Submission No 92

INQUIRY INTO INTEGRITY, EFFICACY AND VALUE FOR MONEY OF NSW GOVERNMENT GRANT PROGRAMS

Organisation: Independent Commission Against Corruption NSW

Date Received: 26 August 2020

ICAC
INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES

Mr David Shoebridge MLC
Chair, Public Accountability Committee
Parliament of New South Wales
By email: public.accountability@parliament.nsw.gov.au

Our Ref: Z20/0078

Dear Mr Shoebridge,

Submission to inquiry into the *Integrity, efficacy and value for money of NSW Government grant programs*

Thank you for the opportunity to make a submission to the Public Accountability Committee's inquiry into the *Integrity, efficacy and value for money of NSW Government grant programs*. The submission of the NSW Independent Commission Against Corruption is enclosed.

Should you or any other Committee members have questions, please do not hesitate to contact Mr Lewis Rangott, Executive Director Corruption Prevention,

Yours sincerely

The Hon Peter Hall QC
Chief Commissioner

26 August 2020

Submission of the NSW Independent Commission Against Corruption to the NSW Public Accountability Committee inquiry into the *Integrity, efficacy and value for money of NSW Government grant programs*

August 2020

Introduction

The NSW Independent Commission Against Corruption ("the Commission") welcomes the Public Accountability Committee's ("the PAC") inquiry into the integrity, efficacy and value for money of NSW Government grant programs ("the inquiry") and thanks the PAC for inviting submissions.

In this submission, the Commission has sought to avoid commenting about any specific grants schemes detailed in section 1(a) of the terms of reference. Instead, the Commission's views relate primarily to the matters in sections 1(b) and (c) of the terms of reference.

Grant programs comprise a significant proportion of government expenditure and recent drought and bushfire events have added to the requirement for grant-based funding. As set out in the recent background paper by the NSW Parliamentary Research Service, grant funding is available from many agencies, for a wide variety of purposes.[1]

Historically, the Commission has not made many corrupt conduct findings in relation to grant schemes. This probably indicates that most grant schemes are administered with a sufficient degree of probity. However, the Commission also notes that mismanagement of small amounts of funds may not rise to the level of serious or systemic corrupt conduct, which the Commission is required to prioritise. However, the Commission does receive numerous complaints about grants and it also has a responsibility to promote the integrity and good repute of public administration.

Categorising grants

The term "grant" applies to a variety of dealings. Most government grants, however, can be categorised as follows.

- **Grants provided for community purposes and to support community activities (including infrastructure works and other projects).** While these grants should be assessed for their value for money, they are not necessarily intended to fund a government service or generate a direct return for the government.
- **Grants provided for service provision (including services traditionally provided by government).** Recipients of these grants are effectively funded to contribute to the

[1] NSW Parliamentary Research Service, *Funding Opportunities for Community Groups*, June 2020.

provision of government services. Often, the grant funding is recurring. Such funding may be made available under a commissioning and contestability model. Grant recipients in this category are more likely to be public officials for the purpose of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act").

- **Grants that the recipient can spend according to its own priorities**, sometimes referred to as an untied grant.

In addition, grants are often made from one government agency to another, with the express or implied expectation that the funds will be re-granted for a community-related purpose (for example, funds made available to local councils in response to a natural disaster).

Grants may or may not be subject to legislation. If not, they may simply be sourced from agency funds and be governed by internal procedures. In addition, grants may be subject to ministerial discretion at an individual or collective level through the Cabinet process.

Finally, most grants are subject to detailed eligibility and assessment criteria and associated evaluation processes akin to a tender assessment. Others are awarded on the near-unfettered judgment of a decision maker such as a minister.

Existing government practice

To the best of the Commission's knowledge, the Department of Premier and Cabinet (DPC) circular C2010-16 *Good Practice Grants Administration*, which references the 2010 publication *Good Practice Guide to Grants Administration* ("the Good Practice Guide"), remains the primary guidance for agencies that administer grant schemes. C2010-16 was published in response to a performance audit report issued by the NSW Auditor-General.[2]

C2010-16 contains general advice, stating that:

- departments should review their grants programs and administrative processes to improve transparency and reduce red tape for grant applicants and recipients
- departments should consider consolidating the administration of grants programs where this would improve expertise in grants administration, provide better economies of scale, reduce red tape, or improve program outcomes
- in light of the 2009 report by the Auditor-General, departments should review their programs to:
    - manage risk and streamline procedures to the minimum needed to ensure accountability and value for money
    - improve transparency by publishing a rolling calendar of grants, procedures for making grant decisions, reasons for any variations from normal procedures in the granting or refusal of grants, and evaluation of what grant programs achieved and how the distribution of funds has supported government objectives
    - set up timely monitoring systems, tie payment to clear performance measures and require the recipient to establish internal controls
    - consider using web technology to streamline applications and administration

[2] NSW Auditor-General - Performance Audit, *Grants Administration*, May 2009.

