Restoring trust in government: the priorities

Professor John McMillan, Acting NSW Ombudsman

Address to the National Integrity Summit, Brisbane, 16 March 2017

We have an excellent integrity framework in Australia. In each jurisdiction we have enshrined in legislation the independence of the Auditor-General, the Electoral Commissioner, the Ombudsman, merit review tribunals, civilian police oversight, electoral donation requirements and – in one form or another – anti-corruption and integrity investigations, and freedom of information and privacy regulation. These agencies and processes play a key role in ensuring integrity in government and maintaining public trust in government accountability.

We have much to be proud of; and there is much to reassure us that notions of integrity and public trust underpin the Australian democratic system. That gives me great personal satisfaction, having been fortunate to head four integrity bodies, and to have been appointed by governments of different political complexion.

And yet ... if I may continue the personal narrative ... In my last two roles there was stiff opposition to the role both in and outside government and overt support was meagre.

Three and half years into my appointment as Australian Information Commissioner the Federal Government announced that the role and the office would be abolished. None of the explanations that were given by Government stacked up. There were no cost savings, as claimed, not least because the Government's planned alternative was that information access disputes would be heard by the Administrative Appeals Tribunal, in which government agencies typically have legal representation. Nor would the change have brought about procedural streamlining or policy coherence, as the FOI and information policy functions of the office were to be dispersed among other agencies, and the privacy function was to be relocated in the Australian Human Rights Commission, which is otherwise an unloved agency.

The explanation for the proposed abolition of the Information Commissioner role was, simply, that governments have a strong dislike of access to information laws – at least after departing the Opposition bench. Rather than accept that access to information rights are a permanent element of our constitutional and democratic fabric, the Government antagonism to those rights drove a fruitless abolition agenda. The agenda did not succeed and the Office of the Australian Information Commissioner limped through an unedifying period while expected to carry on its work. It survives but damaged.[1]

Nor, disappointingly, could the media or legal profession be relied upon to support the need for regulation through an information commissioner. There was a degree of self interest in both quarters in parading as the only true champions of openness, and in supporting an adversarial forum as the battlefield in which their virtue could be on display if not triumphant.

In my current role as Acting NSW Ombudsman my key responsibility has been the Operation Prospect investigation. This was a four year investigation into what has been described as a police bugging operation that occurred between 1999-2002. The Ombudsman's office was asked by government to conduct this investigation, as the controversy was long-standing and

[1] See Richard Mulgan, 'Information watchdog celebrates its survival, though many challenges await', *The Canberra Times*, Public Sector Informant, 4 April 2017

unresolved. The Ombudsman's office was a respected and independent agency that had no connection to the incidents, no agenda to pursue and no stake in the outcome.

The Operation Prospect investigation has met sustained opposition and hostility in NSW. There have been two Upper House Parliamentary inquiries into the Ombudsman's conduct of the investigation, an often hostile media, threatened and actual litigation, acerbic and inflammatory criticism of the investigation by senior lawyers, and some resistance from government agencies. The latest incident, occurring this week, was that the media knew the contents of the NSW Crime Commission's written response to my 900 page report four days before the Commission formally provided that response to me.[2] The scale of opposition to this particular Ombudsman inquiry has been unprecedented, but the factors that lie behind the opposition are not unique.

Lest I leave the impression that the problem may have more to do with me than with the public standing of integrity institutions, I hasten to note that my experience has been repeated in other settings. Examples abound of information commission and administrative tribunal roles that have been filled on an acting or short-term basis for extended periods. All anti-corruption commissions in Australia have faced a barrage of litigation, as well as government restructures that, most recently in NSW, led to the resignation of the ICAC Commissioner when told that she would have to apply to be reappointed for the remainder of her unexpired term.

What lessons can we draw from this? I will make five observations in summary form.

Point 1: We should never be complacent that an integrity framework, once established, will enjoy universal support, that it will flourish, and that it will not later be undermined either by the Executive or by outside forces that have a personal agenda to push. The essence of integrity oversight is to investigate whether there has been wrongdoing by others. There is always the potential for those under investigation to fight back. The fight can be intense if they hold senior office in government or business, have friends in the media or have ready access to prominent lawyers.

Point 2: There are trigger points that frequently provoke a backlash against scrutiny and oversight. I have mentioned two – pressure being applied on government to grant access to information that it would rather not release, and the investigation of allegations of serious police misconduct. There can be other trigger points. A recurring example is the investigation of corruption and conflict of interest allegations against public office holders.

Point 3: It can be awkward for an integrity agency to speak out, defend its work and answer its critics. Official secrecy and privacy laws will constrain the agency's public discussion of individual cases. Speaking out may pit the agency against powerful forces within government or elsewhere. Once the media smells blood they are likely to encourage an escalation of the conflict. The integrity agency has to be mindful that its reputation for independence and impartiality may be at risk if it moves from being a neutral commentator to an aggrieved participant, particularly in responding to criticisms that have been aired before the investigation is complete and a report published. That risk flows over into legal principle – the *Hardiman* principle[3] – which admonishes that a government tribunal or regulator should play a passive role in any legal proceedings that are reviewing the legality of its actions.

---

[2] NSW Ombudsman's office, Media Release, 'Operation Prospect Report', 11 March 2017.
[3] *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.

And yet to stay silent will quickly allow a prejudicial narrative to take root. That is a particular concern in the digital age when a Google search may turn up only stories that portray a one-sided critique of the integrity agency.

There will never be an easy solution to this dilemma, yet it perhaps warrants more discussion in our design of integrity frameworks. Is there scope, for example, to write more expressly in legislation or governance protocols that an integrity agency may respond in a formal way to criticism of its work? A step I have decided to take in NSW is to make a special report to Parliament commenting on developments subsequent to the publication of the Operation Prospect report and responding to particular criticisms.

Point 4: The proliferation of integrity agencies may in fact be working against our shared objectives. The more agencies and the more oversight and scrutiny we have, the more frequently disputes will arise. It is increasingly common that public criticism of one integrity agency quickly broadens into a criticism of all integrity agencies. A recurring criticism on the public record is that integrity agencies generally have too much power, too much scope to damage the reputations and careers of others, and are not sufficiently accountable.

Point 5: There is no identifiable community to defend the work of integrity agencies. When courts are attacked the legal profession circles the wagons in solidarity. Journalists who are under attack will always enjoy strong support from at least some sections of the media community. Auditors-General can rely on Public Accounts committees and the auditing profession for support when needed.

There is, however, no identifiable community to defend the work of an ombudsman, a tribunal, or an anti-corruption commissioner who is under attack. It was once thought that the solution would be a specialist parliamentary committee that could provide a respected forum in which the oversight agency could raise issues that warrant institutional reflection. Sometimes that works, but not always. Recent episodes around Australia suggest that a parliamentary oversight committee may either be indifferent to its role or instead operate as a forum in which the oversight agency gets drawn into other political or special interest battles.

In conclusion, and to connect to the theme of this talk, maintaining trust in government requires that we build respect and confidence in our integrity framework. This will be an ongoing and complex challenge.