Ombudsman
New South Wales

The challenges facing independent statutory officers

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Professor John McMillan AO
Acting NSW Ombudsman

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Introduction

It is a special honour to participate in the Public Law Weekend annual conference dinner. The annual PLW conference now has an illustrious history stretching back twenty years. I had the great fortune to be a co-convenor of the inaugural conference in 1996, and a participant in many other conferences. And, in the earlier years, the title, 'Public Law *Weekend*' had temporal accuracy!

Perhaps the only advantage of being an after dinner speaker rather than a program speaker is that you don't have to announce your title in advance. My mind has meandered over quite a few possibilities in the lead-up to the conference, but events of the past week presented an obvious title: "The Challenges Facing Independent Statutory Officers".

Three prominent examples from the last week have been the resignation of the Commonwealth Solicitor-General following a breakdown in relations with the Attorney-General; the controversy encircling the President of the Australian Human Rights Commission after her Senate Estimates questioning; and a similar controversy involving both the President and the Race Discrimination Commissioner following the initiation of an AHRC investigation for racism against cartoonist Bill Leak.

Every dispute and controversy is distinctive, but these controversies quickly broaden in public discussion of the issue:

- Former *Australian* editor and journalist Chris Mitchell, in an article discussing the President of the AHRC, stated: "The commission ... is just one of a series of extrajudicial bodies that seeks to drive a progressive political agenda in public policy".[1]

- *Australian* journalist Chris Kenny said of the Solicitor-General's resignation that it "is a tectonic shift along the friction lines that run between politics and the law, and between executive government and the bureaucracy".[2]

- The individual incidents are generalised in other familiar ways too. Articles that are critical of an embattled statutory office holder will often start by listing their salary, and quickly move to denigrating all Remuneration Tribunal dependants. Articles in defence of beleaguered watchdogs are often clothed in polarising language and suggest that unless the watchdog is attacking government policy and making themselves unpopular they are not doing their job properly. I am aware too, having been involved in statutory appointment decisions, that each controversy reverberates through the next appointments process in discussion of the qualities of a suitable appointee.

Speaking as one who has held five independent statutory roles in the last 14 years,[3] my simplistic summation of the threefold challenge in each role is to maintain

[1] Chris Mitchell, 'Twigging to Questionable HRC', *The Australian*, 24 October 2016.
[2] Chris Kenny, 'A win for democratic accountability', *The Australian*, 25 October 2016.

independence, to have impact and make a difference, but to steer clear of debilitating controversy. In this paper I'll offer a few thoughts on how that challenge can play out in practice.

Let me start by expanding the frame into a larger picture, that can be alternately gloomy and bright.

On the gloomy side is the fact that most of the institutions headed by independent statutory office holders face difficult challenges at one time or another. Controversy is never far away.

Among Ombudsman, my successor as Commonwealth Ombudsman, Allan Asher, chose to resign after growing tension between him and the government. My predecessor as NSW Ombudsman, Bruce Barbour, who had a stellar career as Ombudsman for fifteen years, faced two upper house inquiries in his last year into the conduct of the Operation Prospect investigation. Most anti-corruption commissions in Australia have at one time or another encountered major reputational assaults and parliamentary inquiries, most recently in NSW where ICAC Commissioner Megan Latham has been a target of some critics.

And then there is the sorry experience of Information Commissioners in Australia. Only three and a half years into my Australian Information Commissioner role I was told that my position was to be abolished, though instead it was consigned to limbo for two years and only recently reinstated with a substantive appointment. The Western Australian Information Commissioner position was occupied on an acting basis for six years, with annual reappointments of one year terms. The Queensland Information Commissioner position was similarly occupied on an acting basis for three years, and the Queensland Privacy Commissioner position was unfilled for four years. There is currently an Acting Freedom of Information Commissioner in Victoria, while the Victorian Government circulates a series of widely differing models for re-establishing the office.

I said there was a bright side as well. Notwithstanding these skirmishes, the concept of independent watchdogs is now well established and accepted, so much so that there is a fruitful scholarly discourse on whether they should be repositioned as a separate oversight or integrity branch of government.

To take my current NSW Ombudsman office as an example, we have 220 staff discharging a large variety of oversight roles. Interestingly, the core and classic Ombudsman function of complaint handling against public authorities is one of our smallest activities. The largest activity is the reportable conduct function, in which we receive and monitor more than 1800 formal notifications each year of abuse and neglect of children and people with a disability in schools, churches, community centres, out-of-home care and supported accommodation. I chair the Child Death Review Committee that reviews every child death in NSW, whether from drowning,

[3] Commonwealth Ombudsman (2003-10), Acting Integrity Commissioner (2007), Acting Inspector-General of Intelligence and Security (2005-09), Australian Information Commissioner (2010-15), Acting NSW Ombudsman (2015-16).

accident, abuse or sudden infant death syndrome. We administer the Official Community Visitor Scheme, under which more than 3000 visits occur each year to residential services. We also oversight public interest disclosures, run a training program of more than 300 training workshops annually, and facilitate a large number of cross-agency advisory and working groups.