- reduce red-tape by using standard terminology when dealing with grant recipients, set targets to better manage the time taken to process grants, and consider harmonising requirements such as audit thresholds across different grant programs
- regularly evaluate programs and publish the results.

The Good Practice Guide contains advice aligned to a multi-stage grants administration cycle addressing the following stages.

- **Plan and design**, which includes advice about developing performance measures that relate to intended outcomes as well as determining and managing risks, including referencing the Commission's (previous) *Guidelines for Managing Risks in Direct Negotiation*.

- **Promote the program**, which includes advice about developing guidelines that set out the grant's eligibility and selection criteria which are consistent with objectives of the relevant program and procedures relevant to application, assessment, and notification.

- **Receive/process applications**, which recommends establishing a transparent, model assessment process.

- **Offer grants and enter into funding agreement**, which outlines the steps to take for parties to enter into a funding agreement that contains appropriate controls and accountability mechanisms. It suggests that for more complex projects involving significant funds (suggested over $15,000) a funding agreement signed by both parties ought to be in place.

- **Monitor and acquit grants**, which outlines the steps that government needs to take "*to establish that funds are being spent correctly and to measure the results or performance of its spending against the objectives of grants programs*".

- **Evaluate the program**, which outlines the steps to review programs, develop performance measures and undertake an objective evaluation process. It advises reporting the outcome of the evaluation on the departmental website, including an explanation of what the grant achieved and how it has supported government objectives.

The Good Practice Guide makes one brief reference to "funds from a Ministerial or Direct General's discretionary fund" but does not describe whether such a fund is subject to different guidance. Brief references are also made to roles played by ministers in the grants process. However, the guidance is silent on whether and how political objectives may impact the grants process. On its face, the guidance suggests that departing from pre-determined selection criteria is impermissible:

> *Grants programs must have criteria against which applications are assessed. The full criteria should be published when promoting the program and decisions must be made on the basis of the published criteria* (page 12).

While the material in the Good Practice Guide is generally sound, some aspects are dated and a number of hyperlinks appear to be broken or out-of-date. Although the Good Practice Guide uses the word "must" in various places, the document seems to confine itself to guidance. In addition, apart from occasional performance audits carried out by the Auditor-General, each cluster or agency seems to be responsible for setting and assessing any compliance requirements. The Commission itself has not properly assessed the level of compliance with the Good Practice Guide but based on the complaints it receives, compliance across the public sector could be improved.

The Commission also notes that since the Good Practice Guide was issued, machinery of government changes have led to a consolidation of agencies into larger cluster arrangements. This might provide an opportunity to standardise or centralise grants administration practices that were previously left to the discretion of smaller agencies.

Other inquiries and guidance

The Commission notes that, in addition to the PAC's inquiry, the NSW Auditor General has announced she will be conducting a further performance audit report on a selection of grants programs.[3]

On 31 July 2020, the Commonwealth Fraud Prevention Centre also announced a new project regarding grant programs, highlighting that there are elevated integrity risks for government grants in times of crisis or emergency.[4]

The Department of Finance has published the *Commonwealth Grants Rules and Guidelines*[5] ("the Commonwealth guidelines"). The Commonwealth guidelines also apply to grants administration performed by ministers.[6] They include the mandatory requirement that a minister "*must not approve proposed expenditure of relevant money unless satisfied, after reasonable inquiries, that the expenditure would be a 'proper' use of relevant money*" and that the "*terms of the approval must be recorded in writing as soon as practicable*.[7] In addition, the Commonwealth guidelines specify that "proper", means "*efficient, effective, economical and ethical*". The Commission supports that the concept of ethics be added to the three traditional "Es", as a basis of public sector administration and decision-making processes.[8]

The Commonwealth guidelines outline specific mandatory requirements for ministers, namely that they:[9]

- must not approve the grant without first receiving written advice from officials on the merits of the proposed grant or group of grants
- 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.

If a minister approves a grant contrary to the recommendations by the relevant public officials, she or he must report to the Finance Minister all such instances, including a brief statement of reasons.[10]

[3] Auditor Office of NSW, *Grants administration: governance probity and benefits*, July 2020. See https://www.audit.nsw.gov.au/our-work/reports/grants-administration-governance-probity-and-benefits-, accessed 5 August 2020.
[4] Commonwealth Fraud Prevention Centre, *Focussing on grants fraud,* Australian Government, 31 July 2020. See https://www.counterfraud.gov.au/news/general-news/focussing-grants-fraud, accessed 31 July 2020.
[5] Department of Finance, *Commonwealth Grants Rules and Guidelines*, Australian Government, 2017
[6] ibid, p.8.
[7] ibid, p.10.
[8] See the Commission's "Foundations for corruption prevention", accessible at https://www.icac.nsw.gov.au/prevention/foundations-for-corruption-prevention/public-sector-ethics
[9] Department of Finance, *Commonwealth Grants Rules and Guidelines*, Australian Government, 2017, p.12.
[10] ibid, p.13.

