

Nepotism, patronage and the public trust

Dr David Solomon AM, Queensland Integrity Commissioner *

In September 2013, the Crime and Misconduct Commission (CMC) published a report of an investigation it had conducted into alleged misconduct at the University of Queensland. The misconduct concerned a decision in December 2010 that a school leaver who did not satisfy the university's entrance requirements should receive an offer to enrol in Medicine which was not warranted according to the admission criteria at the time, there being 343 other applicants who were more qualified. The person who received the offer was the daughter of the then Vice-Chancellor. A formal complaint was made to the Chancellor of the university about nine months later. The following month the CMC began its investigation. The matter shortly afterwards became public knowledge through the media. Both the Vice-Chancellor and his deputy subsequently resigned their positions.

The CMC's report contains just one mention of a word which describes the particular form of misconduct that was involved in this case, nepotism. This was in the introduction to the report, where reference was made to how the public became aware of the matter through having 'read media accounts of irregularities and nepotism at the University'.¹ For the rest of the report, the allegations are referred to as official misconduct and as conflicts of interest. There was no analysis of what 'nepotism' means or involves.

Nepotism is a form of patronage. The exercise of both nepotism and patronage may give rise to a conflict of interest.² It is noteworthy that there is a special word for nepotist behaviour in most European languages. It is almost invariably³ used in a pejorative way.

The Macquarie dictionary defines nepotism as 'patronage bestowed in consideration of family relationship and not of merit' tracing it from the Latin for 'descendant'. My old (4th edition) Concise Oxford gives a more commonly used definition and source, 'Undue favour from holder of patronage to relatives (orig. from Pope to illegitimate sons called nephews)' and says the word is derived from the Italian for nephew.

According to an American book about nepotism:

The term *nepotismo* was coined sometime in the fourteenth or fifteenth century to describe the corrupt practice of appointing papal relatives to office – usually illegitimate sons described as 'nephews' – and for a long time this ecclesiastical origin continued to be reflected in dictionaries... The modern definition of nepotism is favouritism based on kinship, but over time the word's dictionary meaning and its conventional applications have diverged. Most people today define the term very narrowly to mean not just hiring a relative, but hiring one who is grossly incompetent – though technically one would have to agree that hiring a relative is nepotism whether he or she is qualified or not. But nepotism has also proved to be a highly

* My thanks to the Government Research and Information Library (GRAIL) which conducted a literature search on nepotism on my behalf.

¹ Crime and Misconduct Commission, *An examination of suspected official misconduct at the University of Queensland*, September 2013, 1.

² "A conflict of interest, involving a person, is an issue about a conflict or possible conflict, between a personal interest of the person and the person's official responsibilities." – *Integrity Act 2009*, s. 10(1).

³ But see below.

elastic concept, capable of being applied to a much broader range of relationships than simple consanguinity. Many practices that seem normal and acceptable to some look like nepotism to others.⁴

It is necessary to take up two of the specific matters alluded to by the author, Adam Bellow, in that discussion of the definition of nepotism, as well as some of the other issues in his book, which is somewhat aggressively titled, 'In praise of nepotism'.

First, whether it is appropriate to apply the term nepotism only if it applies to the beneficiary being unqualified. Second, whether it is appropriate to apply the term outside 'simple consanguinity'.

The first raises what is one of the most important issues about nepotism, because it challenges the notion that nepotism is inherently improper or unethical. That issue is whether if a relative or other person whose appointment could be described as nepotistic ceases to be so because they hold qualifications appropriate to the position to which they are being appointed. In my view it is still appropriate to use the nepotism label, even if the person benefitting from it is at least as qualified as anyone else who might be appointed. However the beneficiary should not be precluded from the appointment because of his or her familial or other relevant relationship, though there may be other reasons why such an appointment should not be made – for example, it may be difficult to remove such a person from their position if they prove to be unsuccessful, or the requirements of the position may be changed in a way that makes it desirable that they be replaced. What is essential, however, is that an independent observer, fully informed of the facts, can conclude that the person deserved to be appointed for reasons other than the nepotistic relationship. This would normally mean that the position has been open to all, and the merits of those interested in taking it have been properly and independently assessed.

