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31 July 2017

The Honourable Greg Hunt MP
The Minister for Health and the Minister for Sport
CANBERRA ACT 2600

Dear Minister

Submission – Inquiry into a National Sports Plan

Thank you for the opportunity to participate in the consultation process outlined in the National Sports Plan. The views in my submission are my own personal opinions and do not in any way represent Bond University

Please find **enclosed** my submission for your consideration. Please contact me if you have any questions regarding this submission.

Yours faithfully



Annette Greenhow
Assistant Professor

Encl.

Submission in response to the Development of a
National Sports Plan in Australia

Submitted by
Assistant Professor Annette Greenhow

July 2017

Introduction

The development of a National Sports Plan is a long-awaited and necessary step in Australian sport and presents an opportunity to yield new insights into the modern conceptualisation of sport, government and society in the 21st Century and beyond.¹ This submission is focused on one aspect of the consultation and responds to the question around collective approaches to improve population health and government's role in sport.

A central theme in this submission is the important role that government can play in setting and driving the sports agenda in Australia, working collaboratively with National Sporting Organisations (NSOs) and other stakeholders in achieving the primary objective of keeping Australians active. This facilitative and enabling role is essential to ensure that the guardian of the sport – the sport's governing body – meets the expectations of community, government and external stakeholders.

The Intergenerational Review of Australian Sport 2017 identified the risk to Australia's sporting future if steps are not taken to improve participation results beyond the projected decline of 15% by 2036.² To that end, the BCG Report developed a five-step approach to achieving the new aspiration of increased participation in Australian sport. Underpinning each of these steps is the need to ensure that there is a safe sporting system.

A special vulnerability exists in sport where participants place trust and confidence in others to protect private interests, including health and welfare, with expectations of technically competent practices and adherence to the highest standards. Parents and carers need to be confident that their children are participating in a system that meets the highest of standards and upholds the duty of care owed to participants. Individuals need to be assured that they are entering a system that respects this duty of care. This is not to suggest that the obvious or inherent risks associated with the sport are softened, or the essence of a sport is altered to detract from the 'rough and tumble' of the game. Rather, the central plank of this submission is that a safe sporting system encompasses principles of transparency, accountability and maintenance of the duty of care owed to participants.

This submission is based on the role of government in the regulatory space of sport and brings into the discussion modern conceptualisations of regulation that have both academic soundness and practical application. Understanding the regulatory system in sport can yield new insights into determining who should be responsible for setting and driving the regulatory agenda.

¹ Earlier Commonwealth Government reports have looked at the need to consolidate and develop a national approach to sport. For further discussion, see Independent Sport Panel, *The Future of Sport in Australia* 2009 and *Shaping Up A review of Commonwealth Involvement in Sport and Recreations in Australia* (1999) 1. Constitutional constraints have hindered Commonwealth efforts in the past.

² The Boston Consulting Group, *Intergenerational Review of Australian Sport 2017* (BCG Report).

This submission will:

- (a) outline some introductory concepts involving regulation and the regulatory space of sport; and
- (b) provide a case study analysis of sport-related concussion and the recommendations in the United Kingdom regarding the role of government vis-a-vis the duty of care owed to participants and improving population health.

I. Regulation and Sport

The concept of regulation has matured over the decades, and contemporary public and academic discourse extend regulation to mean much more than state or legal interventions in the form of draconian ‘command and control’ regulatory methods.

Conceptualising Regulation

Regulation is greater than rules and regulatory burdens and includes innovative tools and instruments developed to advance public policy objectives and perform a facilitative or enabling role through positive regulatory interventions.³ In this submission, reference to ‘regulation’ is taken to mean the intentional activity of attempting to control, order or influence the behaviour of others to advance the public policy objective of providing a safe sporting system.⁴

Regulatory Actors

Regulatory actors can include individuals, peer groups, associations, firms (both incorporated and unincorporated), unions, NGO’s, governments, supra-governmental agencies, standard-setting organisations and global organisations.⁵ Government, as representative of the public, always occupies a position within the regulatory space, acting as the body politic and provider of the legal, economic and political systems. The degree to which government is involved depends upon the activity under review.

