



**Exercise & Sports Science Australia's
Response to Questions on Notice -
Australian Sports Anti-Doping Authority Amendment
(Enhancing Australia's Anti-Doping Capability) Bill 2019**

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Introduction

Exercise & Sport Science Australia (ESSA) is recognised by the Australian Institute of Sport and Sport Australia as the peak accrediting body for athlete support personnel working in Australian sports science.

ESSA submits this response on behalf of its 350 members impacted by the *Australian Sports Anti-Doping Authority Amendment [ASADA] (Enhancing Australia's Anti-Doping Capability) Bill 2019*:

- 300 of whom work as Accredited Sports Scientists (AESs) specialising in applying scientific principles and techniques to assist coaches and athletes to improve their performance, either at an individual level or within the context of a team environment and
- 50 who work as Accredited High Performance (Sports Science/ Sports Medicine) Managers (AHPMs) who have advanced knowledge and skills in leading and managing a team of sports scientists and sports medicine professionals.

Responses

1. Contracts Where ESSA Members (Athlete Support Personnel) Give Up the Right to Self-Incriminate

At the time ESSA provided feedbackⁱ to *The Review of Australia's Sports Integrity Arrangements*ⁱⁱ (the Wood Review) in 2018, the organisation did not express an opinion on the issue of excluding the right to claim privilege against self-incrimination when answering a question or providing information to ASADA. ESSA focused on other issues like whistle-blower protection, statutory protection against civil actions, a cost effective accessible sports tribunal and the recognition of peak accrediting bodies.

This human rights issue emerged when extensive research was undertaken in preparing ESSA's *Response to the Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019*ⁱⁱⁱ. ESSA noted a legal opinion on the inconsistencies between the current ASADA legislation and its current anti-doping template used by sporting organisations. ESSA considered the issue to be an important human rights issue warranting inclusion in its *Response*.

According to barrister Anthony Crocker^{iv}, ASADA gave itself powers not available to it under the *ASADA Act 2006* to insert a provision in its 2015 anti-doping policy template requiring athletes and athlete support persons to abrogate the right to self-incriminate.

The Act currently states:

“13D Self-incrimination

*(1) An individual is **excused from complying with a requirement to answer a question or to give information if the answer to the question or the information might tend to incriminate the individual** or expose the individual to a penalty.*

(1A) A person is not excused from producing a document or thing as required by a disclosure notice given to the person on the ground that the document or thing might tend to incriminate the person or expose the person to a penalty.”

Mr Crocker further expands on the inconsistency between the *ASADA Act 2006* which does provide for the right not to self-incriminate (as above) and the information contained within the preface of ASADA’s Anti-Doping template in a lecture^{vi} at Bond University in which he notes in one slide:

The Anti-Doping Policy introductory preface:

‘This Anti-Doping Policy is adopted and implemented by the Sporting administration body **in accordance with ASADA’s** and the Sporting administration body’s **responsibilities under the *World Anti-Doping Code, the Australian Sports Anti-Doping Authority Act 2006 (Cth), the Australian Sports Anti-Doping Authority Regulations 2006 (Cth) (including the National Anti-Doping scheme)***, and in furtherance of combined ongoing efforts to eradicate doping in sport in Australia.’

(emphasis added)

and in a second slide:

And further into the preface:

‘**The objectives of this Anti-Doping Policy are to:**

- ▶ **1. Comply with the Code, *ASADA Act*, ASADA Regulations (including the NAD scheme) as amended from time to time**
 - ▶ **2. Promote the integrity of our sport by deterring doping in our sport.’**
-

Mr Crocker states in the lecture that “there is an argument that the (ASADA Anti-Doping) policy doesn’t comply or is inconsistent with the Act”.

All of the organisations which ESSA researched in preparing this submission (Australian Olympic Committee [AOC], Australian Paralympic Committee [APC], Commonwealth Games Australia [CGA], the Australian Football League [AFL] and the National Rugby League [NRL]) have incorporated in their Anti-Doping Policies (ADPs) similar wording from the template provided by ASADA so that the right to self-incriminate is abrogated.

ESSA can confirm that its members who are selected as athlete support personnel in Australian Olympic Committee (AOC), Australian Paralympic Committee (APC) and Commonwealth Games Australia (CGA) teams abrogate their right not to self-incriminate.

Clause 3.4^{vii} from the Australian Olympic Committee’s Anti-Doping By-Law is as follows:

“All Athlete Support Personnel must: ...