PAC members may be aware of two reports by the Australian National Audit Office (ANAO): *Award of Funding under the Community Sport Infrastructure Program* (January 2020) and *Award of a $443.3 Million Grant to the Great Barrier Reef Foundation* (January 2019). These reports made findings about departures from the Commonwealth guidelines, which demonstrate the need for occasional monitoring or audit of grants scheme.

Summary of relevant complaints received by the Commission

To assist the PAC, the Commission has summarised some of the types of complaints it has received about grants since July 2017. These complaints have not necessarily been investigated by the Commission and may or may not have been substantiated by the relevant government agency. They are provided to help illustrate the types of matters that community members might regard as potentially corrupt.

Grant-related complaints, received from members of the public, public officials and agency heads include the following.

- That the process for awarding grants was "light" or did not follow appropriate processes. For example, awarding a grant on the basis of a brief application (or no application) or inadequate community consultation.
- That public officials improperly released information to grant applicants to assist their application.
- That grant applications contained false or misleading information.
- That public officials administering grants schemes held conflicts of interest, which may have be have been concealed.
- Pork-barrelling by government.
- That grants were not awarded on the basis of merit.
- That grants were awarded to people or organisations of poor repute or that are perceived to have engaged in unlawful activities.
- Reporting on successful grant recipients, including the value of the grants, is not clear or transparent.
- Grants were poorly managed, in that it was not clear or apparent what funds were spent on.
- That grant monies were not expended for the approved purpose, to the detriment of the community, including allegations that grants were used for the personal benefit of the recipients, or were simply stolen.
- That grant recipients have breached funding agreements, including situations where payments have been made to recipients that have failed to achieve project milestones or satisfactorily report on progress.

Operation Tarlo

In September 2018, the Commission finalised its *Investigation into the conduct of a principal officer of two non-government organisations and others*, which was known as Operation Tarlo.

The Commission found that Ms Eman Sharobeem, in connection with her senior roles at two non-government organisations (NGOs) – the Immigrant Women's Health Service (IWHS) and the Non-

English Speaking Housing Women's Scheme Inc (NESH) – corruptly misused up to $773,000 of public grant funds.

The Commission found that Ms Sharobeem had, among other things:

- between 2009 and 2015, improperly exercised her official functions to benefit herself by arranging to obtain up to $443,000 from IWHS by way of reimbursement for the cost of goods and services she had purchased for personal use

- knowingly falsified statistics relating to the numbers of attendees for IWHS programs, knowing that the false statistics would be relied on by public sector agencies in determining IWHS grant funding

- improperly arranged for her son to be hired as a paid employee of NESH and facilitated his exclusive use of a NESH vehicle

- improperly applied funds towards the purchase of a vehicle for her husband

- falsely represented herself to be a qualified psychologist with a PhD in psychology.

In its report, the Commission noted that some NGOs, especially smaller organisations, may have:

- limited staff numbers
- incentives to falsify client data, either to enhance reputation or to lobby for increased funding
- volunteer boards with limited time and skills to properly oversee the financial and administrative practices of the NGO and that members of these boards may not be aware of their responsibilities as managers of the CEO and/or other senior staff
- poorly segregated financial practices and controls
- CEOs/coordinators with limited skills in managing staff, and in overseeing financial practices and systems.

The NGOs managed by Ms Sharobeem received recurrent funding from public sector agencies. A major difficulty with monitoring NGOs that are funded in this way is the need to balance effective regulation with the compliance burdens associated with reporting regimes, particularly when an NGO receives funding from a number of sources and may also be subject to oversight by the Australian Charities and Not-for Profit Commission and the NSW Office of Fair Trading.

Twelve corruption prevention recommendations were made as a result of the investigation, which included that:

- relevant public agencies, in conjunction with funded NGOs, develop additional outcomes-based key performance indicators that reflect the critical objectives of the services that they fund. Where possible, measurement of these KPIs should not be based solely on information self-reported by NGOs
- the relevant funding agency adopt a coordinated and holistic framework for monitoring its funded NGOs that incorporates and links NGO governance capability, performance measures and financial reporting
- funded NGOs be required to provide copies of audit management letters from external auditors

- the relevant funding agency develops risk metrics and conducts risk assessments of funded NGOs
- funded NGOs maintain an internal reporting or whistleblowing program.

Full details of the Commission's findings in Operation Tarlo can be found in the public report on its website www.icac.nsw.gov.au.

The involvement of elected officials in the administration of grants schemes

Section 1(b)(iv) and (v) of the inquiry's terms of reference relate to the involvement of elected officials in grants schemes/projects. The Commission's views on this issue are set out below. This content draws from *Investigating Corruption and Misconduct in Public Office* (second edition, 2019), authored by Chief Commissioner Peter Hall QC; in particular, the material dealing with political corruption.

As noted earlier in this submission, the Commission has received complaints alleging that pork-barrelling constitutes corrupt conduct and this inquiry represents a useful opportunity to lay out the circumstances under which this practice, and the practice of favouring marginal seats more generally, might amount to partial or corrupt conduct.

