

Mr Stephen Palethorpe  
Committee Secretary  
Senate Rural and Regional Affairs and Transport References Committee  
Parliament House, Canberra ACT 2600  
via email: [rrat.sen@aph.gov.au](mailto:rrat.sen@aph.gov.au)

26 February 2013

Dear Mr Palethorpe

### **Inquiry into the Australian Sports Anti-Doping Authority (ASADA) Amendment Bill 2013**

Thank you for your invitation to make a submission to the Senate Committee in relation to the ASADA Amendment Bill 2013. I am supportive of the proposals outlined in the Bill. I have had the opportunity to review the "Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 ASADA Amendment Bill 2013 Second Report of 2013 dated February 2013, which addresses many of the human rights, privacy and philosophical concerns raised with me by some of my legal and sporting colleagues.<sup>1</sup> I am also supportive of the submission provided by the Australian Olympic Committee (AOC) dated 21 February 2013.<sup>2</sup>

#### **Summary:**

The challenges for anti-doping organisations (ADOs), including ASADA, are to disrupt and detect doping (anti-doping rule violations in the World Anti-Doping Code [Code] terminology) through information and intelligence obtained from the following:

- Athletes and Athlete Support Personnel as defined by the Code, thereby within the ADO jurisdiction;
- Government organisations, including Law Enforcement Agencies [LEAs]
- Non-governmental organisations and professional associations
- Individuals not within the jurisdiction of the ADO.

ASADA currently has no power to compel any of the classes of person above to provide it with information which ASADA may be able to use to carry out its functions.

I am supportive of ASADA being provided with powers to compel witnesses to provide information relating to potential anti-doping rule violations. It may also be of benefit to ASADA for the Senate Committee to consider whether:

- (a) ASADA should be granted powers of 'search and seizure';
- (b) the National Collaboration Framework can be used more effectively;<sup>3</sup>
- (c) data-matching may be extended in accordance with information handling guidelines;
- (d) anti-doping rule violations should be criminal offences; and
- (e) the provisions of the Proceeds of Crime Act should be applied to ASADA.

#### **Background:**

My involvement with anti-doping began in 1997, as a solicitor acting on behalf of the AOC. I appeared in over thirty anti-doping hearings, before the Court of Arbitration for Sport (CAS) or National Sports Dispute Centre, in the lead up to the Sydney 2000 Olympic Games. At that time I had conducted one third of all international anti-doping cases. I saw, first-hand, the limitations in trying to prosecute doping matters without having the power to compel witnesses to appear and give evidence.

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<sup>1</sup>[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=humanrights\\_ctte/reports/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/index.htm)

<sup>2</sup>[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=rrat\\_ctte/sports\\_anti\\_doping/submissions.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/sports_anti_doping/submissions.htm)

<sup>3</sup> <http://agimo.gov.au/collaboration-services-skills/national-collaboration-framework/>

In 2001 I moved to Europe and worked for Anti-Doping Norway, where I established the Association of National Anti-Doping Organisations. I then transferred to the Middle East, and, in Qatar, created an investigations arrangement for the Olympic Council of Asia, which led to an athlete being banned from the 2006 Doha Asian Games for trafficking. I returned to work at the Senior Executive Service level with ASADA. I reviewed and presented matters before the Anti-Doping Rule Violation [ADRV] Committee and other hearing bodies, including involvement in the investigation into Australian Weightlifting and headed up the general legal function of ASADA when Group Director, Enforcement. I then became Group Director, Detection and was responsible for ASADA's testing, intelligence and investigations functions.

Anticipating the need to more closely explore the relationship between organised crime with corruption, fraud, match-fixing and doping, I left ASADA to complete a Graduate Diploma in Investigations Management at Charles Sturt University, and worked with the Australian Commission for Law Enforcement Integrity. I chaired the organising committee for the 2009 Australian & New Zealand Sports Law Association Conference, bringing the author of "The Fix", Declan Hill, from Canada as the keynote speaker. Hill identified the risk to Australian sport in relation to match-fixing. As an independent consultant, I set up the intelligence unit with UK Anti-Doping, including creating information-sharing arrangements and amending legislation with key LEAs in preparation for the London 2012 Olympic Games. I also assisted the Canadian Centre for Ethics in Sport in enhancing their intelligence capability in the lead up to the Vancouver 2010 Winter Olympic Games.