This approach implies that the exercise of nepotism is not invariably or inevitably improper or unethical. It is necessary to determine the facts about its exercise in any particular case before reaching an objective conclusion about whether its exercise is wrong. The fact that there is a word for it does not mean that nepotism must always be condemned.

The second issue raised by Bellow's definition is how narrowly the term should be defined. Should it be linked, as he put it, to consanguinity. Clearly not. Consanguinity [related by birth] would not include one's spouse or partner and some other close relatives. But what about close friends and associates (including political associates), mates, business partners and the like? Strictly speaking, such associations would be covered by the term 'cronyism' [crony: an intimate friend or companion⁵] but I suspect popular usage now includes cronyism within nepotism. And what about the close relations (children in particular) of colleagues? In what follows I propose to use the word nepotism to describe the appointment by a person in authority of all such people, though later I will extend the discussion to cover the broader issue of patronage, which in relation to this matter, is defined as 'the control of appointments to the public service or of other political favours'.⁶

Bellow is concerned to praise familial nepotism, or what he calls the new postmodern nepotism.⁷ He acknowledges that 'we' (meaning, in context, Americans) 'are in the midst of an enormous boom in

⁴ Adam Bellow (2003) *In praise of nepotism*, 11.

⁵ Macquarie Concise Dictionary (2009)

⁶ Macquarie Concise Dictionary (2009)

⁷ Bellow (2003), 10.

generational succession, one that seems to contradict our public creed of opportunity and merit'.⁸ His argument is that nepotism is a drive that is basic to human survival – 'it is not really a question of whether nepotism is bad or good: nepotism simply *is*. The pertinent question is, How can we practice it so that it does not obstruct our efforts to create a just society? ... The solution is not to get rid of nepotism – something we neither can nor wish to do – but to apply it constructively.'⁹

His argument is concerned to justify the kind of nepotism we in Australia sometimes associate with business,¹⁰ politics¹¹ and some of the professions like medicine and the law, where children make their careers in the same occupation as their parents (usually their father). As he explains:

Nepotism in the traditional sense cannot have been involved in more than a handful of cases. Yet at the same time, it obviously didn't happen by accident, and in all these cases there is a remarkable sameness in the accounts successors give about the process of succession: they grew up around the business and developed an early interest in it; their parents never pressured them, and encouraged them to pursue their own ambitions; doors were sometimes opened, and people often proved happy to do favours for the children of important and powerful colleagues; but once in the door, the successors had to prove themselves to a skeptical (sic) public...¹²

Nepotism of this kind occasionally attracts attention but relatively little concern. That is not the type of nepotism that I will be discussing here.

However before turning in more detail to that problem I propose to refer to a fundamental principle that lies behind the ethical and integrity issues that should influence our approach to nepotism and related matters. I suggest this will point to the tests that we should apply in judging whether in a particular case nepotism is beneficial, benign or bad.

Public Office and Public Trust¹³

Section 6 of the *Public Sector Ethics Act 1994* (Qld) says:

In recognition that public office involves a public trust, public service agencies, public sector entities and public officials seek to promote public confidence in the integrity of the public sector and—

- (a) are committed to the highest ethical standards; and
- (b) accept and value their duty to provide advice which is objective, independent, apolitical and impartial; and
- (c) show respect towards all persons, including employees, clients and the general public; and

⁸ Bellow (2003) 22. Emphasis added. Bellow's primary concern is with relationships within families and he devotes much of the book to examining successful American dynasties, mainly in politics and commerce.

⁹ Bellow (2003) 22-3. Emphasis in original.

¹⁰ e.g. The Murdochs, Packers, Lowys etc.

¹¹ The current Premier and Leader of the Opposition in Queensland, for example.

¹² Bellow (2003) 508.

¹³ The title of the Seventh Annual St Thomas More Forum Lecture, given by Chief Justice (of the High Court) Robert French AC, on 22 June 2011.

