Committee Secretary
Select Committee on Administration of Sport Grants
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

8 May 2020

Dear Committee Secretary,

**RE: Administration of Sports Grants**

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Senate Select Committee on Administration of Sport Grants, responding to terms of reference (a) and (e) of the inquiry.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the complex role of law in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

**Summary of Recommendations:**

1. Clarify and extend the applicability of the *Commonwealth Grants Rules and Guidelines* to 'hybrid' grants where its administration is undertaken by Ministers and Corporate Commonwealth Entities.
2. Extend the application of the *Commonwealth Grants Rules and Guidelines* to Corporate Commonwealth Entities.
3. In the alternative, develop a uniform standard for grants administered by Corporate Commonwealth Entities.
4. The Minister for Sport should be held liable under section 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth).
5. Amend the guidelines to require the Minister to table the reasons for approval of funding in Parliament.

6. Require ministerial staff to appear before the Senate Committee to provide greater transparency of the role of the Prime Minister and the Prime Minister's Office.
7. Develop procedures for greater transparency of communication between Minister's officers in the decision-making process of allocating grants.

If further information is required, please contact us at anulrsjresearchhub@gmail.com.

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## Introduction

The *Community Sport Infrastructure Grant Program* ('the program') raises significant public law issues, including whether the program is constitutional[1] and whether the arrangements adopted to administer the program are legally sound.[2] This submission is made on the basis that the program is constitutional and the arrangement of having the Minister 'approve' the grants is legally sound. Our submission focuses on preventing issues of accountability and transparency arising from similar arrangements in the future.

## 1. Applicability of the *Commonwealth Grants Rules and Guidelines*

The first issue is the applicability of the Commonwealth's own guidelines to the administration of grant programs, the *Commonwealth Grant Rules and Guidelines* ('*CGRG*').[3] As the *CGRG* states, its goal is to 'promote proper use and management' of government resources, guided by, inter alia, the principles of accountability and transparency.[4] The value of the *CGRG* has been demonstrated in the Auditor-General's recommendation that the *CGRG* serve as a model for all government entities.[5]

The Australian Sports Commission ('Sports Australia'), being a Corporate Commonwealth Entity ('CCE'), is exempt from the operation of the *CGRG*.[6] It is not clear, however, if the Minister was exempted from the operation of the *CGRG*.[7] Professor Twomey has argued in her submission[8] that the *CGRG* applies to Ministers when they

[1] See Anne Twomey, Submission No 14 to Senate Select Committee on Administration of Sports Grants, Parliament of Australia, *Administration of Sports Grants* (20 February 2020) 3–6; Cheryl Saunders and Michael Crommelin, Submission No 16 to Senate Select Committee on Administration of Sports Grants, Parliament of Australia, *Administration of Sports Grants* (21 February 2020); Geoffrey Lindell, Submission No 30 to the Senate Select Committee on Administration of Sports Grants, Parliament of Australia, *Administration of Sports Grants* (21 February 2020) 3–6.

[2] Twomey (n 1) 7; Saunders and Crommelin (n 1) 2.

[3] *Commonwealth Grants Rules and Guidelines 2017* (Cth) ('*CGRG*').

[4] Ibid rr 2.1–2.2.

[5] Australian National Audit Office, *Award of Funding under the Community Sport Infrastructure Program* (Performance Audit No 23, 2020) 13. See also 43–44 (*'ANAO Report'*).

[6] Ibid 10; *CGRG* (n 3) r 1.2, fn 1.

[7] See *ANAO Report* (n 5) 44 [4.4].

[8] Twomey (n 1) 12–13.

are conducting 'grant' administration.[9] Given the broad meaning given to 'grant' in the *CGRG,* we agree that the *CGRG* applies to the Minister.[10]

Therefore, we submit that current apparent uncertainty over whether the *CGRG* applies to 'hybrid' grants – whose administration involves both Corporate and Non-Corporate Commonwealth Entities, including Ministers – needs to be resolved in favour of applicability. One way this could be achieved is by applying the *CGRG* to programs which have 'sufficient nexus' with the administrators that the *CGRG* expressly applies to.[11]

**Recommendation 1: Clarify and extend the applicability of the *Commonwealth Grants Rules and Guidelines* to 'hybrid' grants where its administration is undertaken by Ministers or Corporate Commonwealth Entities.**

We would also question the decision to completely exclude CCEs from the operation of the *CGRG*. As you are aware, there are currently 71 CCEs.[12] If the Commonwealth Government intends to involve CCEs in implementing grants, then the absence of uniform guidelines, enforceable or otherwise, may prove problematic. CCEs certainly have a diverse range of functions and objectives and may require individualised standards that are appropriate for their particular needs. However, minimal standards of integrity can and must be required in all expenditure of public monies. Australians can and are entitled to expect equal integrity from all CCEs, be it Sports Australia, the Australian War Memorial, the Australian Broadcasting Corporation or the Australian National University.[13] Indeed, the argument for individualised standards is further undercut by the fact that Sports Australia chose to base its own guidelines on the *CGRG,*[14] a choice which other CCEs might take. At the very least, the possibility of a uniform guideline, *CGRG* or otherwise, should be considered.

