of the MPs complaining that these constituents, and by implication the MP, haven't got the result they wanted.

Rob Behrens: No, no, actually, my experience of MPs is that what they want is for us to do the detailed investigation. And by and large, they will support it regardless of the result of it. And, you know, that's what we should be doing. The problem is that there are a significant number of MPs who don't refer cases to us. And that's not fair to citizens, that prevents access. And we have to do something about that.

Joshua Rosenberg: Yes. And so if people could go direct to you, that would mean more complaints would get to you, and they wouldn't just be held up by the MPs?

Rob Behrens: That's correct. I mean, at the time, I read the Justice Report once a year to remind me - I mean, our institution was set up, according to justice for the little man. For those people who didn't feel confident about dealing with MPs, that has all gone away now. Parliament needn't fear that we are an institution which is going to take away their responsibilities. When, you know, I'm an Officer of Parliament, my responsibility is to report to parliament, not to government. So, there is no problem. They just need to get their act together and do it.

Joshua Rosenberg: And this was really something that was going to be a temporary provision for five years?

Rob Behrens: Yes.

Joshua Rosenberg: That's what they said. Well, we know what happens to Temporary Provisions. The other thing you said was that you wanted to investigate issues without waiting for complaints, and you said there were ten examples in your paper [The Art of the Ombudsman](#) where this happens in other countries, but wouldn't that turn you into a bit of a busy body? If you could just pick a bigger subject out of the air and investigate it?

Rob Behrens: Well, with respect, that's a cheap kind of response. Because if you look at the legislation, it actually occurs in Northern Ireland. And there is provision in the Northern Irish legislation for the Ombudsman having to consult with stakeholders to make sure that what they propose to investigate under own initiative isn't already being addressed.

In Ireland, in Catalonia, in the Netherlands, this takes place routinely, no one says the Ombudsman is a busy body, it makes the Ombudsman more effective, being able to deal with issues much more quickly. So, you know that the terrible thing about the death of Matthew Leahy was that only two people complained about the death of their children in this institution. And we know that at least 25 other people died in a similar way in that institution. But we were not allowed to investigate that, because they hadn't made a complaint. And so we had to support an inquiry, but we couldn't do it ourselves. If we'd had more modern legislation, we could have done it much more quickly, and save the pain and anguish which is going on now.

Joshua Rosenberg: And you say this is one of the Venice Principles? People may not be entirely familiar with what these are and what they say.

Rob Behrens: There are lots of government ministers who are not familiar with the Venice Principles, which they've signed up to and endorsed at the United Nations. And my irritation is that the government in December 2020 signed up to the Venice Principles at the United Nations and then a few months later violated the Venice Principles by excluding us from the safe space, which the Venice Principles say should not happen. And then the government say, "Well, we're very sorry. And we'll look at it to see to see if we need to change it". I mean, it's close to duplicity, actually to do that, but I won't accuse them of duplicity. I'll say they've had to make a judgement and they made a wrong judgement.

Joshua Rosenberg: PACAC, The Parliamentary Select Committee, looked at this in its report last week, and inferred that there was a very slight change of tone by the government. Did you pick that up as ministers change? Michael Gove was replaced as the responsible Minister. Do you think there really is a chance of legislation or is it the inevitability?

Rob Behrens: This is for broad Ombudsman reform?

Joshua Rosenberg: This is for broad Ombudsman reform, but the sort of points that you want, you want own initiative powers, you want to get rid of the MP filter, you want new legislation, you want a new Act of Parliament to reform the position. Or is the cynical reality that you are a thorn in the side of successive governments and it's not in their interest to do anything?

Rob Behrens:

I'm not into cynicism. I think we all need to be constructively engaged with ministers to try to persuade them to do the right thing in order to balance citizen powers with state authority. And that the case that we're making is stronger because Britain is an outlier compared to everyone else in Europe as far as this is concerned. I mean, in every other country, Mick King and I would be in the same institution, but we're not in the United Kingdom.

There are too many Ombudsman in this country. The European Ombudsman says that when other Ombuds go to her conferences, in Strasburg, she sends a taxi to pick people up from the station. When the British come, she sends a minibus because there's so many Ombudsman who come, there too many of us.

Joshua Rosenberg:

Let's talk about transparency, you've clearly become much more transparent in recent years, you publish reports. I know you've said in the past, that complaints are like gold dust, but you do go to some lengths not to identify, for example, individual GPs, general practitioners, where you don't want to blame individuals. You don't routinely name people although you've said that you do interview people on Radio Ombudsman.

You've spoken in the Times about this shocking case of this woman who was raped in Turkey. And you said, this morning that the foreign office consular staff weren't able to give her the advice at the weekend that she needed. And of course, you have published a report on that case, but it's difficult to get from you and from your press releases the information that would really force these stories onto the front page, obviously names, now not a rape victim, but in other cases, there must be more people who are willing to go public and willing to be identified with their complaints.