- (d) acknowledge the primacy of the public interest and undertake that any conflict of interest issue will be resolved or appropriately managed in favour of the public interest; and
- (e) are committed to honest, fair and respectful engagement with the community.¹⁴

The section is somewhat different from the original formulation in the Act, having been amended in 2010. However those first nine highlighted words are unchanged¹⁵. Indeed they are copied directly from the draft legislation prepared and recommended by the Electoral and Administrative Review Commission (EARC) in 1992.¹⁶

The notion of public office as a public trust is an old one, ‘borrowed ... from the principles of equity which define the duties of trustees.’¹⁷ It was applied to Members of Parliament in Australia by the High Court in the 1920s. But as the current High Court Chief Justice, Robert French, explained recently:

The importance of the public trust metaphor¹⁸ diminished over time with the rise of specific mechanisms for oversight and accountability, including: statutory regulation of the public service, parliamentary scrutiny of official action, the political accountability of ministers and the employment arrangements of officials. However, a loss of faith in these mechanisms in the late twentieth century was, as Justice Finn has observed, ‘one of the principal stimuli to renewed interest in the ‘public trust’ and in its implications both for officials and for our system of government itself.’¹⁹

As it happens, Professor Paul Finn, as he then was, was primarily responsible for the revival of the public trust doctrine. In 1990 and subsequently, he wrote and spoke extensively about the subject. He was one of the people consulted by EARC in its ‘Review of codes of conduct for public officials’²⁰ and was quoted extensively in that report. Subsequently he was a leading consultant to the West Australian Royal Commission into the Commercial Activities of Government and Other Matters, otherwise known as the WA Inc. Royal Commission, which reported in 1992.²¹

What are the consequences of the public trust doctrine? It is ‘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’.²² Professor Finn expressed the fiduciary principle this way:

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.²³

¹⁴ *Public Sector Ethics Act 1994*, s.6 (emphasis added)

¹⁵ See s.9 of the 1994 Act.

¹⁶ See, Electoral and Administrative Review Commission, report 92/R1, May 1992, appendix E, ss.9 and 14.

¹⁷ French (2011) at p. 8.

¹⁸ As will be seen, it is not merely a metaphor.

¹⁹ French (2011) at p. 12. The quotation is from PD Finn, ‘The Forgotten “Trust”: The People and the State’ in M Cope (ed), *Equity: Issues and Trends* (Federation Press, 1995) 131 at 134; cf PD Finn, Public Trusts, Public Fiduciaries.

²⁰ Noted earlier. EARC, report 92/R1, May 1992.

²¹ Finn himself attributes ‘the most sustained elaboration’ of the fiduciary or trust principle between the people and the State to the WA Inc Royal Commission report. See ‘The Forgotten ‘Trust’: The People and the State’, in M. Cope, (ed.), *Equity Issues and Trends*, (1995), at p. 3, fn 6.

²² Finn (1995), ‘A Sovereign People, A Public Trust’ in P.D.Finn (ed) *Essays on Law and Government* pp 9-10.

²³ Finn (1995) at p. 14.

This is the principle that has been recognised in the law of Queensland (and some other States), and not merely as an ethical principle or metaphor. *The Crime and Misconduct Act* in Queensland, the *Independent Commission Against Corruption Act* in NSW, the *Independent Broad-Based Anti Corruption Act* in Victoria and the *Western Australian Corruption and Crime Commission Act* make those respective anti-corruption bodies responsible for safeguarding against ‘a breach of public trust’²⁴. The Commonwealth has also recognised the principle. The Statement of Ministerial Standards of the Abbott Government says in s.1.2, ‘In recognition that public office is a public trust...’²⁵

In the *Spycatcher case* in 1987 in the NSW Court of Appeal Justice Michael McHugh observed that ‘governments ... are constitutionally required to act in the public interest.’²⁶ Recently, former High Court Chief Justice Sir Gerard Brennan has explained that:

This notion of the public interest is not merely a rhetorical device – a shibboleth to be proclaimed in a feel-good piece of oratory. It has a profound practical significance in proposals for political action and in any subsequent assessment. It is derived from the fiduciary nature of political office: a fundamental conception which underpins a free democracy.

It has long been established legal principle that a member of Parliament holds ‘a fiduciary relation towards the public’²⁷ and ‘undertakes and has imposed upon him a public duty and a public trust’²⁸. The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee.²⁹

And he said:

Public fiduciary duties depend for their content on the circumstances in which power is to be exercised. The obligations cast on members of Parliament and officers of the Executive Government are many and varied and the law takes cognizance of the realities of political life, but asserts and, in interpreting statutes, assumes that the public interest is the paramount consideration in the exercise of all public powers...

