



Australian Government

Department of Health

**Submission to the Senate
Community Affairs Legislation Committee:**

**Inquiry into the
Australian Sports Anti-Doping Authority Amendment
(Enhancing Australia's Anti-Doping Capability) Bill
2019**

17 January 2020

Introduction

The Department of Health welcomes the opportunity to provide this submission to the Senate Community Affairs Legislation Committee for the inquiry into the Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019 (Bill). The Department has worked with the Australian Sports Anti-Doping Authority (ASADA) to provide this joint submission, which reflects the views of both organisations.

The fight against doping in sport continues to get tougher. Not only is doping a serious risk to an athlete's health and wellbeing, at its foundation it debases all which is good about sport. The key factor in addressing doping across the world is the unrelenting commitment of the international sporting movement and governments to cooperate and coordinate efforts to improve and implement harmonised programs which are robust, effective and fair.

The Australian Government supports a fair, safe and healthy environment for all athletes and Australia continues to be a leader in the fight against doping in sport. Despite this, to respond and protect against increasingly complex and sophisticated doping activity, the current Australian anti-doping legislative framework requires reform. The amendments in this Bill achieve these changes, and will ensure Australia is well placed to effectively address modern doping threats.

Background

In August 2017, the Government commissioned the independent Review of Australia's Sports Integrity Arrangements (Wood Review) as part of the development of the Government's National Sport Plan.

In relation to anti-doping, the terms of reference requested the Wood Review panel to:

- examine the adequacy of Australia's current sports integrity capability against the current national and international sports integrity threat environment, with particular attention to the capability of the Australian Sports Anti-Doping Authority and Australia's sport sector to address contemporary doping threats, including the anti-doping rule violation process, and opportunities for improvement

The Wood Review is the most comprehensive examination of sports integrity arrangements ever undertaken in Australia, if not the world. In presenting 52 recommendations for consideration by Government, the Wood Review found Australian sport faced a number of real and increasing threats to its integrity, including doping. Doping was found to be more prevalent and widespread than ever among athletes at all levels, and facilitated by the increasing availability of highly sophisticated techniques, making it harder to detect. The Wood Review also found serious and organised crime is involved in the supply of performance and image enhancing drugs and the current suite of statutory protections and powers under the *Australian Sports Anti-Doping Authority Act 2006 (Cth)* (ASADA Act) is not sufficient to facilitate ASADA's increasing emphasis on intelligence-based investigations.

The Wood Review made a number of recommendations (including in relation to legislative amendments, principally to the ASADA Act) to enhance the ability of ASADA to perform its functions. In its response, the Government accepted all of the recommendations pertaining to the enhancement of Australia's anti-doping capability.

Overview of the Bill

The Bill makes amendments to the ASADA Act and the *Freedom of Information Act 1982* (Cth) (FOI Act) to implement the Government's response to Wood Review recommendations in relation to anti-doping, and ensure the efficient and effective implementation of ASADA's existing regulatory functions.

These amendments will ensure Australia's anti-doping framework is robust and responsive and will improve the ability of ASADA to perform its functions within an increasingly complex and sophisticated doping environment. Specifically, the amendments will:

- remove unnecessary steps to streamline the administration of the statutory Anti-Doping Rule Violation (ADRV) process
- facilitate better information sharing between ASADA and other persons and organisations, such as National Sport Organisations (NSOs)
- extend statutory protection against civil actions to cover NSOs and their personnel in certain circumstances
- strengthen ASADA's disclosure notice regime, and
- amend Schedule 3 of the FOI Act to include the secrecy provisions of the current ASADA Act.

Consultation and evolution of the Bill

Through the Wood Review, and subsequent development of the Bill, extensive consultation has been undertaken with NSOs, peak sporting bodies, ASADA and the Attorney-General's Department.

A previous version of this Bill was introduced into the 45th Parliament but was not passed prior to the 2019 Federal election. During the intervening period, additional consultation with key stakeholders occurred and comments from the Parliamentary Joint Committee on Human Rights and the Senate Standing Committee for the Scrutiny of Bills (Senate Committee) received. As a result of the further consultation and in response to Committee comments, the Bill was further refined and the Explanatory Memorandum updated to include additional context and clarification on the intent and impact of the proposed amendments.