Nationally, there is an extensive and growing list of Ombudsman offices, Inspectors-General and commissioners. Indeed, a familiar government response to a crisis is to establish an independent oversight mechanism or watchdog – recent examples are the Small Business Ombudsman, the proposed Banking Tribunal, and the likely roll-out nationally of the reportable conduct schemes for child and disability abuse that we have developed in NSW.

Those are the achievements. There is considerable stability in these offices and widespread acceptance that they are part of our constitutional fabric of accountability.

But the challenges remain, for the institutions and the office holders. I'll now offer four thoughts on how one can strive in these roles to maintain independence, make a difference and avoid debilitating controversy.

The **first** challenge for each office is to develop a model and philosophy for the office that is distinctive, effective and enduring. The way that challenge presents itself will be different for each statutory oversight body.

The most successful agency in addressing that challenge has been the Auditor-General. That office has the advantage that it is the oldest oversight body; there is unqualified acceptance of its role; the role has become associated in an uncontroversial way with constitutional imperatives; the office has strong working relationships with a parliamentary public accounts committee, and with agencies generally; it has settled work practices of annual financial audits and selected performance reviews; it adds value with its reports and better practice manuals; high calibre appointments have been made to the office; and it is a remarkably effective office that handles some of the most contentious issues in government and publishes damaging reports that cause severe reputational damage while also triggering significant systemic change. And yet the office generally avoids controversy.

I venture to suggest that the Ombudsman has also become a highly effective watchdog institution. Established now for more than 40 years domestically and over 200 years internationally, the office has developed a clear philosophy and method for working through the tens of thousands enquiries and complaints it receives each year. Ombudsman pronouncements are grounded in the investigation of those individual complaints and notifications; the office eschews advocacy, other than for the principles of good decision making; it investigates in private and reports in public; it delineates clearly what is in and outside its jurisdiction; it has an avowed commitment to principles of independence, impartiality and procedural fairness; and Ombudsman offices share their experiences and collaborate strongly with each other through networks such as the Australian and New Zealand Ombudsman Association and the International Ombudsman Institute.

Anti-corruption commissions are now an accepted element of government, but they are regularly mired in controversy. In large measure that is to be expected, for the reason that when you fight corruption it fights back. But their battles are not just with investigation targets, but as frequently with the media, the legal profession, parliamentary oversight committees, and the senior lawyers appointed as Inspectors. More often than not the battles are about one of two themes. The first is publicity: should investigations and hearings be conducted in public, should corruption findings remain permanently on the public record, and should there be exoneration protocols? The second theme is whether the performance success measure should be the number of people who are convicted as a result of a commission finding, or should the measure be something else, such as the commission's success in raising public awareness of corruption risks and building a resilient integrity culture.

Information Commissions. I've already mentioned their troubled experience in probably every Australian jurisdiction. The main contributor to that turmoil is how closely the commission is stereotyped or perceived within government by its access to information work. FOI is entangled with politics. Information commissions are more successful if they can project a broader dimension that shows how they add value, such as in promoting open data and proactive publication, or balancing the demands of privacy and disclosure. The Information Commissions that have survived tend to be the ones that have defined their role in that way – for example, in Britain, in Queensland, and steadily in NSW.

The only personal reflection I will add is that we knew that was the challenge when establishing the Office of the Australian Information Commissioner. However, we came under assault before we had time to embed a new style within government thinking. This was not helped by a change in government and being moved from the portfolio of the Department of the Prime Minister to the portfolio of the Attorney-General's Department. Interestingly, the OAIC's future may be brighter because the current Information Commissioner, Timothy Pilgrim, has a stronger profile in privacy and is therefore well placed to take the focus off FOI.

Next, the human rights commissions. Over time they have probably attracted more controversy than any other statutory oversight body. There are clearly many issues at play, but two themes predominate. One is that human rights commissioners often define their role as one of advocacy, including on issues of government policy. This can quickly draw them into the political battleground. Secondly, the institutional model of having multiple statutory commissioners appointed to the one institution, each projecting their independence and building their own profile, is a slippery slope into turbulence.

Let me now move to the **second** challenge facing statutory oversight bodies. Publicity. To have impact and to anchor your independence, you must have a public profile both for the office and its work. An invincible watchdog is something of a contradiction. Publicity is important in so many ways – your messages reach a broader audience; the

community is reassured that you are independent and keeping government to account; a publicised issue moves quickly to the desk of the agency head; and a strong public profile will attract talented staff who want to work in an office that makes a difference.

Publicity can be achieved in many ways – through annual and special reports; issues papers; conference presentations; fact sheets and bulletins; and submissions to enquiries. If astutely and professionally written, none of those will cause a problem.

Far and away the most challenging aspect of publicity is dealing with journalists. I think it was Peter Costello who wisely said, 'when you're dealing with the media you're only 10 seconds away from self-destruction'. There is the telling joke about the Pope arriving by plane in New York to be met by a crowd of journalists, and asked the question, 'Pope, will you be visiting any discotheques in New York'. 'Are there any discotheques in New York', he replied. Banner headline: 'Pope's first question: "Are there any discotheques in New York"'.