(7) co-operate with and assist ASADA, including by:

(a) attending an interview to fully and truthfully answer questions;

(b) giving information; and

(c) producing documents,

*in an investigation being conducted by ASADA, **even if to do so might tend to incriminate them** or expose them to a penalty, sanction or other disciplinary measure.*

Clause 3.4^{viii} of Commonwealth Games Australia’s Anti-Doping By-Law is identical to that of Clause 3.4 from the AOC’s Anti-Doping By-Law.

Clause 6A.2.3^x of the Australian Paralympic Committee's Anti-Doping Policy specifically states that "the common law privileges against self-incrimination and self-exposure to a penalty are abrogated by this Article":

"All Persons bound by this Anti-Doping Policy and the APC must assist, cooperate, and liaise with ASADA in relation to any investigation into a potential anti-doping rule violation (or the APC where it has approval by ASADA to conduct its own investigation or be involved in an ASADA investigation). Specifically, all Persons must cooperate with and assist ASADA or the APC (where relevant), including by:

- (a) attending an interview to fully and truthfully answer questions;*
- (b) giving information; and*
- (c) producing documents or things,*

*in an investigation being conducted by ASADA or the APC (where relevant), **even if to do so might tend to incriminate them** or expose them to a penalty, sanction or other disciplinary measure.*

For the avoidance of doubt, the common law privileges against self-incrimination and self-exposure to a penalty are abrogated by this Article."

Clause 13.1^x of the Australian Football League (AFL)'s Anti-Doping Code includes similar wording to previous anti-doping codes:

"(d) All Persons bound by this Code must assist, cooperate, and liaise with the AFL, or any party nominated by the AFL, in relation to any investigation into a potential AntiDoping Rule Violation. Specifically, all Persons must cooperate with and assist the AFL or other Anti-Doping Organisation (where relevant), including by:

- (i) attending an interview to fully and truthfully answer questions;*
- (ii) giving information; and*
- (iii) producing documents or things,*

*in an investigation being conducted, **even if to do so might tend to incriminate them** or expose them to a penalty, sanction or other disciplinary measure.*

(e) For by the avoidance of doubt, the common law privileges against self-incrimination and self-exposure to a penalty are abrogated by this clause."

It appears that the National Rugby League (NRL) is the only organisation ESSA researched to offer limited privilege against self-incrimination in Clause 133^{xi} of its Anti-Doping Policy:

“Limited Privilege Against Self-Incrimination

(1) Subject to Rule 133(2) nothing in this Part or elsewhere shall be taken to permit a person bound by this ADP to refuse to comply with an obligation under the ADP (including each of the several obligations under this Part) on the ground that, to do so, would incriminate that person. (Footnote 100)

(2) Notwithstanding Rule 133(1), where a person bound by this ADP:

(a) has been interviewed as a suspect in a criminal investigation, or has been charged or arrested by a law enforcement agency in respect of a criminal offence;

(b) the proceedings for that offence have not concluded; and

(c) compliance by that person with a particular obligation under this ADP (including each of the several obligations under this Part) would in our opinion prejudice his or her defence of the offence charged;

that person may refuse to comply with that particular obligation on the ground that, to do so, would incriminate that person in relation to the criminal proceedings.

...

(Footnote 100) Our Note: This sub-rule expressly abrogates the common law privileges against self-incrimination. It operates subject only to sub-rule (2) which may apply where a person bound by the ADP is interviewed as a suspect in relation to or charged with a criminal offence.”

2. Professional Development on Anti-Doping and Self-Incrimination

In addition to ESSA professional standards (expanded up in Response 3), the Australian Institute of Sport (AIS) publish Sports Science Sports Medicine (SSSM) Practitioner Minimum Standards^{xii} for all SSSM staff and contractors engaged to deliver services in the disciplines of practice by National Sporting Organisations (NSOs) that are subject to the AIS SSSM Best Practice Principles via their Sport Investment Agreements.

In addition to AIS role specific minimum standards for Physiology/Recovery, Biomechanics, Skill Acquisition and Performance Analysis (all sports science disciplines accredited by ESSA), **all SSSM staff and contractors must complete the ASADA Level 2 anti-doping courses annually before practicing.** Please note, the **Level 2 anti-doping courses are compulsory** which is partly at odds with evidence presented by Leanne Evans at the Hearing which referred to training not being ‘enforced’. All professional development with the exception of the ASADA Level 2 anti-doping courses is elective.

ESSA provides its members with comprehensive anti-doping education via links to anti-doping courses that are easy accessible to all ESSA members via the private section of ESSA’s website on the sports science home page as follows:

Other Professional Development

All CPD are worth 1 CPD point per learning hour; maximum of 15 CPD points claimable.