Whenever political action is to be taken, its morality – and, indeed, its legality – depends on whether the public interest is the paramount interest to be served...

Power, whether legislative or executive, is reposed in members of the Parliament by the public for exercise in the interests of the public and not primarily for the interests of members or the parties to which they belong.³⁰

²⁴ For example, *Crime and Misconduct Act 2001*, s.14(b)(ii) and the ICAC Act, s. 8.

²⁵ December 2013. This same phrase appeared in the ‘Standards of Ministerial Ethics’ issued by the Rudd and Gillard Governments, though not in the equivalent documents issued by Prime Minister John Howard.

²⁶ *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, at 191.

²⁷ *R v Boston* (1923) 33 CLR 386, 412 per Higgins J

²⁸ *ibid.*, at p 408

²⁹ Sir Gerard Brennan (2013), ‘Presentation of Accountability Round Table Integrity Award’, Canberra, 11 December 2013, p. 3.

³⁰ Brennan (2013) pp 4-5.

The requirement that officers must act in the public interest is not novel. In Queensland, so far as appointed officers are concerned, the obligation is spelt out in the *Public Sector Ethics Act*, as I mentioned earlier, where it says they:

- (d) acknowledge the primacy of the public interest and undertake that any conflict of interest issue will be resolved or appropriately managed in favour of the public interest;³¹

Elected officials have a similar duty. They are obliged by the Code of Ethics Standards adopted by the Legislative Assembly to take account of ‘the primacy of the public interest’ and ‘make decisions solely in terms of the public interest.’³² That applies especially to Ministers who, under the Ministerial Code of Conduct, additionally ‘must make decisions, and be seen to make decisions, with the objective of advancing the public interest...’³³

Those are the principles. That is the law. But how well is this understood and applied by those who are elected or appointed to positions of public office?

Nepotism, patronage and public trust

First, an old story, not widely known, but a true one. For quite a while in the late 20th century, it was an accepted practice for a Queensland judge to appoint as an associate, his son or daughter. The position of judge’s associate is a public sector appointment and can and often does provide a pathway to a successful career in the law. Many judges considered it was their right to appoint a family member as an associate, or at least that it was a legitimate perquisite of office. The practice was challenged in the 1990s by the then Attorney-General, Matt Foley, who was given legal advice that he was personally responsible for such appointments, as it was he who would sign an Executive Council minute recommending each appointment. He disapproved of the practice and raised the problem with the Chief Justice and the Chief Judge of the District Court. Following discussions, a protocol was drawn up to require that vacancies in the position of associate had to be advertised, and appointments had to be made on merit. However Foley became aware that the new system was not entirely effective and would have to be strengthened. He held further consultations, including with some judges who insisted that their judicial independence was at stake. Foley suggested they could protect that independence by themselves paying the salary and other expenses of their associate, instead of relying on the public purse. That did not appeal. A second protocol was devised which was apparently more effective, though apparently not completely so.

In his book on ‘Judicial Ethics in Australia’, published some years earlier, then Supreme Court Justice J. B. Thomas made no mention of this issue, but included as an appendix the ‘seven Canons of Judicial Conduct’ published by the American Bar Association. Canon 3, under the sub-heading Administrative Responsibilities, states:

- (4) A judge should not make unnecessary appointments. He should exercise his power of appointment on the basis of merit, avoiding nepotism and favouritism ...³⁴

³¹ Section 6(d)

³² Statement of Fundamental Principles, s. 2.

³³ Ministerial Code of Conduct, p. 2.

³⁴ Thomas (1988) *Judicial Ethics in Australia*, p. 108.

One would have thought that should go almost without saying. But in Queensland it needed to be said.

The principle applies equally to all appointed public officers. The Queensland *Public Service Act 2008* declares:

27 **The merit principle**

- (1) The selection, under this Act, of an eligible person for an appointment or secondment as a public service employee must be based on merit alone (the *merit principle*).

