Professor Anne Twomey
Professor of Constitutional Law

27 October 2022

Mr Julian Hill MP
Chair
Joint Committee of Public Accounts and Audit
Parliament House
Canberra, ACT, 2600

Dear Sir,

Inquiry into Commonwealth Grants Administration

Please accept this submission to your inquiry into Commonwealth grants administration.

While the existing laws and rules governing grants administration at the Commonwealth level are relatively good (including s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) ('PGPA Act') and the Commonwealth Grants Rules and Guidelines), there remain some significant problems that need to be resolved to ensure that public spending is lawful as well as being fairly and effectively allocated.

Constitutional and legal validity of public spending

As the Committee will be aware, the High Court in the *Pape* and *Williams* cases held that most government spending, including spending on grants, must be authorised by legislation. For legislation to authorise public spending, it must be supported by a head of legislative power in the Constitution. The Commonwealth sought to resolve this problem by providing a general authorisation in s 32B of the *Financial Framework (Supplementary Power) Act 1997* (Cth), listing all the approved spending purposes in the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth).

While some heads of power might be relied upon to support some aspects of a grants program, it is sometimes the case that the program as a whole is not supported, or that particular grants do not fall within the scope of the authorisation, because they do not fall within the scope of the heads of power upon which the spending relies. For example, the external affairs power may support spending in relation to providing equal access to sporting facilities to women and disabled people, in accordance with art 10(g) of the *Convention on the Elimination of all forms of Discrimination Against Women* and art 30(5) of the UN *Convention on the Rights of Persons with Disabilities,* but this does not support the entirety of the spending under the Community Sport Infrastructure Program and would not support spending money on many individual grants, such as a grant for upgrading the surface of the local football oval.

The problem is that those who actually approve the grants are rarely aware of the limits on their powers that are derived from the limited legislative support for the spending program. While there seems to be an internal governmental process to check that a grant program can be conceivably shoe-horned into various heads of power, if read in a particularly narrow manner, no one seems to check that the actual projects upon which

Faculty of Law
New Law Building F10
Eastern Avenue
The University of Sydney
NSW, 2006
Australia

T +61 2 9351 0237
F +61 2 9351 0200
anne.twomey@sydney.edu.au
http://sydney.edu.au/law
http://ssrn.com/author=808822

ABN 15 211 513 464
CRICOS 00026A

money is spent fit within the constitutional parameters for lawful spending. I have addressed this in detail, giving examples and explaining the legal reasoning, in: Anne Twomey, 'Executive Power Following the Williams Cases' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (2020) 33-55.

The consequence is that much of the expenditure under grants schemes is unlawful or at least of doubtful legal validity. This needs to stop. Governments should not be unlawfully spending public money. The principle of the 'rule of law' means that the law, including the Constitution, binds the government in relation to the expenditure of public money. Every person who approves public spending should be required to consider whether that spending is supported by legislation, taking into account the necessity of the expenditure falling within at least one head of Commonwealth legislative power.

In the case of the Community Sport Infrastructure Program, the unlawfulness involved was more complex, because there was not only a lack of constitutional power for much of the spending, but there was also a failure to act consistently with statutory provisions in the *Australian Sports Commission Act 1989* (Cth). (For detail about this, see the Appendix to my submission to the Select Committee on the Administration of Sports Grants.) The Minister seemed to take the view that she was entitled to instruct the Commission generally, when in fact her powers were more limited. Again, there appears to have been a failure to advise the Minister of the limits on her powers. Greater efforts need to be taken to educate Ministers and their staff about the limits on a Minister's powers, especially in relation to statutory corporations.

Avoidance of the application of Commonwealth Grants Rules and Guidelines

The other significant problem is that while there are appropriate Commonwealth Grants Rules and Guidelines (CGRGs), efforts are frequently made by politicians to avoid their application or efficacy. (Note that this part of my submission draws on work produced for ICAC on grants administration in New South Wales, which made comparisons with the Commonwealth experience.)

The important parts of the CGRGs, included in the mandatory requirements of Part 1, are as follows.

Paragraph 3.3 requires Ministers to comply with relevant legislative requirements in the *PGPA Act* and with the CGRGs, while officials are required to advise Ministers about these obligations. Paragraph 3.11 repeats the *PGPA Act* requirement that Ministers must not approve expenditure unless satisfied, after reasonable inquiries, that the expenditure would be 'proper' (i.e. 'efficient, effective, economical and ethical'), and requires that the 'terms of the approval *must* be recorded in writing as soon as practicable after the approval is given'. Paragraph 4.4 requires officials to develop grant guidelines for all new grants and paragraph 4.6 requires them to advise Ministers about the selection criteria and process and the merits of the grants relative to the guidelines and the need to achieve value for money.