To begin with, it should be understood that elected officials perform a role that is markedly different from unelected or appointed officials. Holders of ministerial office also perform a materially different role to other parliamentarians. In a representative democracy, political imperatives necessarily allow some broad discretionary policy and political considerations to influence government decisions. Put another way, politicians have a legitimate interest in their own election or re-election and are entitled to allow their political objectives to affect the decisions they make. This idea was expressed in the following terms by Mahoney JA in *Greiner v ICAC*:

> *There is no doubt that, in some cases where public power is exercised, it may be exercised after taking into account a factor which is political or it may be exercised for the purpose of achieving a political object*.[11]

Consequently, allocating grants to particular electorates because they are marginal, or otherwise preferred by the government (also known as pork-barrelling), will not, absent other markers of misconduct, amount to corrupt conduct. That is to say, politicians may preference certain electorates, regions, causes or ideological beliefs without engaging in "partial" behaviour within the meaning of the ICAC Act. In addition, creation or expansion of a grant scheme in order to pursue a political objective (for example, prior to an election), is not corrupt conduct. Nor is the practice of announcing an actual or proposed grant as part of an election campaign, possibly in a marginal seat.[12]

Of course, some citizens view pork-barrelling as corrupt, or at least lacking in merit, and politicians are expected to face the resulting political consequences. Equally, just because pork-barrelling is not corrupt or necessarily illegal, it does not follow that it is a desirable way to administer public funds.

[11] *Greiner v ICAC* (1992) 28 NSWLR 125 at 163

[12] In its report *Award of Funding under the Community Sport Infrastructure Program* (January 2020) the Australian National Audit Office noted that its audit was prompted by circumstances surrounding the presentation of a cheque to a bowling club that was successful under the program. The cheque was presented by the government's candidate for the seat, not the local elected member.

Elected officials do not, however, have an unlimited mandate to pursue political objectives. Ministerial discretion, though often free of expressly-stated limitations, is usually not without constraint. The challenge often lies in identifying the source, nature and limits of any constraint. That is a matter of significance in relation to the freedom or scope of ministerial discretion in relation to determining or authorising funding by way of grant funding.

The preamble to the NSW Ministerial Code of Conduct, prescribed in the ICAC Regulation 2017, describes broad obligations to act in the public interest.

> *It is essential to the maintenance of public confidence in the integrity of Government that Ministers exhibit and be seen to exhibit the highest standards of probity in the exercise of their offices and that they pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest . . .*
>
> *Ministers have a responsibility to maintain the public trust that has been placed in them by performing their duties with honesty and integrity, in compliance with the rule of law, and to advance the common good of the people of New South Wales.*

The comments below describe circumstances in which conduct by an elected official might be corrupt, or at least fall within s 8 of the ICAC Act.[13]

Personal benefit

Clearly, any public official who obtains a personal benefit from the exercise of his or her public duties in relation to a grant of public money, is likely to have engaged in corrupt conduct and possibly the common law offence of misconduct in public office. Conferring benefits on family members, friends and close associates is similarly impermissible, as is deliberately concealing or understating a conflict of interest.

Breaches of public trust

Elected officials have a clear duty not to breach the public trust. This point was also discussed by Mahoney JA in *Greiner v ICAC*:

> *In the case of a high official the power of office carries, by its nature, influence over others. This is particularly so in the case of a Minister who may exercise not merely legal but political power.*
>
> *In the exercise of such power and influence, a Minister may be subject to little or no formal scrutiny; he is trusted to exercise the power properly. The misuse of public power in breach of such trust may be regarded as of particular seriousness*.[14]

Section 8 of the ICAC Act states that a breach of public trust by a public official is an example of conduct that could be corrupt (if not excluded by s 9). If the breach of trust is sufficiently serious, the public official may have engaged in the common law offence of misconduct in public office.

Even if a grant is allocated to a marginal electorate in order to advance a political objective, it must still serve a public purpose. Grants that benefit private interests at the expense of, or without due consideration of, the public interest are improper and may amount to a breach of public trust.

[13] In order to be corrupt, relevant conduct must fall within s 8 of the ICAC Act but not be excluded by s 9. Broadly speaking, s 9 acts to confine corruption to conduct that is serious in nature.

[14] *Greiner v ICAC* (1992) 28 NSWLR 125 at 175

Breaches of public trust can also arise where the action of an elected official interferes with merit-based processes executed by public servants.

Most grant schemes require applicants to make detailed submissions addressing pre-determined selection criteria. Community members, many of them working on a volunteer basis, spend many hours preparing their application to be awarded a government grant.

Similarly, unelected public officials devote considerable time and skill to designing grant programs in a way that aims to maximise public benefit. They also spend time and money: advertising and explaining grants programs, evaluating and ranking grant applications, advising successful and unsuccessful applicants, administering the transfer of funds and overseeing the outcomes of grant-funded projects. Because public servants are required to be apolitical, all of this endeavour is aimed at merit-based outcomes. When a grants scheme is held out to the public as having a prescribed set of merit-based eligibility and selection criteria, applicants ought to be able to trust that the advertised process will be followed.