Public service employees are defined by the Act to include the chief executives of the Public Service Departments, who are appointed by the Governor in Council. So their appointments too ‘must be based on merit alone’. Even in the absence of this legislative direction, elected public officers (i.e. Ministers) making such appointments would need to apply the same rule, in order to meet their obligations to act in (indeed, to advance) the public interest.

Yet it is clear that the merit principle is not applied universally. Sometimes it is suspended or amended to allow nepotism or patronage to prevail.

The current Queensland Premier has expressed the view that it is not appropriate for a minister to employ on their personal staff a member of their own family, but it is possible that a minister could employ family members of other Ministers.³⁵ The new Prime Minister has a slightly stricter rule: ministers’ close relatives and partners must not be employed in the offices of other ministers ‘without the Prime Minister’s express approval’. And ‘A close relative or partner of a Minister is not to be appointed to any position in an agency in the Minister’s own portfolio if the appointment is subject to the agreement of the Minister or Cabinet.’³⁶

In Britain, following a seven-month long inquiry, the Committee on Standards in Public Life, known as the Nolan Committee after its first chairman, recommended several years ago a complete ban on MPs employing relatives on their staff. However the Independent Parliamentary Standards Authority decided that each MP could employ one ‘connected party’ at any one time. Almost a third of British MPs do so.

At the other end of the scale, the Australian Capital Territory has a complete ban on its legislators employing family on their staff.

These various rules are all directed to the problem of the public perception of nepotism. Other than those that prevent the employment of family, they are notable for not applying the appropriate principles that should apply to appointments to public office, namely, the merit principle and the requirement that Ministers making appointments should act in (and to advance) the public interest. Insofar as these rules recognise the public interest (as distinct from political interest) it is in a negative sense. That is, they seem to apply the principle that advancing the interests of one’s family is acceptable so long as a particular appointment is not contrary to the public interest. But that is not the test that should be applied. It is not a matter of avoiding harming the public interest; ministers have a duty to advance the public interest.

³⁵ And this indeed has happened. One Minister appointed the daughter of another Minister as an adviser in her office. The daughter subsequently resigned after a drug-related incident.

³⁶ Statement of Ministerial Standards, December 2013, s. 2.23.

These rules that different jurisdictions have developed all appear to be directed to the problem of the narrowest form of nepotism, in that they specify the extent to which various family members and partners may or may not be employed. They ignore the broader nepotism or patronage problem, the placing in public positions and/or advancement of political and other associates, mates and cronies, and the jobs for the boys (and girls) syndrome.

That last category is used to describe the appointment of former politician, political allies and political activists to public offices that may or may not require expertise. Last December, for example, Dennis Atkins in *The Courier-Mail* had a column, 'Tradition of jobs for mates continues in political appointments' in which he mentioned four such: former Australian Democrats leader Natasha Stott-Despoja made ambassador for women; Tim Wilson, a fellow at the conservative Institute of Public Affairs made freedom commissioner at the Human Rights Commission; former Treasurer Peter Costello made acting chairman of the Future Fund; and in South Australia former Gillard Minister Greg Combet appointed as a lobbyist on car manufacturing.³⁷ These appointments are either to newly created positions, or positions that are vacant.

Even more concerning than the standard 'jobs for the boys' are appointments that newly elected Prime Ministers or Premiers make to chief executive positions to replace incumbents who they have dismissed, sidelined or persuaded to resign to make way for people more acceptable to the Prime Minister or Premier. There is little pretence on most occasions that 'acceptability' involves a judgment that the new appointee is more meritorious than the person they are replacing. Rather, it is about the appointment of people the Prime Minister or Premier considers will be loyal, and/or sympathetic with the policies of the new government, and/or can be trusted to harness public resources to achieve those ends. They will often be people who have previously worked with or for the Prime Minister or Premier or their colleagues or are associated politically or in some other way with them.

Such appointments have become relatively common since the Australian public services came to be managed by men and women appointed as chief executives for relatively short (five years or less) fixed terms, rather than by 'permanent' secretaries. Notoriously, when Labor's Wayne Goss became Premier in 1989 a significant number of senior officers were sent to what came to be described as the 'gulag', to work on 'special projects'.³⁸ When John Howard became Prime Minister he promptly dismissed six departmental heads. Tony Abbott dismissed three, with another allowed to hold his spot for about six months. Campbell Newman on becoming Premier sacked seven chief executives, and others followed later. There are important issues about whether actions such as these have led to a politicisation of the public service, and possibly resulted in a diminution of the willingness of the public service to provide frank and fearless advice. Some are concerned about a fundamental shift towards the American system where all top appointments are political (though subject to Senate approval.)³⁹ But this is not the place to discuss these issues.

