

Ministerial access and the public trust

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In February this year, I published a paper on “Nepotism, patronage and the public trust”¹ in which I explored in some detail the notion of the public trust. I quoted Professor Paul Finn (who was later a Federal Court judge) saying of the “public trust” doctrine, that it requires “that the officers of government, whether elected or appointed, are trustees for the people and as such are accountable to them ... for the use and exercise of their offices.”² And he said:

The institutions of government, the officers and agencies of government exist for the people, to serve the interests of the people and, as such, are accountable to the people.³

Five years ago, my predecessor as Queensland Integrity Commissioner, Gary Crooke QC, gave a paper to the Australian Public Service Anti-Corruption Conference in which he also was concerned with what he described as a fundamental principle which underlies integrity in public administration:

Those elected to, or appointed to, high public office are no more and no less trustees of the capital which they hold for use and benefit of the Community. In no way, is it within their remit as a trustee to do things other than for the public good and, in particular, they should never make use of capital for their own interest.⁴

Mr Crooke said:

The esteem in which the holder of a high political office is held and the power to make decisions that goes with it, are part of the capital which the Community has accorded to the holder of the office to be held in trust for the Community’s benefit. It is not for sale for sectional interest. A political party is a sectional interest.⁵

Mr Crooke made these comments to help illustrate why holding fundraisers, where invitees were charged large sums of money to attend a function with the promise that their subscription would earn them a right to speak to a decision-maker in their area of business or interest, was “a misuse of capital”.

There is an agenda underlying the invitation that is an inappropriate use of the capital entrusted to the individual. To my mind, it is parallel to the hypothetical example of a police officer who pulls up a motorist and asks the motorist to blow into the alcotest device. As the police officer approaches the motorist, he or she says “By the way, would you like to buy a ticket in the Police Station Social Club raffle?” It is the unspoken creation of an expectation

¹ Solomon (2014) (Accessible on www.integrity.qld.gov.au)

² Finn (1995) ‘A Sovereign People, A Public Trust’ in P. D. Finn (ed.) *Essays on Law and Government*, pp 9-10.

³ Finn (1995) at p. 14.

⁴ Crooke (2009), “Five Years as Integrity Commissioner: a retrospective” at p. 5. (Accessible on www.integrity.qld.gov.au)

⁵ Crooke (2009), at p. 6.

of preferential treatment attending this, which will result in the inevitable conclusion by informed public opinion that the activity is untoward.⁶

And he said:

This process has been going on for some time, not only in Queensland but also in Australia and overseas. In part it has regard to desirable aspects of public administration in that it is quite open, to the extent of recording attendances and treating the subscriptions as reportable donations. Neither of these factors addresses the question as to whether such conduct is right in principle.⁷

Unfortunately, in five years nothing has changed – or rather, not for the better. We are still seeing some senior ministers at the Commonwealth and State levels putting a price on access. They run or participate in party fund-raisers where the entry price depends on whether the donor can sit with and talk to a minister. In some cases the “donations” are reported to the appropriate electoral authorities, though the need for this to occur is being removed as minimum reporting limits are increased. These days in Queensland it is unnecessary to declare donations of less than \$12,800 – the LNP fundraiser on October 9, 2014 cost the 100 attendees \$5,000 each.

In recent years there have been two important advances in Queensland in making more open the lobbying of government officials, including Ministers. First, Ministers have been making public edited versions of their diaries every month. However this does not extend to revealing who they meet and talk with at fundraisers. Second, the Government made it possible for the Integrity Commissioner to make rules requiring lobbyists to reveal all their lobbying contacts with government representatives, including Ministers. However this only applies to registered third party lobbyists. It does not cover directors, managers or employees of corporations, lobbying on behalf of their own firms, and it does not cover representative industry bodies such as the Property Council or the Queensland Resources Council that are enormously influential as lobbyists. The Government has refused to extend lobbying rules to cover this kind of lobbying, rejecting a number of submissions by me, and a unanimous recommendation of an all-party parliamentary committee.

So the situation is worse than that which concerned Mr Crooke in 2009: the “subscriptions” of people buying access to Ministers are no longer reportable. The public is deliberately kept in the dark by the organisers of these fund-raisers and by the Ministers concerned about who are paying quite significant sums of money to gain access to Ministers, presumably, in many cases, in an effort to influence them, though no doubt some may find this simply a convenient and convivial way to make a donation.

Apart from “everyone does it”, which is no excuse for improper behaviour, the other justification for selling ministerial access is that political campaigns have to be funded from somewhere. Yes, but surely the activity that provides the fund has to be ethical: government ministers can’t take bribes to allocate mining licenses or contracts, its illegal; they can’t offer jobs in the expectation that appointees will donate part of their salaries to an election slush fund; it would be immoral and improper. Nor should they be able to prostitute their ministerial office by selling access.

Ministers don’t own the offices they hold. They belong to the State. Those who occupy them are obliged to act only in the public interest. Ministerial office is not property that can be utilised for the private benefit of the minister or for his or her political party. Any benefit that is derived from the

⁶ Crooke (2009), at p. 7.

⁷ Crooke (2009), at p. 6.

office belongs to the State – something that is now recognised in the way gifts from foreign dignitaries and others are dealt with.

Selling access to ministers is a breach of the public trust. It is unethical and it should be illegal. The fact that some governments have changed political donation rules to make it possible for donors to keep their identities secret does not provide a justification for the practice. What it does do is confirm in the public mind the low regard they have for politicians.

The breach of the public trust doctrine leads to the undermining of another kind of trust. Trust has many meanings. Probably the most common is, as the Macquarie dictionary puts it, “reliance on the integrity, justice of a person...”,⁸ as when one says, “I trust you (or him or her)”. It is a notorious fact that public perceptions about the ethics and honesty of Australian politicians have been steadily falling and are at a low level – just 12 per cent of respondents in a 2014 poll rated federal and state MPs very high or high for ethics and honesty, just above real estate agents (9 per cent) - compared with top rating nurses (91 per cent).⁹ There are many reasons for this – the phenomenon is not confined to Australia – but conduct such as that described above may well contribute to the low standing of our MPs.¹⁰

Those who abandon their public trust obligations by selling access to their ministerial offices are helping to destroy the efforts that have been made by governments and most politicians to try to demonstrate to the public their desire to promote ethical conduct by MPs and the steps they have taken to establish mechanisms that try to ensure that they act with integrity.

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⁸ Macquarie Concise Dictionary, fifth edition, 2009.

⁹ Morgan poll, 11 April 2014 at www.roymorgan.com, article 5531.

¹⁰ See, Andrew Leigh, “Explaining distrust: Popular attitudes towards politicians in Australia and the United States” in *The Prince’s New Clothes: Why do Australians Dislike their Politicians?* UNSW Press, Sydney, 2002.