Paragraph 4.10 states that a Minister must not approve a grant without first receiving written advice from officials on its merits. The Minister must record, in writing, 'the basis for the approval relative to the grant opportunity guidelines and the key principle of achieving value with relevant money'. The same obligation applies to any official who

approves a grant. Where a Minister approves grants within his or her own electorate, paragraph 4.11 requires the Minister to write to the Finance Minister advising of the details.

Paragraph 4.12 provides that while Ministers may approve grants that are not recommended by relevant officials, they must report annually to the Finance Minister by 31 March about all instances where they have approved a grant which the officials recommended be rejected. The report must contain a brief statement of reasons for the approval of each grant.

These provisions are aimed at ensuring that there is documentation, transparency and the provision of reasoning to support grant decisions, particularly when the Minister acts contrary to the recommendations of officials. They have been thwarted, however, in a number of ways.

Election promises

The first loophole is the treatment of 'election promises'. Prior to elections and by-elections, promises are frequently made to fund infrastructure or make grants within electorates without any assessment having been made about the value of the project, its feasibility and the capacity of the recipient to deliver the project and make best use of it. There are usually no guidelines, eligibility criteria, applications or assessments of merit before commitments are made to provide the funding for particular projects. Public servants have interpreted their role as merely giving effect to election promises, despite the lack of assessment and compliance with the CGRGs. The consequence is that the resulting infrastructure and grants give rise to poor outcomes which do not provide value for the community and that more needy areas often miss out.

Members of Parliament and political parties could, instead, recognize a public interest in spending on a particular subject, announce an election policy to expend $X on that subject and state that the money will be spent on a fair basis according to merit and need, once applications have been made and assessments completed after the election. Candidates and sitting Members could then campaign that they would support and recommend particular projects in their electorate, while recognising that they would still go through a merit procedure. This would allow candidates to be elected on the basis of policies, rather than electoral bribes. However, many politicians appear to prefer to be seen to be handing out gifts to their electorate, even if it is unfair, inefficient, ineffective and a misuse of public funds for party gain. They justify this to themselves as being an aspect of 'democracy' and 'what elections are all about', but this misunderstands and degrades the meaning of democracy.

The *PGPA Act* and the CGRGs do not include any exemptions for election promises. Ministers are still obliged not to approve a grant unless it is a 'proper' (i.e. an efficient, effective, economical and ethical use of public money). But in practice, blind eyes are turned to such matters where an election commitment has already been given. The CGRGs recognise a category of 'one-off or ad hoc grants' that do not have planned selection processes, but are 'designed to meet a specific need, often due to urgency or other circumstances'. It is into this category that election promises are commonly lumped.

For example, on 30 March 2019, the Female Facilities and Water Safety Stream program ('FFWSS') was announced, allocating $150 million over four years, of which $20 million was budgeted to be spent in 2019-20 (Commonwealth, Budget Paper No 2, 2019-20, pp 92-3). Parliament was dissolved shortly afterwards on 11 April 2019. During the ensuing election campaign, 41 promises were made by the Coalition for funding under the program, almost exhausting the entire four year allocation, despite there being no guidelines, no eligibility criteria, no merit selection and not even any applications for the grants. Eighty per cent of the funding was allocated to the construction or renovation of swimming pools, all in seats held by the Coalition Government at the time (one of which was later lost), with only twenty per cent of the fund being allocated to female change rooms. Many bodies awarded funding did not know about it until they read the publicity, and problems arose when the relevant land was not available for use for a pool or the relevant body was not in a position to fund its ongoing maintenance.

Guidelines were only issued for the FFWSS program after the award of the grants was confirmed. These Guidelines were addressed to the delivery of the grants, rather than eligibility and merit selection. The role of public servants was limited to confirming with Ministers' offices the identity of the recipients of the grants and then overseeing delivery. The Guidelines addressed the selection process by simply stating 'You are not eligible to apply if you have not been identified by the Australian Government to receive funding under this grant opportunity' and that general applications will not be accepted. The Department took the view that the design and selection process had been overtaken by the making of election promises, and that they should be treated differently as ad hoc grants (Senate, Select Committee on Administration of Sports Grants, *Committee Hansard*, 27 August 2020, pp 7-8).

