

CMC PUBLIC INVESTIGATIVE HEARING 08/2009

FURTHER SUBMISSIONS MADE BY CRAIG MATHESON

Addressing systemic issues

Improving the grants assessment and decision making process

There are a number of process adjustments that could be considered that either individually or collectively, would improve the transparency of the grants assessment and decision making process. These adjustments would require a reconsideration of current processes, impose a clear separation of the department from the portfolio minister in decision making and provide greater evidence of the application of endorsed assessment frameworks.

The most significant adjustment that should be considered is that of final decision making responsibility for the awarding of grants and related funding being removed from ministers and residing either with departments or independent assessment panels. This would remove a Minister entirely from the assessment and decision making process, but still enable the Minister to make public announcements of funding decisions - given this is a matter of high priority for most Ministers.

The portfolio Minister could still articulate his or her policy priorities for funding programs and schemes through the approval of the program guidelines (which presently occurs) and specific directions to the department or the independent assessment panel (which should be documented via the process outlined below).

Furthermore, in managing the funding assessment and decision making process, departments and/or independent assessment panels should look to adopt some or all of the following practices to strengthen the integrity of these processes:

1. Formulation of clear program guidelines with well articulated priorities, parameters and/or scope for Ministerial direction and publication of clear assessment tools;

2. Clear documentation of all assessment comments and stages, including certifications by assessors at each stage of the assessment process that the assessment has been conducted in accordance with the program guidelines;
3. Assessment comments, certifications, any Ministerial directions and decisions on individual requests for funding be disclosed in departmental publication schemes under the *Right to Information Act 2009* - once the funding decision is announced. In this way, all information that was relevant to the assessment of a funding application would be available automatically for public scrutiny (as opposed to being only made available on the request of the applicant or in response to a Right to Information request);
4. Where funding is allocated through a program round, the processes associated with the administration of the program round be reviewed by the department's Internal Audit Unit at the conclusion of each round. Where funding is not allocated through a defined round but on an "as request" basis, the processes associated with the administration of the program should be reviewed by the Internal Audit Unit on an annual basis;
5. Clearly defined and independent review processes should be available to unsuccessful applicants; and
6. Departments (not Ministers or their staff) are responsible for the administration of an approved grant including the determination of the terms of funding agreements. Any departures from the terms of a standard departmental funding agreement should be endorsed by the Director-General as the accountable officer for the agency.

In relation to "out of round" requests for funding, such as occurred in the case of the grant to the QRU, the practices outlined above should also apply. In these cases, it is important that:

1. Decisions on the request for funding should be made by the department or an independent assessment panel – not the Minister;
2. Any directions from the portfolio Minister (or from the Ministerial office on behalf of the Minister) should be documented in line with the process outlined below;
3. There should be clear documentation of the assessment process and certification by the Director-General (or delegate) that the request for funding has been assessed against the guidelines in existence at that time for the relevant funding program. This could be further reinforced by the inclusion of a checklist as part of the assessment documentation which verifies what documentation has been received from the applicant for the basis of the assessment and the criteria from the relevant program guidelines that were applied through the assessment process.

Directions from the Minister or the Ministerial office

It has been stated in evidence at the Public Investigative Hearings that Ministerial staff do not have the legal authority to direct departmental officers. The practical reality is however, very different as senior Ministerial staff (such as the Chief of Staff, Senior Policy Advisor and Senior Media Advisor) are regularly the conduit for instructions and advice from the Minister to the department. This reflects the realities of the competing

demands on Ministers' time, that Ministers are often not physically located in the same premises as their departmental staff and the particular operating style of individual Ministers who may wish to maintain some distance from departmental officers.

It is accepted practice in Westminster systems of Government that Ministers have the prerogative to issue instructions to their departments, with the convention that this is done through the Director-General. However, with the growing size and complexity of departments and the demands on Directors-General of supporting multiple Ministers, it is no longer reasonable or practical for all Ministerial communication with the department to be confined through the channel of the Director-General. Indeed, in his evidence to the hearing, Mr Kinnane made it clear that Mr Tutt – as the Minister's Chief of Staff – regularly communicated with other departmental officers and that he agreed for this to occur on operational issues and matters of detail, but that all matters of policy should be communicated through him.

It should not be an unreasonable expectation that Ministers be prepared to document directions and instructions which they issue to departments and departmental officers – particularly where they relate to a decision making process that confers a benefit or impacts adversely on the participants in the decision making process or on a third party. The reality is however, that Ministers are generally not favorably disposed to formalising such instructions in writing, preferring to convey such matters verbally and rely on the Director-General or the departmental officer to implement the Minister's requirements.

Achieving a balance that encourages and supports Ministers to formalise such directions and empowers the department to manage a process that does not threaten the working relationship with the Minister and his or her office is a difficult challenge. Any system for formalising Ministerial directions will only be successful if there is significant cultural change, clear direction from the Premier and Cabinet and appropriate protective measures in place for Directors-General and their departments.

In the interests of maximising the integrity of such a system, consideration could be given to a statutory scheme where departments are required by statute to maintain a register of Ministerial directions/instructions. It is worth noting that a similar recommendation was made in the Fitzgerald Report (*Part C-Police-Recommendation 36 on page 383*) in respect of policy directions given by the Minister to the Commissioner of Police.

The requirements for the establishment and maintenance of such a register – along with criteria to assist in determining whether a matter constitutes a Ministerial direction or instruction – could be inserted in an appropriate legislative instrument, such as the *Public Service Act 2008*. Characteristics of such a register could include:

- the register is maintained by the department, but accessible to the Minister at all times for information purposes;
- directions and instructions would only be included or removed from the register by the Director-General;

- the Minister is afforded the opportunity to question the inclusion of a matter on the departmental register and the Director-General may, on consideration of the Minister's representations, decide to remove or amend an item on the register;
- there is no obligation on departments to implement Ministerial instructions or directions that are not included on the departmental register;
- Ministerial instructions or directions included on the departmental register are appropriately referenced in relevant ministerial submissions/briefing notes; and
- Departments are to disclose information in relation to their register of Ministerial directions and instructions in their annual reports.

Empowering public servants

Many of the measures outlined above, if implemented in a supportive environment, will provide some of the institutional levers to empower public servants in the discharge of their responsibilities. In particular, removing Ministers from the funding decision making process, ensuring audits occur of each funding program round, pushing information on grant assessments into the public domain through departmental Publication Schemes and requiring departments to establish registers of Ministerial directions/instructions would collectively provide a "package" of measures to enhance the transparency of departmental processes and significantly reduce the scope for impairing relationships between the Minister, his/her office and departments.

Mr Matheson is not so obtuse as to believe that these measures will absolutely ensure a non-recurrence of the circumstances surrounding the grant to the QRU or that Ministers will never again influence or intervene in the assessment and decision-making processes of departments or independent bodies. However, the measures outlined above do provide the opportunity to formally distance the Minister from the deliberative processes of departments and lessen the opportunity for Ministers or their staff to manipulate departmental officers and processes.

Such safeguards are necessary in an environment of contract employment for senior executive staff. While there is no objection to the concept of contract employment for chief and senior executives, it is undoubtedly the case that the prospect of non-renewal of an employment contract can have an influence on a chief executive or senior executive's decision to object to or question Ministerial directions or requirements. It is considered that some of the institutional levers outlined above – if implemented – will go some way to reducing the occurrence of instances where public servants will find themselves at odds with Ministerial requirements.

Craig Matheson

3 January 2010