I am now lecturing in Sports Governance and I am a PhD Candidate at the National Institute of Sport Studies, University of Canberra, exploring the link between governance and integrity in sport.

### History:

In 2004, a new statutory authority was proposed to replace the Australian Sports Drug Agency (ASDA), to be called the Australian Sports Anti-Doping Authority (ASADA). ASDA was the original National Anti-Doping Organisation for Australia. ASDA was established by the *Australian Sports Drug Agency Act 1990*, and became a statutory authority in 1991. ASADA replaced ASDA on 14 March 2006. The creation of ASADA was a key recommendation of the 2004 Anderson inquiry into the use of drugs by Australia's track cycling team<sup>4</sup>. Justice Anderson recommended, with respect to the investigation of doping offences in Australian sport, that:

*There should be a body which is quite independent of the AIS and of the Australian Sports Commission and of the sporting bodies themselves with the power and duty to investigate suspected infractions such as substance abuse and to carry the prosecution of persons against whom evidence is obtained*<sup>5</sup>.

It was agreed that ASADA should take over the functions performed by ASDA. ASDA's functions were focused on advocacy and the testing and education of athletes and athlete support personnel. Significantly, ASADA was also given the power to investigate doping allegations and present ADRV cases at hearings either before CAS or other sports tribunals under the Code. This new Authority assisted the Howard Government to fulfil its election<sup>6</sup> and treaty<sup>7</sup> obligations. This development was

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<sup>4</sup>. Australian Sports Anti-Doping Authority Bill 2005, Bills Digest no. 79 2005–06, [www.aph.gov.au/library/Pubs/BD/2005-06/06bd079.htm](http://www.aph.gov.au/library/Pubs/BD/2005-06/06bd079.htm)

<sup>5</sup>. The Honourable R Anderson QC, 'Second Stage Report to the Australian Sports Commission and to Cycling Australia', (Anderson Report), Canberra, 27 October 2004, Department of Communications, Information Technology and the Arts, 2004, [http://fulltext.ausport.gov.au/fulltext/2004/feddep/Anderson\\_report.asp](http://fulltext.ausport.gov.au/fulltext/2004/feddep/Anderson_report.asp) (originally located at [http://www.dcit.gov.au/sport/publications/anderson\\_report](http://www.dcit.gov.au/sport/publications/anderson_report)).

<sup>6</sup>. The Howard Government's 2004 election policy, Building Australian Communities through Sport, included; a requirement on sporting organisations to implement anti doping policies and practices consistent with the World Anti-Doping Code as a condition for Federal Government funding. Australian Sports Anti-Doping Authority Bill 2005, Bills Digest no. 79 2005–06, [www.aph.gov.au/library/Pubs/BD/2005-06/06bd079.htm](http://www.aph.gov.au/library/Pubs/BD/2005-06/06bd079.htm). See also the 7 December 2005 reference to; 'the 2004 election policy Building Australian Communities Through Sport', [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?id=2537041&table=HANSARDR](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2537041&table=HANSARDR)

<sup>7</sup>. See: [http://www.wada-ama.org/rtecontent/document/copenhagen\\_en.pdf](http://www.wada-ama.org/rtecontent/document/copenhagen_en.pdf)  
[http://www.wada-ama.org/rtecontent/document/UNESCO\\_Convention.pdf](http://www.wada-ama.org/rtecontent/document/UNESCO_Convention.pdf)

also in keeping with the growth in non-policing public sector agencies performing investigative functions<sup>8</sup>.

### **The Australian Model:**

ASADA's vision is: "to be the driving force for pure performance in sport". ASADA's mission is to: "protect Australia's sporting integrity through the elimination of doping"<sup>9</sup>. The international performance enhancing drug trade is reportedly worth billions<sup>10</sup>. Doping is occurring in Australia and cannot be detected by testing alone. The World Anti-Doping Agency (WADA) promotes Australia as having developed a revolutionary model that solidifies cooperation between the anti-doping authority and other government agencies. WADA refers to the "Australian Model" on its website<sup>11</sup>. WADA is also of the view that a key component in the investigative and intelligence capabilities is the establishment and maintenance of relationships between investigative agencies across Government. This ethos is reflected in WADA's "Guidelines for Coordinating Investigations"<sup>12</sup>.