³⁷ The previous month Daryl Passmore reported in the same paper that Premier Campbell Newman had appointed Geoff Cooper, the husband of a close political ally to chair Screen Queensland, where he had missed out previously on winning the chief executive's position. And see Terry Sweetman 'Friends put in high places'. *The Courier-Mail*, 21 February 2014, p.33

³⁸ This was because the new government believed the public service had become politicised after several decades of non-Labor rule – see, for example, P. Coaldrake, *Working the System*, 1989.

³⁹ See, for example, David Solomon (2007) Pillars of Power, at pp. 74-79, the Symposium in *the Australian Journal of Public Administration* 56(4), December 1997, and a recent article by Andrew Podger, former senior public servant and now Professor of Public Policy at the ANU, at <http://theconversation.com>.

However there has been some academic sympathy expressed for the exercise of patronage in the appointment of senior public servants. Recently, in an article described as a ‘thematic review’ of the relevant academic literature, Professor Matthew Flinders and Dr Felicity Matthews wrote:

...patronage, when viewed as a political resource, can be considered as a risk-reduction mechanism through which high-trust relationships and control capacity can be manufactured and sustained.⁴⁰

The authors drew a distinction between bad and good patronage, between patronage and public appointments. They said:

Patronage appointments are those that can be made by elected politicians without any encumbrance in terms of due process or transparency. In reality, even patronage powers exist within a certain bounded rationality which constrains choices, such as political calculations or informal brokering. However, despite the existence of informal limits on patronage appointments, the underlying variable is one of centralised power in the hands of the patron. Public appointments, on the other hand, are made by elected politicians but against certain explicit standards and frameworks, which are independently verified, to ensure that the public interest is not sacrificed for political gain. Thus, although the capacity of politicians to make the final appointment remains, certain safeguards are in place to ensure that appointments are made on merit and following a transparent, competitive recruitment process.⁴¹

Their reference here to the public appointment process is essentially that which has been adopted in Britain from 1995 on, in the wake of scandals about the abuse of patronage by Conservative Governments in the 1980s and 1990s. For almost 20 years the Office of the Commissioner for Public Appointments had regulated, monitored and reported on Ministerial appointments to the boards of more than 1,000 public bodies and statutory offices. The system established by the Office requires the establishment by departments of panels to assess candidates and recommend which of them satisfy the selection criteria which Ministers have helped to determine. Ultimately Ministers make appointments, choosing from among those who have been recommended. In some special cases parliamentary committees can hold pre- or post-appointment hearings into appointments.⁴²

A different system applies to the appointment of Permanent Secretaries – the equivalent of Directors-General in Queensland or Secretaries in the Commonwealth. The Civil Service Commission runs the selection process, though the relevant Secretary of State (Minister) is consulted throughout about such matters as job description and the composition of the selection panel and also meets all of the short-listed candidates to provide feedback to the panel. The panel recommends one candidate for appointment, but the final decision as to whether the recommended person is appointed rests with the Prime Minister.⁴³

As Flinders and Matthews say:

Overall, the UK provides an important case of a polity in which the party patronage capacity of ministers has become heavily circumscribed in recent years. A proactive regulatory architecture has been put in place that, when combined with an extremely aggressive and sensationalist print

⁴⁰ Matthew Flinders and Felicity Mathews, ‘Think again: patronage, governance and the smarter state’, *Policy & Politics* vol. 38 no. 4 639-56 (2010) at p. 642.

⁴¹ Flinders and Matthews (2010), at p. 647.

⁴² Flinders and Matthews (2010), 647-650.

