

Submission in Response to the Inquiry into
concussions and repeated head trauma in
contact sports

Submitted by
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Introduction

I am an Australian lawyer and legal academic with research expertise in sports law, specifically the regulation of sport-related concussion in Australia. In 2011, I became interested in the legal and regulatory challenges in the United States involving the National Football League (NFL). I questioned whether similar concerns might arise in the Australian context. My doctoral studies (Monash University *Why the Brain Matters: Regulating Concussion in Australian Sport*) applied a regulatory lens to concussion in sport, recognising that the US litigation approaches were unlikely to ‘solve’ or effectively address the problem.

I make this submission as a ‘pro-safe sports advocate’ and an individual who has published and presented on this topic for over ten years. I am the recipient of several externally funded research grants, including as a co-investigator on a Government of Canada Social Sciences and Humanities Research Council (SSHRC) Partnership Development Grant examining youth sport concussion from an interdisciplinary perspective. An interdisciplinary approach is necessary to address this complex problem and bridge knowledge gaps.

This submission is based on the evidence collected as part of my research. It supports my view that regulating sport-related concussion and exposure to repeated head trauma (collectively referred to in this submission as ‘SRC’) lies in the hands of state and non-state actors. My responses to the terms of reference are in Annexure ‘A’.

Key Points

- Ensuring access to an optimally safe sports system for all Australians aligns with two of the four strategic priorities in the Australian Commonwealth Government’s Sport 2030 - National Sports Plan (Building a more active Australia; Safeguarding the integrity of sport). Leadership by the ACG supports the goal to enhance participation, safeguard sport, and promote a whole-of-sport national focus.
- SRC is a public health concern, and negative perceptions of safety present as barriers to participation in contact sports, justifying why SRC should be regulated differently from other sporting injuries. Private non-state actors are ill-equipped to unilaterally regulate high-profile public health concerns within a private and voluntary self-regulatory system.
- Under the current regulatory arrangements, the sport’s governing body (SGB) dominates this regulatory space operating within a private self-regulated system. Consistent with principles of sports autonomy, SGBs voluntarily set, direct and control their regulatory agendas in addressing SRC. This includes assessing ‘who and what really matters’ in their decision-making processes and the salience of stakeholder claims that influence their actions. (Mitchell et al., 1997).

- While various actors have taken steps towards engaging with SRC in Australia, the inconsistent approaches and absence of a national framework have constrained the effectiveness of current regulatory arrangements. This fragmented and haphazard approach creates confusion and information asymmetries around SRC.
- SRC is not a new phenomenon. In 1994, the National Health and Medical Research Council (NHMRC), through the Head and Neck Injuries Committee, identified several precautionary-based recommendations directed to the administrators of the four football codes (Australian football, rugby, rugby league and soccer). Based on publicly available information, there are gaps in the timeline, with little evidence of any significant steps taken to implement these recommendations until issues involving the NFL started receiving attention in Australia. The lack of scientific certainty as to the nature and extent of the causal link between SRC and longer-term neurological concerns appears to be a reason for this lengthy response.
- The scientific discussion as to the extent of the causal relationship will likely continue for many years into the future. In the meantime, a precautionary-based approach, developed in consultation with key stakeholders and reflective of the nuances across various sports settings, can guide decision-makers. State actors play a central and coordinating role within this regulatory space and have the capacity to design and develop a concussion harmonisation strategy in conjunction organised across the areas of prevention, management, education and research.

The Parliamentary Inquiry is essential in building Australia's reputation as a 'concussion smart' nation. Reasonable, necessary and proportionate adjustments can be made to improve outcomes for past, present and future generations of participants. Indeed, an opportunity presents itself to lift our 'concussion smart' status and use this to measure Australia's sporting success as we enter the 'green and gold decade'.

Thank you for the opportunity to provide this submission.