Regulatory Space

The notion of regulatory space assumes that regulatory power does not belong to one actor and can involve state and non-state actors. Regulatory power is dispersed throughout the space and involves actors who individually or collectively have the authority to influence or

³ A range of strategies are available to state and non-state regulatory actors. For further discussion, see A. Freiberg, ‘Re-Stocking the Regulatory Tool-Kit’ (2010) Working Paper No. 15, Jerusalem Forum on Regulation & Governance, 1–45.

⁴ J. Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy*, 1. For further discussion regarding the advancement or promotion of public policy, see A. Freiberg, *The Tools of Regulation* (The Federation Press Australia, 2010) 3, 51.

⁵ L. Hancher, M Moran, ‘Organising Regulatory Space’, in Robert Baldwin, Colin Scott and Christopher Hood, *A Reader on Regulation* (Oxford Scholarship Online, 2012); C. Scott, ‘Analysing Regulatory Space: Fragmented Resources and Institutional Design’ (2001) *Public Law (Summer)* 329-353.

alter the behaviour of others. In such cases, the regulatory system has described as polycentric and:

marked by fragmentation, complexity and interdependence between actors, in which state and non-state actors are both regulators and regulated, and their boundaries are indicated by the issues or problems which they are concerned with, rather than necessarily by a common solution.⁶

In the complex structure of any political society, there exist multiple levels of regulatory systems ranging across the broad categories of self-regulation, co-regulation, meta-regulation and direct government regulation. The state plays a role within each system, ranging in scope from a silent witness or passive observer (in private self-regulation) through to direct intervenor using command and control regulatory mechanisms (direct government regulation).

The Current Regulatory System in Sport

Consistent with current trends in regulation, sport is primarily regulated through a voluntary or consensual self-regulated private system. The ‘voluntary’ nature of self-regulation is based on the absence of any mandate, sanction or coercion on the part of government.⁷ A group of persons (natural or corporate) acting together perform a regulatory function in respect of themselves, over which others accept their authority.

Dominant Regulatory Actors in Sport

An environmental survey of sport identifies the sport’s governing body as an actor occupying a dominant position of influence and control within the regulatory space, albeit with many intervening layers within the organisational hierarchy.

International sporting federations (ISF), NSOs and, for Olympic sports, the IOC and National Organising Committee’s primarily regulate global sport, operating within a multi-layered system of voluntary self-regulated associations. The sport’s governing body is the custodian or guardian of the sport and has been described as ‘holders of the public trust’ and ‘guardians of something which is precious to millions...’⁸

As rule-maker or standard-setter, the sport’s governing body exercises significant degrees of power and control over those who participate in the sport; either directly through contractual relationships and economic controls or indirectly through relationships based on

⁶ J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137.

⁷ J. Black, 'Constitutionalising Self-Regulation' (1996) 59 *The Modern Law Review* 24-55.

⁸ UK Sport, A Charter for Sports Governance in the United Kingdom.

social or cultural norms.

For many of its functions, sport is well suited to self-regulation due to a range of factors that include its special characteristics, its high social utility and the public function performed by private actors in this regulatory domain. Traditionally, governments have recognised the autonomy of sport by adopting a traditional ‘non-interventionist’ approach when it comes to regulating sport.

However, regulatory scholars agree that voluntary self-regulation is not considered an appropriate option for regulating activities that involve matters of ‘high public interest or profile’.⁹ In such cases, perceived conflicts of interest could threaten safety by postponing precautionary-based approaches to a risk. Self-regulation should not be used for regulating activities which pose particularly high risks. The issue of sport-related concussion is a matter of high public interest or profile.

II. Sport-Related Concussion and Improving Population Health

The issue of sport-related concussion provides a useful case study of the tensions that can arise when managing competing interests confronting the sport’s governing body under a private self-regulatory system.