Further changes to the Bill since the first introduction include:

- an amendment to allow ASADA's secrecy provisions to be included within Schedule 3 of the FOI Act, and

- minor and consequential amendments to harmonise operation with the Australian Sports Anti-Doping Authority (Sport Integrity Australia) Bill 2019.

Following the introduction of the Bill in October 2019, the Minister provided advice to the Senate Committee (in response to a request for further information in Scrutiny Digest 8 of 2019) regarding the lowering of the threshold for the giving of disclosure notices and the impact this may have on the right to privacy. The Senate Committee noted the advice and replied to the Minister stating, in light of the information provided, it would make no further comment on this matter. As requested by the Senate Committee, the key information provided by the Minister will be included in the Explanatory Memorandum.

Key legislative amendments

Exemption from the FOI Act

The Bill will amend Schedule 3 of the FOI Act to include the secrecy provisions of the current ASADA Act and thus exempt the release of 'protected information' (as defined under the ASADA Act) to third parties. This change will provide appropriate guarantees to athletes, athlete support persons and NSOs regarding the protection of information, including sensitive medical and health information.

Under the current legislative scheme, ASADA has some recourse to exemption provisions under the FOI Act. However, these are not always sufficient and require lengthy administrative processes to demonstrate. These processes can negatively affect ASADA's relationship with NSOs and impose an administrative burden on those organisations when assisting to establish exemption claims.

The ASADA Act includes strict secrecy provisions preventing the release of protected information, including to a court or tribunal in response to a subpoena. However, when responding to an FOI request, ASADA is currently unable to rely on these provisions. While the FOI Act does provide some protection in relation to the release of this material, it does not provide the same guarantees as the specific secrecy provisions under the ASADA Act. As such, to ensure protected information is not disclosed when unlawful to do so, ASADA is required to argue its case using the exemptions under the FOI Act, creating a lengthy, complicated and expensive process which cannot, ultimately, guarantee the protection of this information.

Amending the FOI Act as proposed will mean 'protected information' will be exempt from release to third parties. 'Protected information' is defined in the ASADA Act as information obtained for the purposes of the Act relating to the affairs of a person and identifying, or is reasonably capable of being used to identify, a person. This means personal information collected by ASADA pursuant to the new disclosure notice framework would be afforded stronger statutory protections from release, assisting in the balancing of privacy concerns.

This amendment will not affect the way in which ASADA will still be required to respond to FOI requests related to subjects outside of 'protected information', such as drug testing statistics and other government functions unrelated to an athlete.

The amendment will further provide consistency of information protection between ASADA and the National Sports Tribunal (NST), which will commence operation in March 2020. The proposed amendment will ensure information provided to the NST by ASADA will have the same protections as it progresses from investigation through to the conclusion of any hearing process.

Streamlining the administrative phase of the anti-doping rule violation process

To streamline the administrative phase of the anti-doping rule violation process, the proposed amendments will abolish the Anti-Doping Rule Violation Panel (ADRVP) and, by consequence:

- remove the Administrative Appeals Tribunal (AAT) appeal option before the matter proceeds to a formal hearing, and
- remove the ADRVP from the disclosure notice regime.

The Wood Review found the current ADRV process is convoluted, confusing and difficult for athletes and other stakeholders to understand. The Wood Review also found the current ADRV process to be time intensive, often taking a minimum of eight weeks from the issue of a 'show cause' letter for a matter to pass through the ADRVP. These findings are consistent with submissions to the Wood Review from both NSOs and ASADA, which stated the ADRVP's involvement in the process was time-consuming, overly complicated, and repetitive.

The proposed amendments give effect to the Wood Review recommendations by streamlining and simplifying this process to the advantage of athletes, support personnel, sporting organisations and others attempting to navigate the ADRV pathway. This will be achieved by providing for the ASADA CEO to directly assert a possible ADRV against a participant without additional consideration by the ADRVP.