⁴³ Civil Service Commission, ‘Recruiting permanent secretaries: Ministerial involvement’.

media, have made the opportunity-costs of [patronage as corruption] appointments a very high-risk, high-cost strategy for incumbent politicians.⁴⁴

They argue that the pendulum has swung too far, and that politicians should have:

the capacity to place competent state managers in key positions in order to develop the high-trust, low-cost relationships that are crucial to the effective governing. This also rejects the assumption of the incompatibility between party patronage and traditional democratic representation, because when exercised in accordance with the principles of merit, openness and transparency, party patronage is eminently compatible with the traditions of democratic responsibility by creating the space for an active dialogue between the appointers and the appointed (which, in turn, is crucial to the facilitation of effective high-trust, low-cost relationships); and in constructing overt lines of accountability across the semi-state back to political actors, who will be publicly accountable for the actions of those they appointed.⁴⁵

It is an interesting academic debate about whether Britain has gone too far down the road of removing the patronage powers of its Ministers. Aside from the strictures in such legislation as the Public Service Act in Queensland requiring appointments in the public service to be based on merit alone, the only legislation comparable to what is happening in Britain at the Commonwealth level are the procedures in the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991* setting out the merit based appointment process now required for board members of the ABC and SBS.

I have quoted Flinders and Matthews at some length to emphasise the point that what has been happening in Australia over the past few decades is totally different from the public appointment process current in the UK. Here, some Premiers and Prime Ministers have indulged in an exercise in patronage apparently paying little regard to the principles of openness and transparency that are required in Britain. It may be that some, most or even all of their appointees might have won a merit-based competition for the positions to which they were appointed. That is not the issue. The process which was adopted was flawed. It would appear to have been contrary to the public interest and inconsistent with the public trust that those Prime Ministers and Premiers were bound by.

But wait. Before reaching that conclusion it is necessary to consider a caveat expressed by Professor Finn in an article published in 1992 in which he discussed the compromises we have to accept in making our system of government workable.⁴⁶ ‘It is not enough,’ he said, ‘to rely on ritualistic formulae – “the public interest”, “the public trust”, “the Westminster system” – as if these, talisman-like, preordained the solutions to our problems.’ And he said:

What, above all, is necessary, in my view, is to understand the very fabric of the systems of public government which we have and to which we aspire. And this necessitates an informed appreciation of the legal, constitutional and democratic norms which express the order we have created. These are by no means static... But they are nonetheless fundamental to the roles and character we attribute to our officials; to the expectations we properly can have of them; to the strictures we can impose on them.⁴⁷

⁴⁴ Flinders and Matthews (2010), at p. 650.

⁴⁵ Flinders and Matthews (2010), at p. 653.

⁴⁶ Finn (1992) ‘Integrity in Government’, *Public Law Review*, pp. 243-257.

⁴⁷ Finn (1992), at p. 257.

The fact is that the roles and relationships of and between Ministers and Chief Executives of the public services in Australia have changed considerably, perhaps fundamentally, in the past two or three decades. And this may well mean that there are some circumstances in which it may be perfectly acceptable for a Premier or Prime Minister to make a patronage appointment because trust and/or commitment and/or loyalty etc may be as important (or more so) as merit in delivering the best performance by government – that is, by elected and appointed officials jointly. We may need to recognise that there is such a thing as ‘good patronage’. We may need to change the rules and/or make them more flexible.

If that is so, it is no longer the case that there should be ‘reform of public sector appointments so that merit is the overriding consideration rather than nepotism and cronyism’. That quotation is from the Liberal National Party’s submission to the Bligh Government’s discussion paper on integrity and accountability in Queensland in 2009 and that policy is already required by the Public Service Act.⁴⁸ Rather we might need to consider a question that the same submission also posed: ‘Should Government/political appointments be subject to Parliamentary probity or scrutiny by an independent body?’⁴⁹

That is already the case in relation to various integrity officers in Queensland⁵⁰, where the relevant Parliamentary committee is involved in the appointment process.

But it is not the case with the appointment of Directors-General and other Chief Executives. If we are to permit and favourably sanction the exercise of ‘good patronage’ do we need to adjust the system to provide more openness and transparency, in ways such as those mentioned in the LNP submission? I think it time these issues were examined and proper safeguards adopted.

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⁴⁸ At p. 4.

⁴⁹ At p. 7.

⁵⁰ Such as the Integrity Commissioner, the Chair of the Crime and Misconduct Commission, the Auditor-General, the Ombudsman and the Information Commissioner.