Dr Annette Greenhow

Annexure “A”

Addressing the Terms of Reference

a. the guidelines and practices contact sports associations and clubs follow in cases of player concussions and repeated head trauma, including practices undermining recovery periods and potential risk disclosure

The sport’s governing bodies (SGBs) design and develop the guidelines and practices based on medical and clinical perspectives they consider relevant for the particular sport. Some sports base their guidelines on the Concussion in Sport Group consensus statement and injury management tools. Different mechanisms of injury seem to be the reason justifying why guidelines and practices differ across sports.

Instances of players underreporting SRC or manipulating baseline tests raise questions about whether the current guidelines and policies align with target audiences’ compliance motivations. In other words, if some players seek to avoid complying with SRC rules, it’s important to investigate and, if necessary, review and reform the rules.

Within competitive sports, strong incentives exist to win, and compelling social, normative, and economic factors influence decision-making. In Australia, several professional players assert that the decision as to their fitness and return to play ought to be theirs to make, irrespective of the risk disclosure by club doctors. In asserting their rights, these players argue that bodily autonomy and their rights over health-related decisions should prevail, despite contrary medical advice and scientific uncertainty regarding long-term harm.

This is a concerning development for several reasons. First, this practice sends mixed and confusing messages to players at other levels within the sport that ‘when in doubt, sit them out’ does not apply to professional levels (this slogan was developed by the Concussion in Sport Group in 2001). Second, this view is antithetical to occupational health and safety principles. Finally, such an approach fails to consider that the injury costs burden is externalised and borne by society.

d. the liability of contact sports associations and clubs for long-term impacts of player concussions and repeated head trauma

In Australia, there is no legal precedent establishing liability in negligence against an SGB or club for long-term impacts of SRC. Class action litigation has been threatened against several codes involving claims from several retired professional players.

Proceedings issued by former Newcastle Knights rugby league player James McManus against his former club did not proceed to trial. McManus claimed damages for negligence, alleging personal injuries sustained during his professional career. He alleged the Knights breached the duty of care as employer for permitting or requiring him to continue to be exposed to injury.

The McManus case was set for hearing in the New South Wales Supreme Court in September 2021. A few days before the scheduled hearing date, the parties advised the Court that they had reached an agreement on substantive issues. The terms of this agreement remain confidential.

In response to a question from Senator Thorpe about the existence of any current legal precedent regarding the liability of sporting codes or clubs at the Public Hearing on 30 January 2023, Mr Buhrer from the Rugby League Players Association stated

The only one that we're aware of was a case against the Newcastle Knights on historical concussion. From what I understand, the club won that. They were able to prove that they weren't necessarily liable. That's to the best of my knowledge and off the top of my head. (Page 32 Transcript)

I have a different view of the outcome of that case and its precedential value. I do not consider that the McManus case was ‘won’ by the club or the NRL (who had carriage of the case). The basis for my view is that the only way a civil case can be won is if a court makes a judicial determination after hearing all

the evidence. The McManus case did not proceed to trial, and no evidence was presented. The NRL issued a media statement following the discontinuance of the case, which some media outlets have interpreted as the club winning the case. In my view, this sends an inaccurate message to the wider public.

Lawyers are entitled to use whatever legitimate and lawful tools protect their client's interests. However, the use of non-disclosure agreements in SRC-related compensation claims stifles the ability to engage in meaningful discussion of the problem in the broader context and constrains the collection of health surveillance data for injury prevention and public health.

e. the role of sports associations and clubs in the debate around concussion and repeated head trauma, including in financing research

Sports associations and clubs are essential in providing and delivering sport in Australia. They are centrally rooted in their sport and typically thought to possess higher levels of expertise or technical knowledge about their sport. However, there are gaps and areas for improvement in how the sports have privately self-regulated SRC. There are many competing or colliding interests to manage, coupled with the disruptions presented by SRC in some full bodily contact sports.

Funding of Research - I am strongly supportive of financial and in-kind contributions and collaborations with sports associations and clubs in research around SRC. However, I believe that research programs and funding must be organised and administered more centrally to coordinate the research agenda, deliver high quality research outputs, and maintain research and academic integrity and ethical standards.

g. the prevalence, monitoring and reporting of concussion and long-term impacts of concussion and repeated head trauma, including in First Nations communities

More consistent approaches to SRC data collection and injury surveillance is needed. Research needs to include population groups represented within the sports.

