INTEGRITY IN GOVERNMENT - SEARCH CONFERENCE:

University of Melbourne Law School 4 December 2012[1]

PUBLIC OFFICE -- PUBLIC TRUST by Hon Tim Smith QC

"Public office is a public trust": until three years ago, I had been unaware of that proposition.

How many of you are familiar with that proposition? Is it studied?

Does it matter? I suggest that it does because it encapsulates

- The true nature and purpose of public office.

  As Justice Paul Finn has said[2]

  > ".. Much the most fundamental of fiduciary relations in our society is that which exists between the community ... And the state and its agencies that serve the community".

  What is a fiduciary relationship? As his honour also said

  > "fiduciary relationships generally can be described as ones in which parties are so circumstanced relative to each other for some purpose, as to give one the right reasonably to expect that the other will act in his or her interests or in their joint interests in discharging a purpose and not in his own self interest". [3]

  The private trust is a classic fiduciary relationship.[4]

  What are the obligations of the fiduciary?

  The fundamental obligation is to put "their principals' interests ahead of their own ... The duty demands a denial of self interest."[5]

The proposition also matters because, by the use of "public trust", it also encapsulates

- The essential obligations of the members of the three branches of government –

  > The members of parliament elected by the people, the executive branch and the judicial branch owe their essential obligations to the people they are supposed to serve

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[1] This paper addresses the situation existing at the end of 2013. It was last edited in August 2014.

[2] 0p.cit., referring to his argument in "The Forgotten Trust": The people and the State", in Malcolm Code (ED), Integrity issues and Trusts, Federation Press"

[3] Paul Finn, " Public trust and fiduciary relations' in "Fiduciary Duty and the Atmospheric, Coghill, Sampford and Smith, 31 at 33

[4] What is a trust? His Honour has written for the non-lawyers,

"..... a trust can be described as a relationship to property in which a person has that property vested in him or her to be held and/or use in some way for the benefit of another person or persons or for a purpose recognised by law. The trustee characteristically will have powers conferred by the terms of the trust to exercise in the interests of those persons (beneficiaries) or for that purpose". ibid[4]

[5] Dr Sarah Worthington, Equity (Oxford University Press, 2003) at 121; cited French CJ, op.ci. p 8

- The ethical foundations of those obligations and of the measures we will be discussing today that are needed to strengthen the integrity of our system of government

I suggest that it also matters profoundly because, where it is forgotten, those holding public office are unlikely to bring any fiduciary obligations into consideration when they are making their decisions. This is particularly important for our elected representatives who, from the moment of their election to office, operate in a situation of some 7 potential conflicts of interest.[6]

For the public service, I suggest that our forgetting of the proposition can be just as significant.

How else can one explain the advice on gifts and benefits in sect 4.12, of the Commonwealth Public Service Commissioner's "Policy and Advice document"[7]?

This is intended to give public servants guidance about appropriate behaviour.

It identifies the APS stakeholders and what should be the paramount concerns of members of the APS.

> ***The stakeholders*** are not the people of Australia. They are the people that the APS deals with who offer APS personnel gifts entertainment and hospitality.
>
> ***The primary relationship*** identified is that between the organisation making the offer and the agency.
>
> ***The paramount concern*** expressly identified when accepting gifts is the reputation of the APS and not the interests of the people of Australia.
>
> The advice even permits public servants to receive fees for activities that form part of their regular duties provided they hand them over[8].

Comments are made such as

> "at times, particularly for senior employees, acceptance of offers of entertainment or hospitality can provide valuable opportunities for networking with stakeholders."

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[6] At the ART's inaugural Integrity Lecture in 2011 http://www.accountabilityrt.org/inaugural-art-lecture-fred-chaney-integrity-parliament-where-does-duty-lie/ , the Honourable Fred Chaney identified 7 different conflicting interests and duties.