Depending on the specific circumstances, the following conduct is capable of amounting to a breach of that trust.

- Designing eligibility and selection criteria for the purpose of favouring a particular applicant, at the expense of the public interest.
- Intentionally misapplying, or directing a public servant to intentionally misapply, nominated selection criteria (including a direction to give preference to an ineligible grant application).
- Encouraging a public official to create false or incomplete records or to conceal the involvement of an elected official, or any other wilful suppression of information about a grants scheme (for example, by interfering in a response to an application made under the *Government Information (Public Access) Act 2009*).
- If the minister is not the appointed decision-maker, directing or urging a public servant to make a decision preferred by the minister.
- A deliberate failure to act on reasonably suspected, or substantiated fraud, misappropriation or misuse of grant funds.[15]
- Action that leads to an unsuccessful applicant being provided with false information about why it was not awarded a grant.

The risks of political interference in a merit-based process were highlighted by the ANAO in its January 2020 report *Award of Funding under the Community Sport Infrastructure Program.* The ANAO found that in parallel with a process being carried out by the relevant department, "*the Minister's office had commenced its own assessment process to identify which applications should be awarded funding. The Minister's office drew upon considerations other than those identified in the program guidelines, such as the location of projects, and also applied considerations that were inconsistent with the published guidelines*".[16]

The ANAO report went on to state that "*It is poor practice for entities to be instructed what their advice should recommend, or for entities to recommend what they understand to be a preferred*

[15] Making or using false or misleading applications, information or documents may be a criminal offence under s 307A, B or C of the *Crimes Act 1900*.

[16] Australian National Audit Office, *Award of Funding under the Community Sport Infrastructure Program*, January 2020, page 8.

approach rather than providing their own recommendations that are developed through an evidence based approach".[17]

In short, any action by a politician that causes a public servant to do or say something that is dishonest or contrary to the stated terms and conditions of a grants program, may breach public trust. If sufficiently serious, the conduct may rise to the level of corrupt conduct.

This means that if a politician wishes to engage in pork-barrelling in order to pursue a political objective, she or he should not do so by creating the false impression of an objective, merit-based grant scheme.

A caveat should be noted here. Ministers are not generally obliged to follow the advice and recommendations of public servants. Such advice can be, and often is, disregarded. But a minister must take great care when substituting his or her opinion for the recommendation of a public servant or committee that has assessed each grants application against the detailed, technical selection criteria.

Where a grant scheme is designed and assessed on the basis of specified eligibility and selection criteria, it would be a rare case (if any) in which a grant should be made (by a minister or anyone else) if the required criteria were not satisfied. A completely arbitrary decision in those circumstances may be seen as an improper exercise of power undertaken with a wrongful intent. That is, a minister may not be at liberty to depart from the "rules of the game".

In the Commission's view, to promote accountability, a minister ought to provide reasons for such decisions, which should be recorded and transparent. As stated in the final "WA Inc" report, "*In a democratic society, accountability to the public is the indispensable check to be imposed on those entrusted with public power*".[18]

As noted in the *Report of Fitzgerald Commission of Inquiry* ("the Fitzgerald Report"), a useful distinction can be made between policy development and policy implementation:

> *Political (but not personal) considerations are properly taken into account in the formulation of policy. Political considerations have no legitimate role (or, at most, a very limited role) in the implementation of policy to arrive at decisions on specific matters, for example to whom a contract should be awarded or whether a land re-zoning should be granted.*
>
> *Unless politicians are forced to consider carefully the ramifications (including the political consequences) of their actions, they may easily overlook the distinction, and the implementation of policy can be influenced by loyalties to political parties and to those who provide support, including financial support, for political objectives*.[19]

The Commission agrees with the views expressed in the Fitzgerald Report. Ideally, politicians should be substantially involved in the policy making process. This can involve the initial decision to create a grants scheme, the amount of taxpayer funds to be provided and the public benefits to be gained.

[17] ibid. page 13.

[18] *Report of the Royal Commission into Commercial Activities of Government and other Matters*, November 1992, Part II, Chapter 3, section 3.1.1.

[19] *Report of Fitzgerald Commission of Inquiry*, 1989, section 3.2.1, p.126

However, where a politician becomes involved in determining which applicants are successful, the risks explained by Fitzgerald may be realised. The Commission therefore recommends that the involvement of elected officials in grants administration be minimised, or at least codified.

Finally, the Commission notes that its observations about potential breaches of public trust by elected officials have broader application. Procurement and contracting, appointments to the senior executive service and carrying out regulatory functions are other areas where policy making and policy implementation are potentially incompatible.