According to para 9.3 of the CGRGs, at a 'minimum, guidelines for one-off or ad hoc grant opportunities should include the purpose or description of the grant, the objectives, the selection process, and reporting and acquittal requirements and the proposed evaluation mechanisms'. In the case of the FFWSS program, there was no selection process other than the making of election promises and the objective appeared to be a partisan one of winning the election. It is also difficult to see how s 71 of the PGPA Act could have been satisfied in the circumstances.

While the CGRGs do not expressly permit such deviations from the basic grant requirements, they have been interpreted, as a matter of convenience, as so doing when it comes to election promises. The result is poorly planned infrastructure, grant outcomes which do not adequately serve the public interest, and the misuse of public money for political party purposes.

The misuse of 'cabinet confidentiality'

In the case of the 'Building Better Regions Fund', a ministerial panel was established to determine funding approvals. It was then claimed that Cabinet confidentiality applied in relation to the decisions of this body, so that any reasons for its allocation of funding were redacted from documents before they were publicly released, removing any transparency or accountability. In relation to Round 3 of the program, of the 330 projects approved, 112 were chosen by the ministerial panel against the merit-based recommendations of the Department. The list of these projects, their location and the reasons for overturning the merit-based recommendations of the Department were all redacted from the relevant letter to the Finance Minister. The same redactions occurred in relation to Round 4 of the

program, where 49 of the 163 projects were approved despite not being recommended for funding by the Department.

Cabinet confidentiality should not be deployed to trump transparency measures imposed by statute to ensure the appropriate exercise of the expenditure of public money on grants.

Failure to produce genuine reasons for overriding merit recommendations

Further, where requirements are imposed, they are often ignored or compliance is perfunctory in nature. This is because there is no adequate oversight of ministerial actions (except when Performance Audits are undertaken by the ANAO). There is no scrutiny of poor and inadequate reasons and there are no penalties for breaches. Sometimes, no reasons are recorded at all for decisions to overturn merit recommendations. For example, the ANAO found 164 instances where the ministerial panel allocating Building Better Regions grants decided not to approve recommended projects without recording the reasons for the decision: ANAO, *Award of Funding under the Building Better Regions Fund* (ANAO Audit Report No 1, 2022-23) [26].

Another example is that the brief to the Minister for Sport in relation to funding under the Community Sport Infrastructure Program stated that the Minister must 'provide reasons for rejecting or changing the recommended grant applicants'. The brief was returned with 'agreed' marked on it, but changes were made to the recommended recipients of the grants and no reasons were provided for making those changes. In that case the Minister later argued that the CGRGs did not apply because the Australian Sports Commission was a corporate Commonwealth entity. But the Australian Sports Commission had its own Grant Management Framework based upon the CGRGs, which also required the giving of reasons. The Minister's office was reminded of this on 5 and 9 December 2018 and in the final brief, but failed to comply.

The requirement to write a letter to the Minister for Finance giving reasons for overturning the merit advice of public servants is often respected only in form, not substance. Sometimes the excuse is given that the decision was made by a former Minister, so no reason is known (see, eg, the letter by Senator Payne to the Finance Minister, 7 April 2020 with respect to decisions made by the former Minister for Women). In one case, a Minister wrote that he was enclosing the details of the grants and 'the reasons for my decisions', only to attach a table which in relation to one grant said 'no reason provided' (Letter by Ken Wyatt MP to the Finance Minister, 29 March 2019). Most commonly the reasons simply describe what the program is intended to do. Almost none explain why the recommendation of the public servants was wrong and needed to be overturned. Note, in contrast, the very good explanation of reasons by Senator Bridget McKenzie in a letter to the Finance Minister, 31 March 2019, regarding a grant that the Department of Communications and the Arts had recommended be rejected. This shows that a Minister may have a good reason for rejecting departmental advice and that transparency in providing that reason is valuable.

The 'pooling' of applications so that no reasons need be given for overturning merit recommendations

Another avoidance mechanism used in the third and fifth rounds of the Building Better Regions Fund program, was for public servants to present 'pools' of applications to the

ministerial decision-makers from which they could choose their preferred applicants. This meant that ministers could exercise wide discretion in allocating grants without having to declare that they had overturned merit recommendations, as long as they chose applicants from within a large pool.

Failure to make grants within the scope of the power and purpose of the grant program

While at the Commonwealth level, the constitutional requirement for legislative authorisation of expenditure means that there is legislation that identifies the purpose or object of grants, this is sometimes ignored in actually making the grants.