Sport-related concussion is not a new phenomenon, and the injury has been associated with participation in combat and contact sports since ancient times.¹⁰ The heightened awareness of concussion in recent decades can be attributed to a series of events in the United States, culminating in the US\$1 billion dollar settlement of class-action litigation by retired players against the National Football League (NFL) as the governing body of professional American football.¹¹ A growing body of evidence suggested that multiple concussions sustained in the sport create risks of later life cognitive and neurological decline. In the United States, participation rates dropped in the junior level of American football by 9.5% around the time when public awareness was raised regarding the National Football League’s mismanagement of concussion within the sport.¹²

⁹ Commonwealth of Australia, Department of the Prime Minister and Cabinet, 2014, *The Australian Guide to Regulation* (Canberra, 2014), 28. Julia Black refers to the 2001 version of the Australian Government Guide to Regulation which cautioned against self-regulation for matters which are ‘high public interest or profile, or for regulating activities which pose particularly high risks’. J Black, ‘Decentring Regulating: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World’ (2001) *Current Legal Problems* 101, 115.

¹⁰ For further discussion about injury constructs that would now meet the modern definition of concussion, see W.P. Meehan III and R.G. Bachur, ‘Sport-Related Concussion’ (2009) 123 *Pediatrics* 114.

¹¹ Perhaps the most confronting (and controversial) account of the risk of multiple concussions was brought to light following the publication of a case note by Dr Bennet Omalu, a forensic pathologist in 2004 suggesting a link between the brain injury of a deceased football player and American football. See B.I. Omalu, ‘Chronic Traumatic Encephalopathy and the National Football League’ (2004) 63 *Journal of Neuropathology and Experimental Neurology* 535 and B.I. Omalu et al. ‘Chronic Traumatic Encephalopathy in a National Football League Player’ (2005) 57 *Neurosurgery* 128.

¹² S. Fainaru and M. Fainaru-Wada, ‘Youth football participation drops’ *ESPN Outside the Lines* (14 November 2013) <http://espn.go.com/espn/otl/story/_/page/popwarner/pop-warner-youth-football-participation-drops-nfl-concussion-crisis-seen-causal-factor> accessed 14 November 2013.

Initially dismissed as a North American phenomenon, sport-related concussion is now considered the no.1 injury risk facing many contact sports.¹³ However, the sports of rugby union, rugby league, Australian football and soccer were all identified in a 1995 Report of the Australian National Health and Medical Research Council in *Head and Neck Injuries in Football*.¹⁴ The issue of football-related concussion was identified as a significant area of concern and several recommendations were made with the goal of managing, preventing researching and providing education around concussion. However, most those recommendations were not adopted by the sports.

Recent recommendations made in the United Kingdom seek to reform the current private self-regulated system and involve government playing a more direct and active role through the establishment of a Sports Ombudsman as a way of improving population health.¹⁵

The United Kingdom Duty of Care Review

Motivated by media reports and anecdotal evidence of matters concerning the welfare and safety of participants in a range of sports across the United Kingdom, the Minister of Sport commissioned an independent report to ascertain the current status of the ‘Duty of Care’ towards participants.¹⁶ The *Duty of Care in Sport Independent Report to Government* was published in April 2017 and identified some themes around the concept of the duty of care towards participants in sport, including a duty of care regarding concussion in sport.

A priority recommendation in the report is the creation of a Duty of Care Guardian (appointed by the NSO) and a Sports Ombudsman (created by government) to ‘hold national governing bodies to account’ and provide ‘independent assurance and accountability’ regarding the duty of care owed to participants.¹⁷ These recommendations expand the regulatory space to include additional actors that could play a future role in the regulatory space of sport-related concussion should the recommendations be adopted. Principles-based legislation would be

¹³ In the sport of rugby union, concussion has been identified as the no. 1 injury risk. For further discussion, see M. Raftery et al., ‘It is Time to Give Concussion an Operational Definition: A 3-step Process to Diagnose (or Rule Out) Concussion Within 48 h of Injury: World Rugby Guideline’ (2016) *British Journal of Sports Medicine*, 1.

¹⁴ National Health and Medical Research Council, *Head and Neck Injuries in Football: Guidelines for Prevention and Management*, 1995.

¹⁵ Department of Digital, Cultural, Media & Sport, *Duty of Care in Sport: Independent Report to Government* (2017) (‘Duty of Care Review’).