A recent example was reported by the Queensland Crime and Corruption Commission ("the CCC") in its report, *An investigation into allegations relating to the appointment of a school principal*. The report examined allegations of political involvement in what should have been a merit-based appointment. The report stated:

> *The CCC submits that in some cases public servants may feel pressure to be "over-responsive". The conduct uncovered here demonstrates the real danger of public servants being "over-responsive" or "over-sensitive" to the perceived wishes of their political masters.*
>
> *The risk of it occurring is something all Ministers and all public servants should be mindful of. If Ministers engage in conduct designed to have this effect, they are undermining the conventions that govern political–administrative relationships, and public servants who succumb to the pressure are failing to discharge their duty*.[20]

The role of ministerial advisers

Much of the preceding commentary about elected officials can be applied to their staff. While staff such as ministerial advisers are usually not in official decision-making roles, they can exercise influence over the outcomes of a grants scheme. Ministerial staff are also often involved in media activities associated with the announcement of grants.

This was illustrated in a 2010 investigation by the Queensland Crime and Misconduct Commission ("the CMC"),[21] *Report on an investigation into the alleged misuse of public monies, and a former ministerial adviser*. The report concerned a $4.2 million grant made to the Queensland Rugby Union ("the QRU"). The grant was arranged in some haste, in order to allow the relevant minister to announce it at an opportune moment. The CMC report details evidence that the grant was made on the basis of limited information from the QRU and involved a highly unusual payment arrangement.

In addition:

- there was evidence that $200,000 of the granted funds were given to another party, for a purpose not covered by the funding agreement
- numerous key discussions about the proposed grant were not documented
- the relevant minister told the CMC she was unaware that a member of her staff was issuing junior public servants with instructions about progress of the proposed grant.[22]

Among other things, the CMC recommended "*That government departments and agencies be encouraged to introduce transparency measures, such as a statement of rationale, in respect of documenting their decision-making processes where a final decision by government overrides agency*

[20] Corruption and Crime Commission, *An investigation into allegations relating to the appointment of a school principal*, July 2020, pages 77-78.
[21] The CMC became the CCC in July 2014.
[22] See Chapter 5 of the CMC report.

advice".[23] This recommendation is consistent with the Commission's earlier observation about the need for politically-driven decisions to be made transparent.

The "WA Inc" report also touched on the role of ministerial staff where it said:

> *For so long as the salaries if such staff are paid from the public purse, their position and roles, no less than those of any other public official, must be made clear. Their employment cannot be a private matter between themselves and their minister.*
>
> *. . . There can be no retreat from the principle that those who assume to exercise public power , whether through command, the exertion of influence or otherwise, be held accountable to the public for their actions.*[24]

Due diligence in grants administration

As its name suggests, the Commission's recent publication, *Supplier due diligence: a guide for NSW public sector agencies* (June 2020), is aimed primarily at guiding agencies with regard to best practice due diligence procedures when engaging suppliers. However, the publication can also be applied to the administration of grants.

Performing due diligence on grant applicants is important because it can:

- increase the probability of allocating grants to reliable, bona fide recipients that will successfully fulfil the conditions of the selection criteria and funding agreements and provide value for money
- maintain trust in public administration since it is in the public interest for funding decisions to be fair and based on merit. It is therefore desirable for agencies to make informed decisions about grant applicants, including whether they have a history of poor performance
- prevent corrupt conduct. Poor due diligence can increase the risk of public agencies awarding grants to applicants who provide false or misleading information, and who may have previously misused public funds
- encourage compliance with legal and regulatory requirements. This can include ensuring that agencies ensure that grant applicants do not have criminal records that could preclude their eligibility for funding.

The Commission recommends that agencies take a risk-based approach to assessing applications prior to awarding grants and during the course of the agreement. Due diligence checks are aimed at establishing:

- is the applicant genuine?
- is the applicant capable and reliable?
- has the applicant any record of previous poor financial management, including fraud?
- does the applicant have the required authorities, licences, and current, or proposed, qualified staff for the services it proposes to deliver? With certain grant applications, it may be important to verify that the recipient is a bona fide not-for-profit organisation, registered with the Australian Charities and Not-for-profits Commission

[23] ibid, p.viii.

[24] *Report of the Royal Commission into Commercial Activities of Government and other Matters*, November 1992, Part II, Chapter 6, sections 6.4.3 and 6.4.10.

- is the applicant of good repute and integrity?

The level and complexity of the due diligence checking will depend on a number of factors including:

- the amount of money awarded
- whether it is a one-off grant or recurrent funding
- what the funds are to be spent on – for example, organisations that are funded to provide human services on behalf the government may warrant closer scrutiny
- the cost of verifying the outcomes of the grant
- the existence of compliance obligations (for example, mandatory working with children checks).

Common probity issues in grants administration

As all grant programs involve public money or assets, the probity principles of transparency, accountability and fairness should be observed. Grants should also be directed towards purposes that are consistent with government objectives. However, the Commission believes that there should be a greater focus on the probity principles for high-risk grant schemes, including those involving complicated arrangements, high values, where the consequences of poor performance are significant and where a grant transfer to a recipient is intended to provide equal (or greater) value to government.