The abolition of the ADRVP will not affect the present right of a participant to have a fair hearing of an allegation of an ADRV. In fact, the intent and effect of the proposed amendments is to expedite the participant's opportunity to be heard. The amendments reduce the duplications in process to the benefit of the individual and NSO, while retaining the opportunity for the individual to respond to an allegation made against them prior to the issuing of an infraction notice.

In the anti-doping context, rights and obligations between the athlete or support person and their sport are determined through the processes set out in the anti-doping policy of the sport with which they have agreed to abide. The role of the ADRVP is to be satisfied, on the material provided to it by the ASADA CEO and by the athlete or support person (should they so choose), there is a possible anti-doping rule violation and to make such an assertion.

As such, the ADRV does not make a final and binding determination on the breach of an anti-doping policy—it does not determine rights and obligations at a suit at law and (as explicitly provided by section 41(3) of the ASADA Act) it is not a hearing body pursuant to Article 8 of the World Anti-Doping Code (WADC). Rather, it conducts a pre-hearing process, which may lead to referral of the matter to a tribunal.

Currently, the relevant hearing body for the vast majority of athletes and support persons is the Court of Arbitration for Sport, while some also have the option of seeking a hearing before sport-specific tribunals. On establishment in March 2020, the NST will be available to serve as a hearing body for the purposes of Article 8 and ensure the Australian sporting community has access to an effective, efficient, transparent and independent specialist tribunal for the fair hearing and resolution of sporting disputes. The NST will have powers to properly inform itself, including by requiring the attendance of witnesses and the provision of documents. The NST will also not be subject to direction from any party, so any person appearing before it can be assured of an impartial and independent hearing.

As with the decisions of the ADRV, any decision of the AAT would not determine the rights and obligations of participants in relation to their sport. At most it determines a step in the process, being the decision to advise the ASADA CEO of the possible violations. Under the proposed amendments, individuals will still have recourse against a decision handed down by ASADA with an ability to seek a judicial review. The actions of the CEO would rightly be scrutinised by a sport's anti-doping tribunal or the proposed NST.

By removing unnecessary delays to the pre-hearing process, these amendments will expedite the participant's opportunity to a fair hearing by reducing the time taken for a person to have access to a tribunal to have their matter heard (should they elect to do so).

The Wood Review received strong support including from the Coalition of Major Professional and Participation Sports (COMPPS) for the proposed changes, particularly streamlining the ADRV process to make it faster and more efficient and to ensure the results management process closely aligns with the WADC. It will ensure Australian athletes are subject to the same set of anti-doping procedures as the rest of the world.

Strengthening the disclosure notice process to support ASADA's investigative capability

The Wood Review found increasingly sophisticated doping is harder to detect by urine and blood sample analysis alone, with intelligence-led investigations now indispensable in the detection of doping incidents and programs. The disclosure notice regime has proven critical to ASADA's ability to catch doping cheats.

Under the ASADA Act, the ASADA CEO may issue a disclosure notice to require a person to do one or more of the following things:

- attend an interview and answer questions
- give information
- produce documents or things.

The Wood Review identified elements of the disclosure notice regime requiring enhancement and the Bill subsequently proposes the following changes to the ASADA Act:

- replacing the requirement the CEO 'reasonably believes' the recipient of a disclosure notice has relevant information, documents or things, with the requirement the CEO 'reasonably suspects' the recipient has such information, etc.
- preventing the recipient of a disclosure notice claiming the privilege against self-incrimination or the privilege against self-exposure to a penalty in order not to answer a question, give information or produce a document or thing, and
- increasing the penalty for non-compliance with a disclosure notice from 30 to 60 penalty units.

Lowering the threshold for disclosure notices

Lowering the threshold for issuing disclosure notices will allow the ASADA CEO to better investigate credible allegations or indications an ADRV has occurred.

Under the current regime, the ASADA CEO may only issue a disclosure notice if he or she reasonably believes the person has information, documents or things which may be relevant to administration of the national anti-doping scheme and three ADRV members are in agreement with this belief. This means the issuing of disclosure notices has generally been limited to those matters where there is already a body of evidence acquired by ASADA suggesting an ADRV has occurred – for instance, in connection with an Adverse Analytical Finding (AAF, a returned 'positive' sample). ASADA is generally confined to issuing disclosure notices to those persons already believed to have committed anti-doping rule violations, rather than those persons facilitating and enabling the commission of such violations.