### **ASADA's Limitations:**

ASADA does not possess powers of compulsion, or of search and seizure. ASADA must therefore rely on information derived from sport anti-doping rules and cross-government agreements. ASADA's current limitations became more obvious through the release of the Australian Crimes Commission (ACC) "Organised Crime and Drugs in Sport" report on 7 February 2013.<sup>13</sup> The ACC has coercive powers to investigate criminal matters at the national level, particularly focused on organised crime. However, the ACC has referred the matters outlined in its report to the State and Federal police forces, and to ASADA (in relation to anti-doping). Unfortunately ASADA cannot compel the Athletes or Athlete Support Personnel featured in the ACC report to provide any further information, so unless they voluntarily come forward, there is no guarantee that any of the matters identified can be progressed.

### **Information Sharing with Sports Organisations:**

In order to investigate those matters within its jurisdiction, referred to it by the ACC or otherwise, ASADA must rely on the agreements in place with the major National Sports Organisations (NSOs) requiring the NSOs to: "immediately advise ASADA of any alleged anti-doping rule violations and [to] provide assistance to ASADA in any investigation that ASADA might reasonably request."<sup>14</sup> If an NSO fails to comply with this agreement, ASADA only has limited legal (eg: breach of contract) and political avenues to pursue (eg: embarrassment in the media, with the Minister for Sport or the Australian Sports Commission). The NSO in turn has jurisdiction over the Athletes and Athlete Support Personnel via their membership contracts (club, state and then national) or employment arrangements.

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8. Examples of public agencies having investigative functions include: the Australian Taxation Office, Centrelink, Medicare Australia, the Office of National Assessments, the Australian Securities and Investment Commission, the Australian Commission for Law Enforcement Integrity, the Australian Competition and Consumer Commission, Customs Australia, Comcare, Auscheck, and the Department of Families, Housing, Community Services and Indigenous Affairs. See P Fairchild, 'The emerging police complex: Hoogenboom and Australian Inter Agency Cooperation', Australian and New Zealand Journal of Criminology, 27 (1994), p111-132.

9. [www.asada.gov.au](http://www.asada.gov.au)

10. WADA Media Release, 'Interpol and WADA Team Up to Fight Cheats', 2 October, 2006, <http://www.wada-ama.org/en/newsarticle.ch2?articleId=3115331>. Eg: 'International Law Enforcement Operation Targets Underground Manufacture of Anabolic Steroids, "Operation Raw Deal" Nets 124 Arrests Nationwide To Date', US Department of Justice, 24 September 2007, [http://www.usdoj.gov/opa/pr/2007/September/07\\_crm\\_753.html](http://www.usdoj.gov/opa/pr/2007/September/07_crm_753.html)

11. <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=694>. See also the joint WADA & Interpol press release: "WADA Applauds Actions Targeting the Illegal Manufacture and Distribution of Doping Substances New Era in Anti-Doping Must Involve Coordination with Law Enforcement" and Ings R, (2007), *Play True*, WADA Issue 1, p10-11 [http://www.wada-ama.org/rtecontent/document/PlayTrue2007\\_BeyondtheAthlete\\_En.pdf](http://www.wada-ama.org/rtecontent/document/PlayTrue2007_BeyondtheAthlete_En.pdf)

12. <http://www.wada-ama.org/en/World-Anti-Doping-Program/Governments/Investigation--Trafficking/Investigations/Guidelines/>. See also Senator George Mitchell in his findings into the illegal use of steroids in Major League Baseball (USA): Mitchell GJ, (2007) "Report To The Commissioner Of Baseball Of An Independent Investigation Into The Illegal Use Of Steroids And Other Performance Enhancing Substances By Players In Major League Baseball", <http://www.primerahora.com/XStatic/primerahora/docs/espanol/informemitchell4.pdf>

13. <http://www.crimecommission.gov.au/publications/other/organised-crime-drugs-sport>

14. An example of this type of agreement is found at Appendix D of the "Cycling Australia Review" conducted by the Hon James Wood AO QC released on 14 January 2013 <http://www.regional.gov.au/sport/resources/reports/review-of-cycling-australia.aspx>