As grants for funded services are often considered high-risk, there should be a strong focus on probity requirements in respect of these arrangements, particularly when it comes to selecting recipients, performance monitoring and assessing outcomes. As a result, such grants are typically subject to performance-based contracts, clearly defined outputs and outcomes and assessments of whether value for money was achieved. In addition, high-risk grants should be award based on the outcome of competitive selection processes which involves the due diligence described above.

Based on the Commission's information holdings, complaint handling experience and corruption prevention work, the following probity issues can arise in a grants scheme:

- absence of an open, public application process, so that the grant has the appearance of a direct negotiation between the recipient and government
- no eligibility or selection criteria, which might include absence of an evaluation methodology and weightings, or criteria that are vague or highly subjective
- evaluation methodology that is incompatible with the stated eligibility and selection criteria
- misapplication of eligibility and selection criteria
- applicants missing out on funding despite being ranked above other applicants that were successful
- eligibility and selection criteria that are so strict that they unreasonably or deliberately narrow the field of potential recipients to a very small number
- a public official having an undisclosed conflict of interest, such as a personal relationship with a grant applicant[25]
- applicants receiving grants after originally being excluded on the basis of ineligibility

[25] The June 2020 ANAO report *Management of Conflicts of Interest in Procurement Activities and Grants Programs* and the Commission's April 2019 publication *Managing Conflicts of Interest in the Public Sector* are useful guides for agencies wishing to manage conflicts of interest.

- applicants receiving grants without having submitted an application, or after submitting a late application
- applicants receiving more funding than is requested or required
- applicants being funded to produce outcomes that are incompatible with their delivery and governance capabilities
- funding being made to an entity outside the bounds of any accepted grants scheme, such as a grant that appears to be a one-off ex gratia payment
- scheme conditions containing inadequate provisions requiring grant recipients to acquit the use of funds.

While the Commission would not necessarily expect very small, one-off grants to be the subject of detailed procedural requirements, any established grants scheme should be administered so that the risk of these probity issues is minimised.

The importance of financial controls

In the case of procurement, the normal practice is to pay a supplier's invoice *after* the goods or services have been delivered. With grants, the sequence is usually reversed: payment is made *before* anything is delivered. This obviously heightens the risk that granted funds will be misspent or that the objectives of the grant will never be fulfilled. On rare occasions, the funds are simply stolen or used for an illegitimate purpose. As discussed earlier, an example of this was the Commission's Operation Tarlo.

Comparing again with procurement, when paying a supplier invoice, most agencies use a 'three-way match' process which involves comparing the invoice with an authorised purchase order (PO) and a goods/services receipt, all of which should match. Most agencies use finance systems that require the PO be approved electronically by an officer whose delegations are programmed into the system.

With grants, there is no purchase order, so a three-way match cannot be performed, at least not in the normal way. Similarly, an agency's process for creating a grant payee might be less robust than the process for creating a supplier. This triggers some additional risk that agencies will transfer funds that have not been properly authorised. The Commission would expect agencies to have compensating controls that establish a source of funding and document necessary approvals.

Tracking re-granting and grants from different sources

It is common for NGOs to receive funding from numerous sources, including multiple government agencies.

For instance, the Commission's consultation paper into the funding of human services NGOs[26] described a case where one small organisation received approximately $1 million in government funds per year to deliver certain services from "five programs spread across nine agencies and three jurisdictions".

[26] NSW ICAC, *Funding NGO delivery of human services in NSW: A period of transition: Consultation Paper*, August 2012, section 4.1.

In addition to potentially creating an unnecessary administrative burden on grant recipients, such arrangements make it very difficult to efficiently determine what was achieved from a given funding agreement. This is particularly the case where the funding in question is designed to subsidise the delivery of the service, as opposed to fully finance it.

Such circumstances are not unique to human-services funding. They are also applicable to grants for services more generally, and even infrastructure and community grants. For instance, funding to renovate a community facility may come from a state government scheme, the local council as well as private sector donors.

The Commission's subsequent position paper on NGOs[27] recommended that this complexity be addressed through service bundling and the use of an integrated contracting model to reduce the number of agreements between government and NGOs. Such an approach is generally applicable to funding service delivery but is less so for other types of grants.[28]

Other approaches that can be taken to enhance transparency and accountability include asking the grant recipient to specify:

- what will be achieved by the specified grant
- what will be achieved by the grant in combination with other funds held or received by the grant recipient.

Additional challenges arise when government grants funds are used by the recipient to fund another entity, which is sometimes termed "re-granting". This may happen, for instance, when the NSW Government provides a grant to a local council which then uses some of or all the money to fund a local community organisation.

There are two key considerations in these situations:

- How can the initial funding agency obtain assurance that the originally granted funds were used in the manner intended? Similar to supply-chain assurance challenges, a responsibility to obtain such assurance still remains with the original agency (with the possible exception of untied grants).
- How can "double dipping" be prevented? An entity may receive funds directly from the NSW Government and funds that have been re-granted by a different grant recipient. How can assurance be obtained that the NSW government has not paid twice for one set of deliverables?