ASADA Level 1	ASADA Level 2	Keep Sport Honest Course
ASADA	ASADA	NISU
Ongoing	Ongoing	Ongoing
Register here	Register here	Register here

Anti-Doping e-Learning Platform (ADeL)

WADA

Ongoing

[Register here](#)

As per the above screen shot, ESSA members are aware of the World Anti-Doping Code (WADA) Code through links to professional development courses and their obligations under their professional standards (more detail follows in Response 3).

ASADA is best placed to advise on the uptake of its courses on the requirements of the Act. ESSA is unable to provide that information.

ESSA also has a best practice resource page in its Members’ lounge for sports science which includes the following:

- the **Sports Science Sports Medicine Best Practice Principles^{xiii}** (previously referred to developed by the Australian Institute of Sport (AIS) as a practical guide to assist boards and senior management of sporting organisations in performing their oversight function in relation to sports science and sports medicine practices.
- the **National Anti-Doping Framework^{xiv}**, which aims to align domestic anti-doping efforts in Australia through a set of agreed principles, alongside clearly identified areas for cooperation between the Australian and State and Territory governments. The framework is overseen by the National Sport Integrity Unit, a branch of the Department of Health.

Links to the following eLearning modules are also provided to members:

[ASADA online course](#) – anti-doping e-learning (prohibited substances, prohibited methods, therapeutic use exemptions, doping control and whereabouts)

National Integrity of Sport Unit /Illicit Drugs in Sport (IDIS) Online Education Program– e-learning Illicit drugs in sports (for sports people) (anti-doping, match-fixing and illicit drugs).

ESSA is not aware of any anti-doping courses or resources that include learning outcomes on the issue of abrogating the right not to self-incriminate.

Responses to a brief survey to a sample of 52 sports science members (in which members had one night to respond) elicited the following responses from 10 members:

- 40% of members were not aware of the 'right not to self-incriminate' issue
- no member had signed an employment contract requiring him or her to self-incriminate
- 20% of members had signed a contract as part of an appointment to a national team or other representative team requires me to selfincriminate
- 50% had not signed a contract requiring him/her to self-incriminate in respect to cooperating and assisting ASADA
- 70% were aware ASADA offers anti-doping courses
- 100% had completed one or more of these courses.

Based on conversations with another six members, ESSA is of the opinion that most of its members remain unaware of the 'right not to self-incriminate' issue and are unaware that this right is abrogated in the anti-doping policies of sporting organisations for which they work.

ESSA is not aware of any other cases where members have signed away their right to not self-incriminate in employment contracts.

Feedback from members included "Communication around specific 'powers' of ASADA would be helpful alongside a more in depth briefing of testing procedures and potential subsequent investigations" and "Education and knowledge of rules is one aspect of the issue but the main underpinning cause revolves around values and one's personal moral code. I feel we continually overdo the rules side of things believing this is the answer. We are all aware of regulations. No more time needs to be spent on this."

3. Professional Standards and Requirement to Adhere to Legislation

ESSA has detailed Professional Standards for Accreditation. To gain a Sports Science accreditation, members need to show the following Professional Attribute:

"Understanding of, and capacity to practise in accordance with, ethically relevant policies, legislation and regulations, including those concerning anti-doping, member protection, match fixing, privacy, equal opportunity, antidiscrimination, and workplace health and safety^{xv}."

To gain a High Performance accreditation, members need to show the following Professional Attribute:

“Knowledge of, and capacity to uphold ethical practice and the values of sporting excellence, fairness and athlete safety and well-being including ensuring SSSM staff understand and are updated on anti-doping, supplementation, medication, injection, and match fixing rules^{xvi}.”

To be accredited with ESSA, members agree to abide by a Code which says:

“1. Professional conduct

Exercise and sports science professionals demonstrate professional integrity when they uphold the standards of best practice. These include evidence-based practice and principles such as: beneficence (produce good), non-maleficence (do no harm), fairness, justice and respect for autonomy.

Exercise and sports science professionals may work in a variety of settings and with a diverse range of Clients, including but not limited to apparently healthy people, high-performance athletes, elite and professional athletes and people with acute and chronic medical conditions. Exercise and sports science professionals have a duty to make Client care their first concern, and to build a relationship based on honesty, reciprocity and trust.

1.1 An exercise and sports science professional must always:

1.1.1 act in the best interests of the individual Client

1.1.2 deliver services competently, diligently and ethically

1.1.3 comply with this Code of Professional Conduct and Ethical Practice

1.1.4 comply with other relevant legislation such as the National Code of Conduct for Health Care Workers and **the World Anti-Doping Code^{xvii}**.”