**Recommendation 2: Extend the application of the *CGRG* to Corporate Commonwealth Entities.**

[9] Ibid 13. See *CGRG* (n 3) r 2.9.
[10] Twomey (n 1) 13.
[11] See *CGRG* (n 3) r 2.9. See also Twomey (n 1) 12–13; *ANAO Report* (n 5) 45.
[12] Commonwealth Department of Finance, 'PGPA Act Flipchart and List'*: Department of Finance* (Web Page).
[13] See Ibid.
[14] *ANAO Report* (n 5) 43–44 [4.1].

**Recommendation 3: In the alternative, develop a uniform standard for grants administered by Corporate Commonwealth Entities.**

## 2. Ministerial Liability under the *Public Governance, Performance and Accountability Act 2013* (Cth)

Even if the Minister for Sport had legal authority to exercise the power to approve Community Sport Infrastructure Grant Program ('CSIG') funding as identified in the program guidelines, the Minister for Sport would still be in breach of the duties outlined in the *Public Governance, Performance and Accountability Act 2013* (Cth) ('*PGPA Act*').

The *PGPA Act* is the cornerstone of the Commonwealth Resource Management Framework and establishes general duties and obligations for all officials in relation to the use and management of public resources.[15] The Minister is an officer of the Commonwealth and therefore, if she had the legal authority to approve the funding, she would have had to abide by the ministerial duties set out in the *PGPA Act.*

Specifically, Division 9 of the *PGPA Act* enshrines special provisions applying to Ministers only. Section 71 of this Division outlines the process for approval of proposed expenditure. The provision states that "a minister must not approve a proposed expenditure of relevant money, unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money".[16] Hence, the Minister was obligated to make reasonable inquires and be relevantly satisfied that the funding for CSIG was proper use of Commonwealth monies, prior to approving them.

It is possible that the Minister may have approved CSIG funding without conducting a reasonable inquiry for two reasons outlined in the Auditor-General's Report. Firstly, the fact that the Minister was warned about the possible questions of legal authority suggests that, a reasonable inquiry involves obtaining legal advice prior to making the decision. However, the Minister did not seek legal advice as required by the Department of Health.[17] Secondly, the assessment advice of the Minister was

[15] 'Introduction to the PGPA Act for Officials', *Australian Government Department of Finance* (Web Page) <https://www.finance.gov.au/government/managing-commonwealth-resources/managing-risk-internal-accountability/duties/duties/introduction-pgpa-act-officials>.
[16] *Public Governance, Performance and Accountability Act 2013* (Cth) s 71.
[17] *ANAO Report* (n 5) 25; *See also:* Emeritus Professor Geoffrey Lindell, Submission No 30 to Senate Select Committee on Administration of Sports Grants, *Inquiry into Administration of Sports Grants* (21 February 2020, 4.4).

inconsistent with the program guidelines and rather, the Minister relied on other considerations such as the location of projects.[18]

Therefore, it is possible that a contravention of section 71 of the *PGPA Act* may lead to the Minister being held liable for loss due to misconduct under section 69. However, it is unlikely that the Minister will be liable to pay all of the money appropriated under the CSIG program.

Even if there was a reasonable inquiry, the guidelines must be amended to require that the Minister approving grants of Commonwealth money must table the terms of the approval required under section 71(3)(a) of the *PGPA Act,* before each House of Parliament. This is especially important as the Minister's assessment process was inconsistent with the approved program guidelines and was not informed by clear advice.[19] The ANAO report also notes the approach adopted for each round of funding was different, shedding light on structural inconsistencies in the funding process.[20]

By requiring the Minister to table the reasons, Parliament can affirm that the Minister did in fact conduct a reasonable inquiry prior to approval and the reasons can be published allowing for public access and review. This will allow for further measures of political accountability to take course when a Minister is approving large sums of money. The gravity of the ministerial action justifies the requirement for a statement of reasons to be tabled before each House of Parliament.

**Recommendation 4: The Minister for Sport should be held liable under section 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth).**

**Recommendation 5: Amend the guidelines to require the Minister to table the reasons for approval of funding in Parliament.**

## 3. Transparency of the Decision-Making Process of Allocating Grants

The former Minister described the last-minute changes to the final allocation as "administrative errors."[21] However, it is unacceptable given the significant amount of

[18] *ANAO Report* (n 5) 8.
[19] Ibid.
[20] Ibid.
[21] Bridget McKenzie, 'Statement Regarding Senate Estimates' (Media Release, 5 March 2020).

public money involved. Even if the former Minister was unaware of the final changes, as she claimed in her media release, the ministerial staff might have acted to reflect general principles that she had previously approved. Furthermore, noting the correspondence between staff of the Prime Minister's Office and the former Minister's Office, it may also suggest that the former Minister previously indicated to her staff that they should take into account directions from the Prime Minister's Office in the decision-making process.

