

February 21, 2020

Committee Secretary
Senate Select Committee on Administration of Sports Grants
PO Box 6100
Parliament House
Canberra ACT 2600
By e-mail

Re: *SUBMISSION TO THE SENATE SELECT COMMITTEE ON ADMINISTRATION OF SPORTS GRANTS*

Dear Secretary

Thank you for the opportunity to make a submission to this Committee.

We make this submission in our capacity as members of the Centre for Comparative Constitutional Studies ('CCCS') and academic staff of the Melbourne Law School, University of Melbourne. We are solely responsible for its content.

This submission has been prepared on behalf of CCCS by Professor Cheryl Saunders AO, and Professor Michael Crommelin AO.

If you have any questions relating to the submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely,

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SUBMISSION TO THE SENATE SELECT COMMITTEE ON ADMINISTRATION OF SPORTS GRANTS

Introduction

The Committee's terms of reference for this inquiry centre on the administration and award of funding under the Community Sport Infrastructure Grant Program, with particular reference to program design and guidelines.

This submission draws attention to the logically prior, related issues of the constitutionality and legality of the program and the decisions taken in relation to it. These issues are important in their own right, but they also have a direct bearing on the questions about the administration of the program with which the Committee is concerned.

The submission is made in our capacities as members of the Centre for Comparative Constitutional Studies at Melbourne Law School, with support from the Laureate Program in Comparative Constitutional Law.

Constitutional problems

There seems to be some uncertainty about whether the sports grants were made under the *Australian Sports Commission Act 1989* (Cth) or in the exercise of the non-statutory executive power of the Commonwealth. On either basis, there are constitutional problems.

If the grants were made under the *Sports Commission Act* there is no plausible head of legislative power to support most and, perhaps, all of them and they are unconstitutional on this basis. If they are not made under the *Sports Commission Act*, we have been unable to find any other, valid, statutory support for them. In the absence of any such statutory support, the grants are unconstitutional for the reason that they are beyond the proper scope of non-statutory executive power. As the High Court held in *Williams v Commonwealth* (2012) 248 CLR 156, grants and contracts normally require statutory authority. There are significant exceptions, but these are not in issue here. Even if legislation were enacted, it would be invalid unless a head of legislative power could be found in the Constitution to support it; this conclusion follows from our earlier observations about the validity of the grants had they been made under the *Sports Commission Act*.

Administrative law problems

In addition to questions of constitutional validity, the grants also are vulnerable on a range of administrative law grounds.

If the grants were made pursuant to the *Sports Commission Act*, they are invalid for failure to comply with the provisions of the Act. The Act confers on the Commission, not the Minister, the power to make grants for the purposes of the Act. The role of the Minister is severely circumscribed in a way that is familiar in Commonwealth legislation, by conferring on the Minister merely a power to give written directions in relation to policies and practices, in ways that provide for transparency. The effective decision-making role of the Minister, on which the program guidelines also insist, is clearly inconsistent with the statute. In administrative law terms, that role results in the exercise of a statutory discretion 'at the direction or behest of another person', which is unlawful.

In any event, grants made in the exercise of either statutory or non-statutory executive power are governed by legal standards derived from legislation or the common law. Power must be exercised for the purpose for which it was conferred; taking relevant, but not irrelevant considerations into account; in a manner that is legally reasonable; and by a decision-maker that is neither biased nor perceived to be biased. Failure to comply with any of these standards makes a decision void.

The values at stake

Compliance with constitutional and legal requirements is necessary for reasons of the rule of law. The worrying example of the sports grants and other similar Commonwealth grant programs that have come to light in recent weeks illustrates how and why compliance with these requirements also is important for accountable, fair and transparent government and for minimising waste of public money.

- Statutory authorisation of programs that involve the expenditure of large sums of public money has the advantage of ensuring that elected representatives in the public forum of the Parliament can consider the merits of a program and provide a legal framework for it that identifies its purposes, the appropriate decision-maker, the procedures to be followed and the core conditions on which grants are to be made. We note in passing that these advantages are lost where loosely described grant programs are authorised by delegated legislative instruments under section 32B of the *Financial Framework (Supplementary Powers) Act 1997 (Cth)*; a mechanism the constitutional validity of which also is unclear. This mechanism was not used for the purposes of the sports grants, however and we do not pursue it further here.
- Observance of federal constitutional limits on Commonwealth power constrains overlap or inconsistency with State and local government initiatives, in areas for which these levels of government have front-line responsibility. Values served by observing these limits include the equitable provision of facilities and for the efficient use of public funds. Genuine gaps in community facilities identified by Commonwealth MPs can be managed through effective relations between levels of government. If States and territories lack resources, the Australian Constitution provides a mechanism for dealing with that issue through financial assistance under section 96 'on such terms and conditions as the Parliament thinks fit'. The centrality of the Parliament for these grants and the conditions attached to them also should be noted.

Questions

We would be pleased to answer questions about any aspect of this submission.

Conclusion

We cannot emphasise strongly enough the significance of the constitutional and legal issues we have raised. The Australian constitutional system relies heavily on the integrity and effectiveness of governing institutions. These are jeopardised by the sports grants and similar programs, exacerbating the erosion of trust in public institutions which already is a matter for concern. One of Australia's great strengths lies in respect for the rule of law, including (and especially) by governments. This too is placed at risk in the sports grants and similar programs.

The Committee's inquiry offers a watershed moment in which to take stock of Commonwealth spending practice before it gets further out of control.