Injury surveillance data and a central repository or reliable data collection across sports are required to redress information asymmetries. This informs agenda-setting and injury prevention strategies across wider participation groups.

According to the 2019 Australian Institute of Health and Welfare Report, concussion is the most common TBI-related diagnosis (74%; 17,250 cases). Almost one-fifth (19%; 4,500) of the study population (23,445) were hospitalisations while patients were engaged in a sport when the TBI occurred. Nearly 1,800 were playing a type of football (all codes combined - Australian football, rugby, rugby league and soccer).

h. workers, or other compensation mechanisms for players affected by long-term impacts of concussions and repeated head trauma

Most professional athletes are excluded from workers' compensation regimes and consequently entirely dependent upon privately negotiated terms under the terms of the relevant collectively bargained agreements.

The absence of state-provided workers' compensation means that professional athletes depend on private compensation systems to recover compensation. This also depends upon negotiated terms of any collective bargaining agreement and the adequacy of the amount and duration of compensation.

Privately arranged career-ending compensation systems are internally managed by the sport, so it is difficult to get reliable evidence of how many athletes receive compensation and retire from the sport.

i. alternative approaches to concussions and repeated head trauma in contact sport, and awareness raising about its risks

While each of the sports has individually established regulatory arrangements in responding to SRC, horizontal oversight and leadership still need to be present in directing the SRC agenda as representative of the public. No identifiable dominant actor champions the public interest and takes leadership in designing the regulatory arrangements with that interest in mind.

Without pre-empting the recommendations of this Inquiry and recognising the significant differences in cross-national systems, government-led initiatives in other countries, especially Canada and the United Kingdom, provide evidence of the role of government in regulating SRC. To date, government engagement has led to the development of best practices and harmonisation strategies. In Canada, initiatives include establishing Concussion Awareness Week, hosting annual concussion symposiums, and amalgamating resources through the Sports Information Research Centre (SIRC). Other initiatives include funding for organisations to develop concussion tools/resources, tying federal funding to implement uniform concussion protocols and establishing a common data collection system for concussions in sports across Canada.

j. international experiences in modifying sports for children

An example of rule modification for children is the banning of body checking in Ice Hockey across several Canadian Provinces. In 2013, Alberta and Ontario raised the minimum age for bodychecking to Bantam/U-15, and several other provinces have adopted similar changes. Hockey Canada has implemented these modifications, and the minimum age for bodychecking is 13yoa across Canada.

As an example of legal regulation designed to achieve minimum standards and education in response to SRC, the Government of Ontario implemented *Rowan's Law*, making it mandatory for sports organisations to:

- 1) ensure that athletes under 26 years of age, parents of athletes under 18, coaches, team trainers and officials confirm that they have reviewed Ontario's Concussion Awareness Resources every year.
- 2) establish a Concussion Code of Conduct that sets out rules of behaviour to support concussion prevention.
- 3) establish a Removal-from-Sport and Return-to-Sport protocol.

k. Any other related matters

If we frame SRC as a public health concern, then it follows that state actors ought to be coordinating the research agenda, and government research agencies advising on funding procedures, research integrity and health ethics and health innovation and translation. The NHMRC could again play a role in SRC research and form a working committee or reference group specific to biomedical research. Other government research grant agencies could coordinate funding programs for social sciences and other disciplines.

Budget 2022/23 provides over \$400,000 million to the Australian Sports Commission and Sport Integrity Australia within the Health and Aged Care Portfolio. The Australian Sports Foundation Ltd (ASF) received donations of \$48,200m. The ASF is Australia's leading sports charity (a wholly owned Cth company established in 1986) whose role is to distribute donated funds to clubs, schools and organisations at all levels of Australian sport for relevant 'essential projects'. The ASF aims to develop an active and healthy nation for all Australians, and according to its website, '*We address issues that block participation in sports. We fund a number of grant programs to help overcome these challenges*'. Perhaps SRC capacity building might be identified as an 'essential project' and involve the ASF at some stage in the future.