While a one-size fits all approach is unlikely to be suitable, communication and clear accountabilities are key to managing these risks. Potentially relevant controls include:

- setting clear conditions about when and how re-granting is permitted
- specifying the details of how re-granting should be reported to the funding agency
- determining responsibilities and methodology for reporting on and evaluating outcomes when funds are re-granted
- using an account management model when one agency has responsibility for liaising with the grant recipient regarding all direct and indirect government funds.

[27] NSW ICAC, *Funding NGO delivery of human services in NSW: A period of transition: Position Paper*, December 2012.

[28] It is for this reason that the Commission's position paper recommended that grants (a) not be used as a vehicle for funding human services delivery and (b) be managed separately to other funding arrangements.

Evaluating outcomes

Merely awarding a grant does little, if anything, to advance the public interest. Benefits are only generated when the funding has been applied to its intended purpose, which is why the administration of grants schemes should involve a process for verifying outcomes. Most grant programs involve an acquittal process. This typically involves the recipient lodging a report, perhaps with supporting documentation, explaining how the funds were used. Established grant programs often have a standard acquittal template that recipients must complete.

In some cases, an agency can adequately verify the use of grant funds by examining the acquittal documentation. However, for more complex and costly grants, agencies may have to take additional steps to satisfy themselves that value for money has been obtained. Agencies may underestimate the time and cost required to properly verify the use of a grant. It may, for instance, take considerable time and effort to:

- follow-up on acquittal paperwork that is not complete or ambiguous
- conduct site visits (for example, if the grant is to build/purchase a new asset)
- conduct a detailed examination of supporting information such as bank statements, invoices, written reports and photographic evidence
- if the grant is used to fund an employee's salary, verify that the employee has worked on tasks related to the purpose of grant
- check that all undertakings made by the applicant in its grant application have been delivered
- verify that any matching funds required from the recipient have been produced and properly applied
- identify any unspent funds that need to be returned to the agency
- check that the grant recipient has not used funds from another source to deliver outcomes funded by a NSW Government agency (as discussed elsewhere in this submission)
- verify that significant expenditures have been approved, and documented, in accordance with the acquittal requirements and with the grant recipient's financial policies and procedures.

In addition, in some cases, a significant period of time elapses between the grant of public funds and the completion of the relevant project. This can add to the costs of verification, especially if record keeping is poor or where there is turnover in agency personnel.

Finally, in situations where a grant has been made to an ineligible applicant, outside an approved scheme, or in order to pursue a political objective (all of which are discussed elsewhere in this submission), the verification process is further complicated. In these situations, the approved purpose of the grant is less likely to be documented and a public official may have no legal basis for assessing value for money. Where the grant is connected with a political objective, any misuse or misapplication of funds by the recipient could be politically embarrassing. This may create challenges because public officials tasked with accounting for the use of taxpayers' money should not be deflected by the possibility of political embarrassment.

Follow-the-dollar powers

The Public Accounts Committee has previously recommended that the Audit Office of NSW ("the Audit Office") be given "follow-the-dollar" powers.[29] Currently, the Audit Office cannot audit the use of taxpayers' money once it passes into the hands of a non-government entity, such as a grant recipient. Follow-the-dollar powers would give the Audit Office scope to conduct performance audits (but not financial audits) of grant recipients and improve overall accountability of the way public funds are used. Given the move towards commissioning and contestability models of government service delivery, such powers make sense.

The Commission supports the creation of follow-the-dollar powers for the Audit Office and understands this is consistent with practices in other states.

Grants with no acquittal

There are some grants, usually for small amounts, which are not tied to a specific purpose or outcome. They are effectively subsidies paid to a recipient whose endeavours are assessed as warranting support. In these cases, there is generally no acquittal process and no need to verify how the funds are spent. Value for money issues are addressed when the grant is assessed and due diligence procedures (discussed above) are performed. While this is a valid method for making small, straightforward grants, it should not be overused and public officials are still responsible for assessing merit and value for money.

Recommendations

In the Commission's submission, it is open to the PAC to recommend that the DPC's *Good Practice Guide to Grants Administration* be revised. A revised Good Practice Guide should address:

- obligations to act ethically and in accordance with general probity principles such as transparency, accountability and fairness
- the proper role of ministers, other elected officials and their staff in the grants process
- better practice from other jurisdictions, such as the *Commonwealth Grants Rules and Guidelines*
- the key findings and recommendations in Operation Tarlo
- the need for some mandatory requirements in grants administration such as:
    - elements of a grants scheme that must be made transparent
    - use of formal funding agreements with standard terms and conditions
    - independent audits for large or complex grants.
- the need for a single online directory of available grant schemes, including their terms and conditions.

The need for follow-the-dollar powers should also be considered by the PAC.

[29] See the NSW Public Accounts Committee's report on the *Efficiency and effectiveness of the Audit Office of New South Wales,* 2013, and its *Quadrennial Review of the Audit Office,* February 2018.