1. **Himself or herself and his or her political philosophy and policy views**
2. **Being true to one's family (they have made sacrifices) and supporters (contributors and moral supporters) not to advantage them but to live up to their faith in you.**
3. **Being true to one's political party which selected you as member of Parliament, including maintaining party unity and stability even though the member may disagree with other members on issues of national, state and local levels and within Parliamentary party**
4. **Parliamentary party or caucus that was automatically joined on election.**
5. **The electorate which voted you in and believes that you represent its interests .**
6. **The Parliament itself.**
7. **Cabinet and the Shadow Cabinet – Solidarity**

[7] http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values-and-code-of-conduct/aps-values-and-code-of-conduct-in-practice/gifts-and-benefits (17.11.2013)

[8] "Generally, it is expected that APS employees will not accept outside payment for activities considered part of their normal duties. If an employee is offered a fee to speak at a work-related conference, it may be accepted providing the agency receives the benefit, not the individual." - (ibid)

-and

> “attendance at significant events can provide senior public servants with opportunities to make important business connections that will be of considerable benefit to their agencies.

Has the business model been allowed to replace the public trust model for the APS? How has this happened?

And what about our elected representatives? They appear to have forgotten. I suggest that a significant part of the explanation for the behaviour of our federal elected representatives in this parliamentary term, and the slow, painful and tortuous path taken federally and in this state in developing an overarching anticorruption body is that the proposition has been forgotten. But we must all share the responsibility for that.

There was a time when the proposition was widely accepted and referred to. Disraeli said -

“All power is a trust; that we are accountable for its exercise; that from the people and for the people all springs, and all must exist.” [9]

In the 1920s, there are two reported Australian High Court decisions where reliance was placed on the proposition that public office is a public trust[10].

In ***Horne v Barber*** [11] it was held that a commission agreement between a member of the Victorian Parliament and a land agent under which the member of parliament was to lobby for a land agent was illegal and therefore void because it breached the member's fundamental obligations. Justice Rich referred expressly to the trust principle. In ***R v Boston***[12], the High Court upheld a conviction of a member of Parliament in New South Wales on a charge of conspiracy concerning the acquisition of land from government. It relied upon cases which rested on *"violation of a public trust".*

As Justice Higgins commented in ***R v Boston,”***

> "He is a member of parliament holding a fiduciary relation towards the public, and that is enough” [13]

Breach of public trust appears to be still accepted as an element in the common law offence of bribery[14]. Note; the second ICAC report in the Greiner matter, discussed the common law offence of “breaching the public trust” and its application to members of parliament.[15]

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[9] http://www.worldofquotes.com/author/Benjamin+Disraeli/2/index.html

[10] Chief Justice Robert French AC, “Public office and Public Trust", Seven Annual St Thomas More Forum Lecture, 22 June 2011,10-11

[11] (1920) 27CLR 494

[12] (1923) 30 3CLR 386

[13] At 412

[14] Gerard Carney, “Law and Ethics” Ch 8

[15] ICAC, Second Report on Investigation into the Metherell resignation and appointment, September 1992, p21. Appendix ; https://bleyzie.files.wordpress.com/2012/02/second-report-on-investigation-into-the-metherell-resignation-and-appointment-1992.pdf . “The law relating to the public trust, in brief terms, provides that anything whereby an act would give a basis for civil relief between parties, if performed by an official against a citizen, is a common law offence of breaching the public trust, see *R v Bambridge* (1783) 22 State Trials at 155, as discussed in 51 ALJ 313 at 315.” And “where a statute or regulation that prescribes, the behaviour of public servants is breached, unless a civil penalty is prescribed, a common law offence is committed”.

In recent years the concept of the public trust has been recognised and accepted in the Commonwealth ministerial standards of ethics[16] and in definitions of corrupt conduct in legislation establishing anti-corruption bodies, "a breach of public trust"[17] has been included, including the Victorian IBAC legislations.