### **Information Sharing with External Organisations (including LEAs):**

ASADA's legislation includes expanded information disclosure provisions and specific references to allow ASADA to share information with sports and law enforcement bodies, eg: Australian Customs, the State and Federal Police, Therapeutic Goods Administration, National Anti-Doping Organisations and International sports Federations.<sup>15</sup> This is a one directional power, which needs to be replicated in the each of the agencies ASADA wishes to receive information from (including through MoUs). It was intended that this information would enable ASADA to identify athletes or support personnel suspected of doping, and then concentrate its resources on them, whether via further investigation or targeted drug testing. Sharing information between government agencies is consistent with the 'Whole of Government' approach.<sup>16</sup>

### **Barriers to Information Sharing with Government Agencies (including LEAs):**

An expansion to ASADA's powers as anticipated by the 2013 Bill will assist to overcome one of its current challenges: reliance on LEAs. In order to have matters thoroughly investigated, ASADA must attract the attention of organisations which have scarce resources and higher priorities for community safety (eg: murders, child pornography, and the trafficking of non-performance enhancing drugs, including ice and heroin). Even if the LEAs are keen to provide information to ASADA, there are additional barriers to sharing information, both internally and externally.

One of the additional challenges to inter-agency cooperation is Australia's privacy legislation. This has not been addressed in the current draft Bill. For example, In 2008, ASADA attempted to data-match records with Medicare to determine whether doctors were prescribing performance enhancing drugs to athletes for non-therapeutic purposes, particularly where those substances may be subsidised by the Pharmaceutical Benefits Scheme (PBS). Other Australian Government agencies data-match on a regular basis, and far in excess of the number of records referred by ASADA, and yet ASADA's efforts in that instance were blocked.<sup>17</sup> Before a response was received from Medicare, concerns relating to the privacy of medical records were raised in the media.<sup>18</sup> Following an investigation initiated by the then Sports Minister, Kate Ellis,<sup>19</sup> questions were asked of ASADA by the Commonwealth Parliament Senate Estimates Committee.<sup>20</sup> This led to the Privacy Commissioner conducting an investigation and handing down recommendations for ASADA to implement in its future information handling practices.<sup>21</sup> It would be of assistance to ASADA if this Bill was amended to allow for data-matching exercises to be conducted to investigate ADRVS, including, for example, to examine whether public funds are being diverted from the PBS inappropriately.

If it would assist the Senate Committee, I am available on Friday 1 March to attend as a witness at the public hearing to further discuss the enhancement of ASADA's powers.

Catherine Ordway

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<sup>15</sup> ASADA Act, 2006, [www.comlaw.gov.au](http://www.comlaw.gov.au)

<sup>16</sup> See also the National Collaboration Framework cited above. W G Carson, "Whole of Government and Crime Prevention for Victoria", August 2003, Department of Criminology, University of Melbourne, p1-40, [http://www.criminology.unimelb.edu.au/staff/kit\\_carson/whole-government-crime-prevention.pdf](http://www.criminology.unimelb.edu.au/staff/kit_carson/whole-government-crime-prevention.pdf). H Goldstein, "Problem-oriented policing: the basic elements" in *Problem-Oriented Policing* (1990), McGraw-Hill, New York, p32-49 at p47

<sup>17</sup> J Magnay, "Minister orders review", and "Medicare enlisted for fight against 'loophole seekers'", *Sydney Morning Herald*, 15 March 2008, [www.smh.com.au](http://www.smh.com.au)

<sup>18</sup> S Parnell, "Investigators scouring athletes' medical records for drug cheats", *The Australian*, 14 March 2008:

<http://www.theaustralian.com.au/news/secret-anti-doping-probe/story-e6frg7mo-1111115793892>

<sup>19</sup> S Parnell, "Doping Checks May End", *The Australian*, 15 March 2008: <http://www.theaustralian.com.au/news/doping-checks-may-end/story-e6frg7mo-1111115803868>

<sup>20</sup> See Senate Estimates Committee hearing transcript, 5 June 2008, [www.aph.gov.au](http://www.aph.gov.au). See also S Parnell, "Secret List of Athletes Led to Drugs Inquiry", *The Australian*, 24 July 2008: <http://www.theaustralian.com.au/news/secret-athletes-list-led-to-inquiry/story-e6frg7mo-1111117000573>

<sup>21</sup> News 22 July 2008, ASADA website, "On 30 June 2008 the Australian Privacy Commissioner (OPC), contacted ASADA outlining three recommendations . . .", [www.asada.gov.au](http://www.asada.gov.au)