ESSA has a mechanism within its Complaints and Disciplinary Procedures^{xviii} where required, it will cooperate with regulatory bodies and recognise the sanctions of complaint investigations and prohibition orders issued by regulatory bodies authorised to investigate complaints:

“3.2.11. conduct its complaint review in line with ESSA Complaints and Disciplinary Procedures and independently of investigations by other regulatory bodies

3.2.12. where required under law, co-operate with complaint investigations by regulatory bodies authorised to investigate complaints

3.2.13. where required, recognise the sanctions of complaint investigations and prohibition orders issued by regulatory bodies authorised to investigate complaints.”

This means if ASADA imposes a sanction on a member, ESSA would recognise (and enforce) that sanction.

Withdrawal and Substitution of Recommendation

A more detailed examination of the WADA Code reveals the Roles and Responsibilities of Athlete Support Personnel under Clause 21.2^{xix}:

“21.2.1 To be knowledgeable of and comply with all antidoping policies and rules adopted pursuant to the Code and which are applicable to them or the Athletes whom they support.

21.2.2 To cooperate with the Athlete Testing program.

21.2.3 To use his or her influence on Athlete values and behavior to foster anti-doping attitudes.

21.2.4 To disclose to his or her National Anti-Doping Organization and International Federation any decision by a non-Signatory finding that he or she committed an anti-doping rule violation within the previous ten years.

21.2.5 To cooperate with Anti-Doping Organizations investigating anti-doping rule violations.

21.2.6 Athlete Support Personnel shall not Use or Possess any Prohibited Substance or Prohibited Method without valid justification”.

It would appear there are no provisions for an accrediting/registering body like ESSA to become a signatory to the Code, therefore ESSA accepts that accrediting/registering bodies for athlete support personnel cannot be added to the definition of sporting administration body.

In reflecting on Mr Darren Mullaly’s (Deputy Chief Executive Officer, Legal, Education and Corporate, Australian Sports Anti-Doping Authority) evidence to the Senate Hearing on Friday 14 February, 2020 that ESSA does not have a role to play in terms of applying World Anti-Doping Code sanctions, ESSA withdraws Recommendation 6:

“ESSA supports the definition for a sporting administration body be expanded in Part 1 – Introduction, Section 4 to ensure the role of accrediting/registering bodies for sports support persons is recognised and included within the *Australian Sports Anti-Doping Authority Act 2006* through the addition of the following:

- (i) an accrediting or registering body for support persons”.

ESSA asks that an alternative recommendation be considered by the Committee:

Revised Recommendation 6

ESSA supports the inclusion of a new definition for accrediting or registering bodies for support persons in Part 1 – Introduction, Section 4 to ensure the role of accrediting/registering bodies for sports support persons is recognised and included within the *Australian Sports Anti-Doping Authority Act 2006*.

General Feedback

After hearing the evidence presented by various Commonwealth officials, ESSA is still of the opinion that ASADA has not been able to justify via specific Australian cases in which the lowering of the evidence threshold from 'reasonable belief' to 'reasonable suspicion' would have made a difference to its investigations. ESSA therefore maintains its position that the burden of proof threshold for the issuance of disclosure notices should not be lowered.

ESSA is further concerned that if evidence threshold is lowered at the same time that the Anti-Doping Rule Violation Panel is removed, then the Bill eliminates an independent check of the ASADA CEO's powers.

ⁱ Exercise & Sports Science Australia, Response to Review of Australia's Sports Integrity Arrangements – Developing a Government Response, Brisbane, 2018. Accessed 15 January, 2020
https://www.essa.org.au/Public/Advocacy/Submissions_Lobbying/Public/Advocacy/Submissions_Lobbying.aspx?hkey=a641d3b5-9198-4a92-8869-6f4c80c08ffe

ⁱⁱ Commonwealth of Australia as represented by the Department of Health, Report of the Review of Australia's Sports Integrity Arrangements, 2018, Accessed 18 February, 2020
[https://www1.health.gov.au/internet/main/publishing.nsf/Content/63F0A5D7BDA5A0B5CA2582CF005E6F9/\\$File/HEALTH-RASIA-Report-Acc.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/63F0A5D7BDA5A0B5CA2582CF005E6F9/$File/HEALTH-RASIA-Report-Acc.pdf)

ⁱⁱⁱ Exercise & Sports Science Australia, Exercise & Sports Science Australia Response to the Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019, Accessed 18 February, 2020

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ASADAAnti-DopingCapabil/Submissions

^{iv} Holmes, T., “ASADA stripping athletes' legal right to silence by inserting provision in policy, sports lawyer says”, Australian Broadcasting Corporation, 29 Nov 2015, Accessed 17 February, 2020
<https://www.abc.net.au/news/2015-11-29/asada-stripping-legal-right-to-silence-lawyer-says/6984008>

^v Australia, Australian Sports Anti-Doping Authority Act 2006, Accessed 15 January, 2020,
<https://www.legislation.gov.au/Series/C2006A00006>

^{vi} Bond University Faculty of Law, *Sporting Contracts A current health check - Mr Anthony Crocker* (Video of Presentation), Interdisciplinary Colloquium on Sport, 21 March, 2018. Accessed 19 February, 2020.