It is also accepted that the public office public trust analysis has supplied the ethical foundation for the development of our administrative law both in the courts and in parliament.[18]

The proposition has, however, been recently referred to by Chief Justice French.[19,] as a "political metaphor".

The categorization of the proposition as a "metaphor" is perhaps understandable when it is viewed from a legal perspective because there are limits on the extent that the courts are prepared to have regard to or enforce the public trust. The law and lawyers tend to focus on the rules of law and their content not the legal and ethical principles on which those rules are based. It also perhaps fits more comfortably with our Australian modesty and discomfort with rhetoric.

But to do so diminishes the proposition and its force and value as a clear and succinct statement of the true nature of public office and its obligations. It also contributes to the likelihood of the proposition being dismissed and forgotten.

I submit that to have any hope of addressing the serious integrity issues in our system of democratic government it will be critical to revive this fundamental proposition that public office is a public trust.

How can that be done?

1. It needs to be part of the syllabus in every course in law, government and politics.
2. We have to stop apologising for it by calling it a metaphor and embrace it as being in its own right a clear and succinct statement of the true nature of public office and its obligations
3. We must challenge the metaphor label.[20] The law recognises the neighbour principle as the ethical foundation of the law of negligence. The public office/public trust proposition provides the ethical foundation of our administrative law and the common law criminal offences. It too should be recognised as a "principle".

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[16] Note also the sections in the Code on Honesty and the obligation to correct misleading information.

[17] Commission against Corruption Act 1988 (NSW) ss 8 (10 (C)), 12; A broad-based Anti-corruption Commission Amendment (Investigators Functions) Bill 2011 s4 ("3A Corrupt conduct (1) For the purposes of this Act, corrupt conduct means conduct ----- (c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust;"

[18] Chief Justice Robert French AC, "Public office and public Trust", Seven Annual St Thomas More Forum Lecture, 22 June 2011, 14 and following

[19] At p8

[20] According to the Shorter Oxford dictionary a "metaphor" is a "figure of speech in which a name or descriptive term is transferred to some object to which it is not properly applicable." The word "trust" is a word most commonly used in the law to describe a particular form of fiduciary relationship - the private trust. But I question whether just because this public trust is not one enforced in all its aspects by the law, the word trust is not properly applicable. Clearly the relationship between the people and those in public office, be they judges, public servants or members of parliament and ministers, is a fiduciary relationship. The word "trust" is properly applicable to it. The distinction between it and the "trust" relationship most commonly recognised and enforced by the law is that it is a public trust not a private trust. Each expression acknowledges the nature and purpose of each type of trust.

But do we need to go further to elevate and acknowledge its proper significance? I want to put on the table for discussion a different proposition - the proposition that our democratic system of government is a public trust having all the elements of the private trust.

Is this an accurate and succinct description of the nature and purpose of that system? Let us briefly consider the Commonwealth.

The people are the source of the fiduciary's power.[21] We entrust those elected with the power of office, together with those appointed to the public service and agencies, to make decisions which will affect all our lives in major ways. We entrust very large sums of money to them for that purpose. We are vulnerable to the decisions that the parliamentarians and the public service and agencies make.

Does our Commonwealth democratic system of government have the key features that we find in the private trust?

Its establishment?

By the people and the Constitution over 100 years ago.

Its essential structure and terms?

Set out in our Constitution and constitutional conventions and other documents such as the judicial commissions and other appointment documents.

The trustees

They comprise the three branches of government identified in the constitution – the parliament (and its Houses and members), the executive government and the judicature.

The beneficiaries

The people of Australia.

Assets and income

The executive branch of the trustee holds massive assets to be used on behalf of the people for the common good and receives a massive income from and on behalf of the people to be used for the common good.