A whistle-blower allegation or other credible information gathered from other intelligence sources may not meet this threshold, especially where the evidence necessary to either confirm or deny the allegation/intelligence is held by a third party enabler. Given the finding of the Wood Review about the sophistication of doping efforts and the decreasing likelihood of detection through sample collection and testing alone, Australia's anti-doping efforts will increasingly rely on intelligence and investigations and it will be imperative ASADA is able to act on credible sources of information below the level of 'reasonably believes'.

It is vital integrity authorities can act where there is information generating a reasonable suspicion and the ability of the CEO to respond will expedite the investigation of a possible ADRV. Inability to act on a suspicion may leave the suspicion neither proved nor disproved, to the overall detriment of public confidence in the integrity of the sport, competition or parties involved.

Lowering the threshold for action is consistent with recent calls from Thomas Bach, President of the International Olympic Committee 'for the urgent need to focus much more on the Athlete's entourage....using the full support of government authorities....who have the necessary authority and tools to take action'.¹

¹ Extract from the speech delivered by Thomas Bach at the 5th World Conference on Doping in Sport in Katowice, Poland on 5 November 2019.

By way of comparison, the nature of a disclosure notice is quite different to a search warrant as an example. A search warrant relevantly permits the entry into and search of specified buildings, vehicles, receptacles or places and authorises the use of force to do so. A disclosure notice, on the other hand, does not authorise the ASADA CEO or the CEO's delegates to conduct searches of the premises or other locations pertinent to the recipient of the notice. Rather, a disclosure notice operates as a direction to the recipient to attend an interview to answer questions, or to provide information, or to produce documents or things. Nonetheless, despite the more intrusive and higher level of compulsion involved in a search warrant, many jurisdictions in Australia use 'reasonable suspicion' and not 'reasonable belief' for the issuing of disclosure notices. It would not be excessive overreach to apply to the less intrusive nature of the disclosure notice a similar standard for action.

Further comparison can be made with the contractual powers of many NSOs which, through their policies, are in position to require members to comply with investigations. The legislative threshold of reasonable suspicion remains above of a sports body which has no threshold to meet.

There will be extensive communication with affected stakeholders regarding the intent and implications of the reforms.

Privilege against self-incrimination

The disclosure notice provisions were first inserted into the ASADA Act in 2013 to extend ASADA's statutory investigative functions to compel cooperation by persons of interest. These changes also captured persons facilitating doping violations ('third party enablers'), but who were not contractually bound to cooperate with anti-doping investigations conducted under the anti-doping policies of any NSO.

The ASADA Act currently places limits to ASADA's coercive powers once a disclosure notice has been granted. A person may currently claim privilege against self-incrimination when answering a question or giving information to ASADA. However, a person may not currently claim privilege against self-incrimination in relation to a requirement to produce a document or thing. To enable ASADA to effectively execute its intelligence and investigative functions particularly with respect to third party enablers, the right to claim privilege against self-incrimination when answering a question or giving information to ASADA will be excluded. This will, in effect, harmonise ASADA's current powers across the provision of information and is consistent with the recommendations of the Wood Review agreed by Government.

Importantly, the changes included do not have a practical impact on members of an NSO who are already obliged to comply with requests from the NSO for this information. The primary intent of the changes is to ensure the legislative framework allows ASADA to pursue third party enablers who currently sit outside of these contractual relationships, and to align ASADA's powers with the existing contractual powers of sport. By doing so, third party enablers - who through their activities have a compounding effect on undermining the

integrity of sport – will not be able to evade or frustrate anti-doping measures as is currently the case.

All registered members of sport, under their sport's anti-doping policy, abrogate their common law privilege against self-incrimination. In these circumstances, there is no threshold which applies. For example a typical provision included within a NSO anti-doping policy is:

All Persons bound by this Anti-Doping Policy and the sporting administration body must assist, cooperate, and liaise with ASADA in relation to any investigation into a potential anti-doping rule violation (or the sporting administration body 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 sporting administration body (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 sporting administration body (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.