For example, the FFWSS program was funded under a budget allocation for the purposes of 'Regional Development'. The Department of Infrastructure recorded that its purpose was supporting 'women's participation in sporting activities in our regions and strengthening regional sustainability, capacity and diversity'. Yet most of the funding commitments were neither directed at regions, nor women's participation in sport. Notoriously, a considerable amount was allocated to the renovation of a swimming pool in North Sydney, which was hardly a regional area. The ANAO has previously been critical of the Commonwealth Government for making grants intended for 'regional' purposes to projects in cities (Australian National Audit Office, *Design and Implementation of Round Two of the National Stronger Regions Fund,* Report No 30, 2016-17, 32-3).

Giving Ministers discretion to apply 'other factors' in making assessments

In the case of the Building Better Regions Fund program, the merit criteria were set out in the grant guidelines, but applicants were told that the panel allocating the grants could then apply 'other factors' in making their decisions, which were unknown to the applicants and therefore unable to be addressed by them. The ANAO reported that the use of 'the "other factors" in the guidelines was inconsistent with the intent of the CGRGs and eroded the role of the published merit assessment process by enabling and introducing discretion to decision-makers with little or no transparency.' The ANAO also noted that as the program progressed through its five rounds, there was 'an increasing disconnect between the assessment results against the published merit criteria and the applications approved for funding', reflecting the increasing reliance upon 'other factors' when making funding decisions.

Proposals for reform

Amendment of s 71 of the PGPA Act: Section 71 of the PGPA Act could be amended to add that the Minister must be satisfied that he or she is acting impartially and in the public interest in approving public expenditure.

Amendment of the CGRGs: The CGRGs could be amended to provide that Ministers may not approve grants (including in relation to election promises) until they have received advice assessing grant applications against criteria and ranking them according to merit (rather than providing a pool of eligible applications). The CGRGs should require Ministers to act fairly (eg not favouring particular applicants by accepting their late applications, not advising them how to alter their applications so that they are successful, not altering the selection criteria after submissions have closed, and not agreeing to make a grant to a body before it has applied for it or before the scheme has even

opened). They should also require Ministers to act impartially (eg not acting to favour projects in electorates held by a particular party, or targeting marginal electorates with additional funding).

If a Minister decides to act contrary to the advice of public servants, which a Minister may legitimately do, the Minister should be obliged to give written reasons which explain why the altered outcome is more meritorious than that recommended, assessing this by reference to the criteria in the grant guidelines and specifying the additional evidence relied upon by the Minister to reach that conclusion. The CGRGs should require the Minister to publish such reasons on the relevant grant website, with no redactions for Cabinet confidentiality, before such funds can be paid to the relevant recipient, or if the alteration is to deny funding to a recipient, then publication should be required to occur at the same time that recipients are notified of the outcome. This would improve the transparency of grant schemes and would provide a basis for genuine scrutiny of such decisions.

The CGRGs should also formalise the role of the local Member of Parliament in relation to grants in his or her electorate, including when the local Member is a Minister. Members should be permitted to advocate in favour of projects within their electorate and to provide supporting evidence, but such advocacy and evidence should be only one input into the assessment, which should be required to be made in a fair, unbiased process, of the merits of applications against the criteria in the grant guidelines. All such inputs should be published, as well as whether they had any effect upon the distribution of grants.

Oversight: There needs to be a body that maintains oversight of such schemes to ensure that there is compliance with the CGRGs and that adequate reasons are provided and published. This could be a standing parliamentary committee or an integrity agency. Penalties for non-compliance could include critical publicity, directions to public service agencies to ensure their compliance, and parliamentary censure of Ministers who fail to meet the required standards.

Penalties: Consideration might also be given to what kind of penalties might be applied to serious breaches of mandatory grant rules or of any legal obligation regarding the approval of expenditure. At the public service level, this might result in disciplinary conduct. At the ministerial level, consideration would need to be given to what kind of penalties would be appropriate.

Education: A significant contributing factor to the misuse of public funds in grant administration is the lack of education of Ministers and their staff as to the limits of their powers and the standards imposed upon them. It is also possible that there is active avoidance of such knowledge so that innocent mistake can be asserted if they are called out for misconduct. Better and compulsory education is necessary in the future.

[redacted]

Yours sincerely,

[redacted]

Anne Twomey
Professor of Constitutional Law