Responsibilities

It has extremely significant responsibilities, far greater than any private trustee. At the federal level, not only does it have responsibility for maintaining civil order, managing the economy, organising infrastructure, education and health services, preserving the environment and

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[21] "The powers of government belonged to, and are derived from, the governed, that is to say, the people of the Commonwealth. The repositories of government power under the Constitution hold them as representatives of the people under a relationship, between representatives and represented, which is a continuing one." Per Deane and Toohey JJ, Nationwide News Proprietary Ltd v Wills (1992) 177CLR, 122.
See also from the National Anti-corruption Plan Discussion paper chapter 3
"Australia has a strong federal and democratic system of 'representative government'— that is, government by representatives of the people who are chosen by the people. This fundamental principle is enshrined in the Australian Constitution and, together with independent and impartial courts and non-partisan public services, provides a strong foundation upon which anti-corruption measures can be built.
Respect for the rule of law, accountability and having the highest ethical standards are the foundations of any democracy and provide the grounding for a society that is resilient to corruption. Indeed, the Australian public rightly expects high standards of behaviour and a high level of performance from their government, public institutions and the business sector. "

managing the exploitation of the people's resources, it also has a responsibility to manage our international relations and organise the defence of us and our country.

Enforcement

With a typical private trust, the beneficiaries can go to court to have their rights enforced.

It so happens that this fiduciary relationship is not one enforced solely by the courts but it has its own internal and external enforcement mechanisms;

A. Those within the trustee body

(a) *The parliament and its members*

The parliament and its members have the role of holding the executive branch of the public trustee to account,

(b) The judicature

It also plays an important role because it is empowered to rule on the legality of the actions of the other branches of government and itself applying , inter alia, rules of law developed on the basis of the legal and ethical principle that public office is a public trust . [22]

B. The people

Under the terms of the trust we, the stakeholders, have the right every three years to vote on who should represent us and who should be entrusted with ultimate power over us for the next three years.

This is a remarkable creation – it was unique at the time it was created.

Understandably, this public trust is not one the courts have been asked to enforce or administer in the way they do private trusts. For a start, it is too big and too complex and to attempt to do so would immediately raise issues about the separation of powers. Those obstacles, however, should not diminish the principle.

I invite you to consider again the principle that our Commonwealth democratic system of government is “a public trust”. I submit that it is not a metaphor but an accurate and succinct description of the fundamental nature and purpose of that system of government and the relationship which exists between the people of Australia and our three arms of government, and the ethical and legal obligations placed on them as holders of public office.

Can this make a difference?

Turning to recent experiences in the Commonwealth and Victoria in anti-corruption reform, the reality has been that the members of public service and the elected arms of government have been inevitably placed in a conflict of interest position between their personal interests and their fiduciary duties when making decisions about whether to strengthen their community’s government integrity system and how to do it.

Looked at from that perspective I suggest that one of the reasons why [23] the Commonwealth experience has been different to the Victorian, and may well result in a positive outcome for the Commonwealth integrity system, is that the resolution of the conflict of interest position has been

[22] Chief Justice French, AC, 7th Annual St Thomas Moore Lecture” delivered 22 June 2011 Canberra, particularly, 14

[23] As at 4 December 2012

helped by the structure provided for the exercise as part of the UNCAC, OECD and G 20 international obligations and the associated scrutiny and the requirement of public consultation within the Australian community and that public consultation. In Victoria, on the other hand, the consideration of the critical issues and the decision making process occurred essentially behind closed doors and involved only those who were going to be the subject of scrutiny by the system they were creating.

Would the results have been different in Victoria, for example, if the public office public trust proposition had not been forgotten and was, therefore, not in the minds of those making decisions? Perhaps not for all, but more would have considered the need to put their own personal interests aside.

Would an appropriate ethical guideline for such an anti-corruption reform process have been as follows?

> "Consistently with our fiduciary duties as holders of public office, which include maintaining and strengthening the integrity of government, we are obliged to support and implement reforms where
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> - The integrity system of which we are trustees is at risk of corruption, and
> - The proposed reforms are likely to help to meet or reduce those risks
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> unless to do so would damage the public interest.
>
> In making that judgement, it is not relevant or permissible to consider our own personal benefit or advantage."