Issues currently arise where such provisions in a NSO's anti-doping policy only bind athletes and support personnel, while the third party enablers of doping remain unchecked in their activities. These third party enablers are not bound by an NSO's anti-doping policy and the contractual requirement policy brings, and as such represent the biggest threat to sport, which can only be effectively addressed through the implementation of an appropriately regulated power with inherent legislated safeguards.

There have been instances where a third party has claimed to have lost the document or thing sought and then claimed privilege against self-incrimination in answering questions. Such instances can work against the interests of an athlete or athlete support person because the nature of the information, document or things can be exculpatory. Because of the strict liability nature of the anti-doping framework, it is essential athletes and athlete support personnel have access to all information able to clear them of suspicion. In addition, third party enablers have more rights than athletes and support persons. These amendments will require such persons to answer questions and answer them truthfully (unless the exemptions noted below apply).

Further, under current arrangements, because of the ability for a recipient of a disclosure notice to claim privilege against self-incrimination or self-exposure to a penalty, ASADA is in the position where the NSO to which the person belongs has greater (contractual) powers to compel the person to answer questions truthfully and to provide information than ASADA

does as the regulator. This amendment will reduce the reliance on contractual obligations in order to gather critical information.

These amendments include the same protections against non-direct or derivative use in a criminal prosecution as currently exist in the ASADA Act in relation to the production of documents or things. The amendments make it clear, in the case of an individual, answers or information given (or documents or things produced) under a disclosure notice will not be admissible in any proceedings other than those in connection with the ASADA Act or the Australian Sports Anti-Doping Authority Regulations 2006 (ASADA Regulations) (including proceedings before CAS, the NST or a sporting tribunal relating to sports doping or safety matters), or an offence against 137.1 (false or misleading information) or 137.2 (false or misleading documents) of the Criminal Code Act 1995 (Criminal Code). The ASADA Act also requires the notice to specify the kind of information required to enable the recipient of the notice to understand the matters and process with which they are required to comply.

The strengthened measures to combat doping and target third party enablers are balanced by the Wood Review recommendation to empower the ASADA CEO to exercise discretion in respect of athletes below the national level to apply rules which are more flexible. This recommendation is consistent with the new approach to 'recreational athletes' in the revised 2021 WADC and will be introduced in the amendments to the ASADA Regulations. In certain circumstances this change will allow the ASADA CEO, in consultation with the NSO, to impose a lesser consequence on lower level athletes - such as a warning and mandatory education - in place of the current rigid sanctioning regime.

The existence of a greater degree of flexibility will assist ASADA in establishing outreach and engagement programs for participants in sport while ensuring anti-doping testing and investigations are targeted at elite levels and facilitators of doping.

Safeguards against unauthorised use of information

Both the Parliamentary Joint Committee on Human Rights (following the Bill's first introduction) and the Senate Standing Committee for the Scrutiny of Bills have commented on the privacy implications of the amendments to the disclosure notice provisions. These concerns have been addressed through enhancements to the Explanatory Memorandum (since the Bill was first introduced in the previous Parliament) and in the Minister's response to the Senate Committee.

The amendments are reasonable, necessary and proportionate to the legitimate aim of catching doping cheats and facilitators, particularly given the safeguards existing in the ASADA Act for the protection of information, and other important safeguards against the unauthorised use of information prescribed in international anti-doping codes, conventions and standards with which Australia is required to comply.

Section 67 of the ASADA Act creates an offence punishable by 2 years' imprisonment for an 'entrusted person' to disclose 'protected information', except in the circumstances permitted by Part 8 of the ASADA Act.

The WADC International Standard for the Protection of Privacy and Personal Information is a mandatory instrument imposing strict requirements on an anti-doping organisation to ensure the privacy of persons subject to doping control are fully respected. As Australia's National Anti-Doping Organisation, ASADA must also comply with the confidentiality requirements under the WADC and this International Standard when processing personal information pursuant to the WADC.