Quite simply, you cannot control a message in the media as you might like to. You must nevertheless deal with the media, both to project the work of the office and also to avoid being the target rather than the source of the story. A recent example from my own office of the difficulty in scripting the message was a headline in the *Daily Telegraph*: "'Boy starved in care outrage', that was based "on documents obtained by The Daily Telegraph" from the NSW Ombudsman.[4] The article was headed "Exclusive". The document the journalist obtained for the story was our Annual Report. Or another article the following month, also headed 'Exclusive': '$10m Ombudsman's inquiry bombshell; Shock for cops facing the dock'.[5] This was based on a job advertisement I'd released for a senior investigator position to prepare briefs of evidence should matters need to be referred to the Director of Public Prosecutions.

The lesson you draw from those and countless other examples is that you need to work hard on ensuring that the necessary publicity around your work is not debilitating. You must be careful that your public pronouncements are not provocative or aggressive. You need to be circumspect about announcing a new investigation as opposed to the results of a completed investigation: in the latter you define the scope of the story, in the former you don't.

You must also have a constant dialogue with agencies about the need to publicise your work, but also to alert them to issues that are coming down the pipeline, or to explain references to your work in sensational media stories. Unorthodox steps may be required. My NSW predecessor released statutory declarations sworn by staff attesting that they were not the source of a damaging leak of information about an Ombudsman investigation. And recently, on our initiative, we gave an agency a copy of our emails with a journalist to indicate that we had responded to questions but not initiated or planted a story.

[4] Laura Banks &Anthony De Ceglie, 'Boy starved in care outrage', *Daily Telegraph*, 9 September 2016.
[5] Mark Morri, '$10m Ombudsman's inquiry bombshell', *Daily Telegraph*, 20 October 2016.

That leads on to my **third** challenge. You have to treasure and promote your independence, but you also have to get along with the other players in the government system. Again there are many reasons. Government administration is hard enough without the unnecessary distraction of an incessantly noisy watchdog. In part, your job is to help improve administrative systems and deliver outcomes by working constructively with other players, and not to take the self-satisfying path of only pointing out what went wrong. You don't have all the answers, and you see issues only through the prism of the few complaints you may have received. Occasional humility doesn't hurt.

Pragmatism is also needed. However well you get along with an agency, they know you're the stone thrower. They all hold a baseball bat behind their back. Occasions will arise when you get things wrong, a staff member makes a mistake, an email goes to the wrong person, a letter goes out in wrong envelope, a lost document turns up at an undesirable location, or your quoted words were not well-crafted or were misquoted. That's the moment when it helps to have some capital in the bank – when you need friends who won't seize the opportunity to call for your resignation.

In the same vein you also have to get along with the legislature. They are the elected body, with a democratic legitimacy that you will never have. You must show respect to and build relationships within the legislature. On the other hand, individual parliamentarians try to draw you into their battles, to ask you questions that shouldn't have been asked, or goad you into reflecting critically on the other side of politics. For every good friend you make in the legislature, you make another potential enemy.

The **fourth** and final challenge I want to mention is to be guided by administrative law experience and principles.

You are always on safer ground if your decision making and regulatory actions are administrative law compliant. Not only does this remove an obvious ground of criticism and challenge, but it enables you to make tougher and more controversial decisions. Even the most unpopular decisions are reinforced if they are evidence-based, well-reasoned, deal only with the issues at hand, are stripped of irrelevant hyperbole or sermonising, and procedural fairness was extended to those who may be adversely affected. In short, administrative law can slow you down and complicate your task, but it also provides a secure pathway to being strong and magnifying your impact.

This does not mean that the head of agency must be an administrative lawyer, or even a lawyer. But it does mean that the agency must understand administrative law, that it becomes a central part of staff induction and training, the agency participates in administrative law forums, it keeps up to date with developments, and as the office expands and new functions are acquired, each function is tailored to an administrative law setting. Whether the function is resolving a Centrelink dispute, inspecting a prison or immigration detention centre, handling an allegation of child sexual abuse against a carer, or dealing with a whistleblower complaint, the function must be tailored to align with administrative law requirements. Put another way, however diverse the functions within the office, all staff must understand that they work in a single institution that projects a unified method and philosophy.

In my early days as Commonwealth Ombudsman three things were said to me that resonated through the years. The first was by Prime Minister Howard: ‘So, you’re the meat in the sandwich’. Another was by an agency head: ‘Sometimes we agree with the Ombudsman, sometimes we don’t’. And the third was said by an agency head to one of my predecessors: ‘You know you’ll only ever be peripheral’.

Those observations capture the different dimensions of the challenges I’ve spoken of in this paper. At the end of the day, you want agencies and the community to think you are right *all* of the time. You want to be a *central* player on some issues, and influential from the sideline on others. And you’re now wondering how I’m going to address the former Prime Minister’s observation. Well, I suppose you want everyone to walk away thinking it was a very wholesome and satisfying sandwich.