Is there more that can be done to get publicity, thus to get your job better known, to increase transparency, by actually giving names, by actually giving geographical details for local papers and local radio

stations and so on? is there more you could do to actually thrust your work into the public domain?

Rob Behrens: There's always more we should do. And in the last year, Martin Deller has transformed our operations to make us more outward facing and to attract more press interest. Actually, what we've done as far as women's state pensions is concerned, what we've done about Windrush, what we've done about HS2, that has attracted a lot of publicity. The Social Security scandal as well is another example of us happily getting press and media coverage about that. Rebecca had 15 minutes on Woman's Hour to discuss the disgraceful incidents in Turkey. So, we are getting there.

But to come to your point, we will not publish the names of individual complainants if they don't want those names published. I think that is absolutely right. Where people want to be associated with the publication of a report, then they identify themselves, and they can make public comments, as some Windrush people have done, not the one who died. So, I think this is the right balance. We need to continue to be assertive in setting out the breaches of human rights, but we mustn't use the names of individual complainants unless they agree.

Joshua Rosenberg: Can I just pick out one point that struck me in your remarks just now. You said that the terms of reference of the COVID inquiry and Baroness Hallett don't go far enough? What's wrong with those terms of reference?

Rob Behrens: Well, they're written by people who don't really want to examine what has happened. They're restrictive, they're cautious. It's not clear to me that a common sense person reading them would think that the government really wants to know what happened, and that's disappointing.

Joshua Rosenberg: And you know, you have a broader point about public inquiries, don't you, and this is really frustrating for you, you see the same old public inquiries coming around every decade. You see the same failures, particularly in the health service in hospitals and so on.

Every so often, public inquiries, you know, sit and make reports, and then those are passed on to ministers and ministers change, and nothing very much happens. And you have the same tragedies occurring again and again. It must be very depressing.

Rob Behrens: Well, it's awful. But it's worse for those people who suffered as a result of what happened. So, take the example of Morecambe Bay and the death of children reported on by Bill Kirkup in 2015. And the failure of the health service to deal with infant mortality and perinatal death, and then go on six years and read the Ockenden report. And it's exactly the same, the same issues have risen. And ministers say this must never happen again. But it did happen again.

And that's a failure of leadership. And the whole issue of public inquiries, which resides in policy terms with the Cabinet Office is out of date, it's misunderstood. It's not properly arranged, and it needs reform. And until we get that, and until we get own initiative powers, they're going to continue to be these tragic cases.

Joshua Rosenberg: What about more powers for yourself? Because you're not a regulator. You don't have enforcement powers, you ask organisations to apologise, you invite them to pay compensation, you tell them how much but there's not a lot you can do. I mean, in 1967 this was the 'good chaps' theory of government where you rely on naming and shaming government departments and expecting them to do the decent thing.

Rob Behrens: Yes, I think they're asking us for this to be the last point. And this is a very important point on which to end. There is still huge benefit in naming and shaming. Because reputation is so important to public bodies. And they don't like having negative publicity about what they've failed to do and admitted they've failed to do. And in over 90% of cases departments do implement our recommendation.

I do not want - I've followed the situation in South Africa very carefully with the Public Protector. And she's got into enormous trouble, because she has binding powers to impose decisions. And what happens is that the bodies in jurisdiction, bring litigation, and they spend huge amounts of public money contesting her decisions in the courts. And so they're delayed, and they don't happen. So, I think binding powers are not the answer. The answer is to reform the leadership inside public administration. So, they understand that reputational handling is not as important as telling the truth.

Joshua Rosenberg: I have got one last question and then there'll be a break for coffee before the discussion. You've clocked up five years in this job. You asked for a two-year extension, which takes you to April 2024. It sounds like a bed of nails and a lonely one at that, so a lonely, single bed of nails. And why did you want to stay on? Why did you want to do another couple of years?

Rob Behrens: Well, it's not about me, it's about the institution, the institution is in a good shape. It's doing things that need to be done, it needs to be clear that it has an effective succession plan for a new Ombudsman. And that will start in about a year's time under Sir Alex Allen's leadership. People wanted me to stay which is unusual. And I know that you have to get out of jobs before people want you to leave. That hasn't quite happened yet. It will happen. But I'll be going so it's okay.

We've got a lot to do. We've got unfinished business. But we want to have an orderly transition. And my last point is this - it's not a bed of

nails. It's a wonderful privilege to be involved working with colleagues and stakeholders and going to Manchester and being with our people there is just fantastic. It's in your face. It's northern pride. Its people absolutely concerned to get things done for people who can't get things done themselves. It's an absolute privilege, and I'm very lucky to be in a position to do it for a bit longer.

Joshua Rosenberg: Rob Behrens, thank you very much indeed.

Rob Behrens: Thank you.