Amending the FOI Act as proposed provides extra protection as it will render 'protected information' exempt from release pursuant to FOI. Accordingly, personal information collected by ASADA pursuant to the new disclosure notice framework would be afforded stronger statutory protections from release, assisting in the balancing of privacy concerns.

While the purposes for which the information can be lawfully released are generally directed to giving effect to Australia's anti-doping regime, the provisions give the CEO discretion to disclose information in other circumstances. For example, if ASADA uncovers information about the misconduct of an individual who is beyond the reach of the WADC, or the conduct is so serious it requires attention beyond the WADC (e.g. by other law enforcement or regulatory agencies), they are able to disclose the information to relevant authorities. In this way, the provisions strike an appropriate balance between the need to maintain the confidentiality of information, except when disclosure is necessary for the purposes of enforcing Australia's anti-doping regime, or where it is necessary as a result of broader public interest considerations.

Immunity from civil liability for national sporting organisations performing anti-doping functions

The amendments will extend the protection against civil proceedings to NSOs and their employees and contractors to ensure they are not exposed to litigation when exercising ADRV functions under the NSO anti-doping policy in good faith and promotes cooperation with ASADA on anti-doping matters.

Currently, the ASADA Act includes a suite of regulatory protections for the ASADA CEO, staff and engaged personnel against civil action when they have acted in good faith. This protects ASADA in its role when presenting evidence or material against an athlete or support person at a hearing, issuing of an infraction notice or making recommendations about a provisional suspension. The proposed amendments would extend this protection to NSOs or a person performing work or services for the NSO (employees or contractors). The extension of the immunity reflects the fact a NSO may be required to do things as a result of ASADA's exercise of its legislative functions. These are actions required to be taken under the sports anti-doping policy (rather than under the NAD scheme).

For example, the ASADA CEO, in accordance with the NAD scheme, advises an NSO there is evidence an athlete has committed a non-analytical anti-doping rule violation (i.e. a violation not involving a 'positive test' for a prohibited substance) and instructs the NSO to impose a provisional suspension in accordance with their anti-doping policy. The NSO is required to take action, and in the case where they do not, could be reported to Sport Australia by the ASADA CEO for non-compliance.

By way of example, it is possible an NSO, acting within the terms of its anti-doping policy (the terms with which the athlete has agreed to abide), provisionally suspends the athlete pending the hearing of the athlete's matter by a sporting tribunal. However, the sporting tribunal may subsequently determine it is not comfortably satisfied the athlete committed the particular anti-doping rule violation. In a circumstance such as this, the NSO, having acted in good faith, should not be exposed to civil liability for having provisionally suspended the athlete in the circumstances permitted by the anti-doping policy and required by the ASADA CEO.

Immunity proposed for NSOs will be limited to actions or proceedings for damages in relation to an act done - or omitted to be done - in good faith in implementing or enforcing the NSO's anti-doping policy. The types of proceedings not precluded by the immunity would include proceedings for damages where the NSO (or its personnel) had knowingly acted beyond power (indicating the absence of good faith), administrative proceedings (for example, the exercise of functions under the Privacy Act 1988) and criminal proceedings

Conclusion

It is widely acknowledged sport plays an important role in Australian society, improving the lives of individuals and building communities. Doping is potentially injurious to a person's health, may distort the outcome of sporting contests, and undermines the integrity of sport. Australian governments make significant investments in sport, and this investment is diminished when the integrity of sport is subverted in this way.

Of greatest concern, as highlighted by the Wood Review and further outlined in the speech of IOC President Thomas Bach, is the increasing problem of third party enablers and infiltration of organised crime – threats which are unable to be adequately addressed through current anti-doping policies or legislative framework. These amendments are crucial to ensure ASADA and Australia are best placed to defeat such threats, in particular to ensure third party enablers are subject to the same rules as athletes and athlete support personnel.

The most effective way to ensure Australian sport is played in an environment free from doping is to ensure the application of rigorous and effective anti-doping arrangements. This Bill amends the ASADA Act to enable key measures to be implemented to ensure Australia meets its obligations to contribute to a safe and fair sporting environment, safeguard athlete health, and continue to protect the fundamental values of sport.