Pursuing this line of thought, the Senate Committee should further investigate (1) the extent to which the Prime Minister and the Prime Minister's Office might have influenced the final allocation, and (2) whether the former Minister's lack of oversight represented undue influence of the Prime Minister over the final allocation. Notwithstanding the former Minister's assumption of responsibility for the actions of her office,[22] the series of events draw attention to issues extending beyond the internal affairs of the former Minister's Office. Therefore, compelling ministerial staff to appear before the Senate Committee can provide greater transparency over the two issues mentioned above.

The present case does not give rise to the common concerns about ministerial staff appearing before Senate Committees. First, the McMullan principle may no longer exist as a constitutional convention, and should not be entrenched as one.[23] Although the principle has been cited to suggest that ministerial staff cannot appear before Senate Committees without the permission of their individual Minister, it has not been "consistently acknowledged and accepted by political participants."[24] Second, inquiries into the role of the Prime Minister and the Prime Minister's Office in the series of events, do not necessarily compromise the confidentiality and trust of relationship between the former Minister and her staff. Instead, it can strengthen ministerial accountability by protecting ministerial decision-making from undue influence.

For ministerial staff appearing before Senate Committees, protocols similar to those applying to public servants can be established to accommodate concerns about retaining the confidentiality and trust in relationships between ministerial staff and their Minister. For example, the *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters* prohibits public servants from giving

[22] Ibid.
[23] *See* Lorraine Finlay, 'The McMullan Principle: Ministerial Advisors & Parliamentary Committees' (2016) 35(1) *The University of Tasmania Law Review* 69.
[24] Ibid 83.

information on matters of policy and those protected by public interest immunity.[25] A relationship of trust also exists between Ministers and public servants, to uphold legislated Australian Public Service values for public servants to provide honest advice.[26] Since public servants routinely appear before Senate Committees, there is also a case for ministerial staff to do the same.

**Recommendation 6: Require ministerial staff to appear before the Senate Committee to provide greater transparency of the role of the Prime Minister and the Prime Minister's Office.**

The Auditor-General found no record of evidence that the former Minister received legal advice from the Department of Health or Sports Australia on whether she had the relevant legal authority to approve the grants.[27] Following the *Williams (No. 1)*[28] and *Williams (No. 2)*[29] decisions, it is inappropriate for executive decision-makers to assume that public spending decisions can be valid without statutory authorities. Furthermore, Professor Geoffrey Lindell explained in his submission that the former Minister and her staff had no apparent legal authority to make decisions in relation to the Sports Grants, nor did the Sports Commission have any apparent authority to delegate these functions to them.[30] The concern here is that greater transparency of communication between these parties would have allowed them to assess the legal risks of their various roles and alert the former Minister during the series of events.

If individual Ministers fail to demonstrate the legitimacy of their actions, it risks undermining public confidence in the executive government and may put their staff in a compromised position. Whether conscious or not, ministerial staff are increasingly exercising executive power beyond that permitted by the *Statement of Standards for Ministerial Staff.*[31] In the present case, the former Minister's assumption of responsibility meant that the internal operation of her office does not be need to be examined. However,

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[25] Department of the Prime Minister and Cabinet, *'Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters'* (2015) 9 [4.2].
[26] *Public Service Act 1999* (Cth) s 10.
[27] *ANAO Report* (n 5) 25 [2.16].
[28] *Williams v Commonwealth* (2012) 248 CLR 156.
[29] *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.
[30] See Lindell (n 1) 3–6.
[31] Yee-Fui Ng, 'Ministerial Advisers: Democracy and Accountability' in Glenn Patmore and Kim Rubenstein (eds), *Law and Democracy* (ANU Press, 2014) 65; *See also*: 'Statement of Standards for Ministerial Staff', *Special Minister of State* (Web Page) <http://www.smos.gov.au/resources/statement-of-standards.html>.

in cases where a Minister is not prepared to assume responsibility, ministerial staff may find themselves taking blame for actions that might have been condoned by the individual Minister. From this perspective, ministerial staff acting to reflect general principles that Ministers approved, may put their reputation and careers in the hands of their individual Minister.

For the above reasons, scrutiny of the decision-making process raises questions about the legality of involving officers across the Department of Health, Sports Australia, and staff of the Minister's Office, including the Prime Minister and the former Minister for Sports, in the decision-making process. It is thus essential to improve the transparency of communication between these parties to help them understand their corresponding role and legal risks in the decision-making process of allocating grants.

**Recommendation 7: Develop procedures for greater transparency of communication between Minister's officers in the decision-making process of allocating grants.**

## 4. Concluding Remarks

We would welcome the opportunity to speak to the Committee about this submission should the Committee deem it necessary.