<https://www.youtube.com/watch?v=xuT5dAoCJSQ&list=PL1DzOO9myBeUI32WeJFyJmW-y-PfEvg6t&index=4&t=0s>

^{vii} Australian Olympic Committee, Anti-Doping By-Law, (2015), Accessed 17 Feb, 2020
<https://content.olympics.com.au/public/2019-07/AOC%202015%20Anti-Doping%20By-Law.pdf>

^{viii} Commonwealth Games Australia, Anti-Doping By-Law, (2019), Accessed 17 Feb, 2020
<https://commonwealthgames.com.au/wp-content/uploads/CGA-Anti-Doping-By-Law-Update-2019.pdf>

^{ix} Australian Paralympic Committee, Anti-Doping By-Law, (2015), Accessed 17 Feb, 2020
<https://www.paralympic.org.au/wp-content/uploads/2015/09/P-OPP-004-Anti-Doping-Policy-effective-1-Jan-2015.pdf>

^x Australian Football League Anti-Doping Code 2019, Accessed 18 February, 2020
<https://resources.afl.com.au/afl/document/2019/12/04/4b71e9d0-3704-4a19-a7c1-bf0bca5bf873/AFL-Anti-Doping-Code-2019-FINAL.pdf>

^{xi} National Rugby League Ltd, LEAGUES ANTI-DOPING POLICY OF THE AUSTRALIAN RUGBY LEAGUE COMMISSION, THE NATIONAL RUGBY LEAGUE, THE NEW SOUTH WALES RUGBY LEAGUE, THE QUEENSLAND RUGBY LEAGUE, THE COUNTRY RUGBY LEAGUE AND OUR MEMBER & SUB-MEMBER ORGANISATIONS, 2015 Version, Accessed 18 February, 2020
<https://www.nrl.com/siteassets/operations/documentation/the-leagues-anti-doping-policy.pdf>

^{xii} Australian Institute of Sport/Sport Australia, *AIS Sports Science Sports Medicine (SSSM) Practitioner Minimum Standards*, Oct 2018, Accessed 18 February, 2020
https://www.sportaus.gov.au/_data/assets/pdf_file/0007/692395/Dec2018_35226_AIS_SSSM_Practitioner_Minimum_Standards.pdf

^{xiii} Sport Australia, *AIS Sports Science Sports Medicine Best Practice Principles*, Revised: October 2018, Accessed 17 February, 2020
https://www.sportaus.gov.au/_data/assets/pdf_file/0004/687559/SSSM_Best_Practice_Principles_October_2018.pdf

^{xiv} Commonwealth of Australia, Department of Health, National Anti-Doping Framework Revised 2015, Accessed 17 February, 2020, <https://www1.health.gov.au/internet/main/publishing.nsf/Content/anti-doping-framework>

^{xv} Exercise & Sport Science Australia, *Accredited Sports Scientist Level 1 and Level 2 Standards*, 2013, Accessed 18 February, 2020
https://www.essa.org.au/Public/Professional_Standards/The_professional_standards.aspx

^{xvi} Exercise & Sport Science Australia, *Accredited High Performance Manager Standards*, 2013, Accessed 18 February, 2020
https://www.essa.org.au/Public/Professional_Standards/The_professional_standards.aspx

^{xvii} Exercise & Sports Science Australia, *Code of Professional Conduct and Ethical Practice*, Brisbane, 2017 Accessed 15 January, 2020,
https://www.essa.org.au/Public/Professional_Standards/Professional_Standards.aspx

^{xviii} Exercise & Sports Science Australia, *ESSA Complaints and Disciplinary Procedures - Version 2*, August 2017, Accessed 19 February, 2020.
https://www.essa.org.au/Public/ABOUT_ESSA/Constitution_and_Bylaws.aspx

^{xix} World Anti-Doping Agency, *World Anti-Doping Code 2015 with 2019 Amendments*, 2019, Accessed 20 February, 2020
https://www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2019_english_final_revised_v1_linked.pdf