¹⁶ The report does not explicitly refer to the existence of a legal duty of care but more the principle of a duty of care vis-a-vis the welfare and safety of participants. ‘Duty of Care’ is conceptualised to mean everything from personal safety and injury; to mental health issue; to the support given to people at the elite level. For further discussion around the duty of care, see Department of Digital, Cultural, Media & Sport, *Duty of Care in Sport: Independent Report to Government* (2017) 4. Participants are defined as athletes, sportspeople, including working or volunteering in sport. Department of Digital, Cultural, Media & Sport, *Duty of Care in Sport: Independent Report to Government* (2017) 5.

¹⁷ Department of Digital, Cultural, Media & Sport, *Duty of Care in Sport: Independent Report to Government* (2017) 6.

required to provide legislative recognition of the state to monitor compliance or compel the reporting to an external party about the regulatory and compliance activities of the NSOs.¹⁸

Safety, injury and medical issues are covered in the report and include strategies designed to address concussion management, prevention, education and research. Government and its agencies are expected to play a more active role based on the recommendation to investigate how parties can work together on concussion.¹⁹ Further, the recommendations are designed to address information asymmetries and invoke the transparency principle to require disclosure of information. The disclosure requirement of information in the annual report of the number of athletes leaving the sport due to health or injury issues is an example of an informational regulatory tool.²⁰

How do we ensure sport delivery bodies (e.g. Australian Sports Commission, State Departments of Sport and Recreation, National Sporting Organisations etc.) and health promotion organisations work together as effectively as possible to improve population health?

When public health issues arise in the sporting arena, those in the privileged position of acting as guardians of the sport need to demonstrate a genuine regard for stakeholder, community and government interests. Otherwise, the question *quis custodiet ipsos custodios?* or ‘who will guard the guardian?’ could be answered by state actors willing to intervene and impose a more coercive regulatory strategy.²¹ Recent developments in the United Kingdom suggest that such willingness may already be under consideration.

A possible way of improving population health under a National Sports Plan could involve the adoption of an independent third party (as a co-regulated statutory body) with overarching responsibilities across sport to ensure that matters involving public health are properly managed by the NSO. Using the case study of sport-related concussion and the proposals under the UK Duty of Care Review, this could involve a co-regulatory system where industry provides the expertise and the state provides the principles-based regime to improve population health outcomes. The statutory body could provide national oversight and co-

¹⁸ The first ‘Priority Recommendation’ in the Duty of Care Review is to establish a Sports Ombudsman (or Sports Duty of Care Quality Commission). The recommendation states that this position should ‘have the powers to hold NGBs to account for the Duty of Care they provide to all athletes, coaching staff and support staff’ (at page 6) and to provide ‘third party assurance’. For further discussion, see Department of Digital, Cultural, Media & Sport, *Duty of Care in Sport: Independent Report to Government* (2017) 15. Principles-based legislation will need to be enacted if this power is intended to have legislative force.

¹⁹ Department of Digital, Cultural, Media & Sport, *Duty of Care in Sport: Independent Report to Government* (2017) 25.

²⁰ For further discussion, see Theme 1, Education. Department of Digital, Cultural, Media & Sport, *Duty of Care in Sport: Independent Report to Government* (2017) 27, 29.

²¹ M. Beloff QC, ‘Judicial Review - 2001: A Prophetic Odyssey’ (1995) 58(2) *The Modern Law Review* 143-158.

ordinate regulations, policies and administrative practices in responding to issues such as sport-related concussion and other areas involving management, prevention, research and education.

The disclosure of information in the sport's annual report about the number of participants who leave the sport due to injury issues is another measure designed to address information asymmetries. Mandatory injury surveillance reporting would also assist in addressing information asymmetries given the uncertainty around incidence and prevalence rates for some injuries such as concussion.

The co-regulatory model could also revisit the recommendations made by the NHMRC in 1995 including collaboration across sport to centralise the collection of data and establish a Sport Concussion Register. These suggestions are preliminary and further research is needed to ascertain the regulatory costs and benefits and regulatory impact of such an approach.