

Chapter 3

Issues

Need for the bill

3.1 Following the release of the Australian Crime Commission's *Organised Crime and Drugs in Sport* report and other recent doping scandals, witnesses expressed strong support for the Government's efforts to ensure that Australian sport remains as far as possible drug-free. There was also general support for the strengthening of ASADA's investigative powers,¹ although concerns were expressed about certain provisions contained in the bill.

3.2 The Government stated that drug testing alone is not enough to identify anti-doping rule violations (ADRVs) and that increased investigative powers are needed. The department submitted that:

With doping becoming increasingly sophisticated, it is less likely that anti-doping rule violations will be detected through analytical testing means alone. It is also the case that a number of the behaviours which constitute an anti-doping rule violation in the World Anti-Doping Code can only be detected and substantiated through non analytical means, that is through investigations and the collection of evidence.²

3.3 The Australian Olympic Committee (AOC) submitted data obtained by an international survey conducted by the Association of Summer Olympic International Federations. That survey of the Association's members showed that, despite expenditure of \$US1.2 billion on testing every Olympic quadrennial, only 0.89 per cent of the thousands of anti-doping tests that were conducted resulted in meaningful ADRVs. The AOC submitted that the increasing sophistication of sports doping practices and the inadequacy of a traditional reliance on athlete urine and blood testing demands stronger powers of investigation.³

3.4 The Coalition of Major Professional and Participating Sports (COMPPS), which is the peak body for Australia's major professional sporting codes (namely AFL, ARU, Cricket Australia, FFA, NRL, Netball Australia and Tennis Australia) posed the question whether the new investigative powers contained in the bill are needed. Mr Malcolm Speed, Executive Director of COMPPS, stated that:

1 See, for example, Australian Paralympic Committee, *Submission 2*, p. [1]; Law Institute of Victoria, *Submission 3*, p. [1]; Exercise and Sports Science Australia, *Submission 4*, p. [1]; and Sports Medicine Australia, *Submission 5*, p. [1].

2 Department of Regional Australia, Local Government, Arts and Sport, *Submission 12*, p. 3.

3 Australian Olympic Committee, *Submission 7*, p. 4.

The history of ASADA's involvements with athletes has generally been one of full cooperation. That was Justice Wood's finding in that respect. I do not expect that that will change. There is no doubt that the provisions are quite extensive and unusual provisions. The issue is whether they are justified. To establish that, we need to go back and look at what we are seeking to achieve here, which is wider investigatory powers. Are those wider investigatory powers required? That is the basic issue.⁴

3.5 In answer to the this question, COMPPS told the committee that the bill will fill an existing gap in the major sports' investigatory and intelligence gathering capabilities:

The sports do the enforcement but there is a gap in the middle there between testing and investigation to build a case before we get to the enforcement stage. The sports are very competent at dealing with tribunal hearings and proceedings and imposing penalties. What this legislation seeks to do is to increase the investigatory and intelligence gathering capability of the sports. The sports for some time have been asking for assistance from police forces and from government agencies to be able to collect greater information to enable them to exercise their powers to a greater extent.⁵

3.6 The CEO of ASADA, Ms Aurora Andruska, informed the committee that since 2006 one third of all ADRVs that have been recorded have resulted from investigative work not positive tests.⁶ Further, she stated that in the past 12 months 45 per cent of the persons on whom ASADA had evidence of a suspected ADRV refused to cooperate with the Authority in giving a full interview.⁷

3.7 As discussed in Chapter 2, the Act already provides ASADA with certain investigative and intelligence gathering powers. The Government now proposes to increase these powers to compel athletes and others to cooperate in ASADA's investigations. This is to be done by imposing penalties on athletes and others who do not comply with disclosure notices issued by the Chief Executive Officer (CEO) of ASADA. Disclosure notices may be issued by the CEO if he or she reasonably believes that a person has information, documents or things that may be relevant to the administration of the National Anti-Doping (NAD) Scheme.⁸

4 Mr Malcolm Speed, Executive Director, Coalition of Major Professional and Participating Sports, *Committee Hansard*, 1 March 2013, p. 14.

5 Mr Malcolm Speed, Coalition of Major Professional and Participation Sports, *Committee Hansard*, 1 March, 2013, p. 11.

6 Ms Aurora Andruska, Chief Executive Officer, Australian Sports Anti-Doping Authority, *Committee Hansard*, 1 March 2013, p. 58.

7 Ms Aurora Andruska, Chief Executive Officer, Australian Sports Anti-Doping Authority, *Committee Hansard*, 1 March 2013, p. 55.

8 Australian Olympic Committee, *Submission 7*, p. 5.

3.8 Ms Andruska estimated that if ASADA had been able to compel compliance in its investigations an additional ten ADRVs (or 25 per cent more ADRVs) would have been recorded in the past 12 months.⁹

3.9 Although most witnesses agreed that ASADA's investigative powers should be strengthened, the Australian Athletes Alliance, the Commercial Bar Association and others had concerns about some of the bill's provisions. These mainly related to human rights and common law privileges.

New coercive powers

3.10 As discussed above, the bill proposes that the CEO of ASADA would have the power to issue disclosure notices to compel persons to cooperate in ASADA's investigations. Arguing against the proposed coercive powers, the Commercial Bar Association of Victoria submitted that:

Coercive powers including curtailing the right to privacy of a citizen, requiring the writer of a document to produce the document against that person's free will...should only be granted in exceptional circumstances.

...

There has been no material submitted to establish that the coercive powers will assist ASADA in catching more drug cheats. The mere assertion by ASADA that increasing its powers will make it more effective is not supported by any evidence.¹⁰

3.11 The contrary argument was put by the President of the Australian Olympic Committee, Mr John Coates:

I would like to say that we do not think that this [the conferring of coercive powers] is a precedent. I know that the Australian Securities and Investments Commission Act gives similar powers—and, while I have not read the explanatory memorandum, I take it that is because it is important to protect the integrity of our financial markets. I put it to you that it is important to protect the integrity of Australian sport.¹¹

3.12 ASADA's powers of compulsion would apply to anyone, not just athletes or athlete support staff. This gave rise to questions during the inquiry about the potential use of this process to conduct 'fishing expeditions'.¹²

9 Ms Aurora Andruska, Chief Executive Officer, Australian Sports Anti-Doping Authority, *Committee Hansard*, 1 March 2013, p. 58. See also proposed section 13A, Australian Sports Anti-Doping Authority Amendment Bill 2013.

10 Commercial Bar Association of Victoria, *Submission 9*, pp 2 and 4.

11 Mr John Coates, President, Australian Olympic Committee, *Committee Hansard*, 1 March 2013, p. 24.

12 See for example, concerns raised by committee members and responses from Government officials, *Committee Hansard*, 1 March 2013, pp 49, 56, 57, 61 and 62.

3.13 It is relevant that anyone, even if he or she has not breached one of WADA's eight anti-doping violations, may be issued with a disclosure notice if the CEO has a reasonable belief that there is something relevant to the NAD Scheme.¹³ Ms Perdikogiannis stated that:

...the CEO of ASADA...would need to have a reasonable belief that a person has information that is relevant to the administration of the NAD scheme. That means that a reasonable person sitting in the position of the CEO of ASADA would need to have information in front of them that would enable them to form that belief.¹⁴

3.14 Ms Andruska informed the committee that ASADA would not even ask to interview someone unless it had good evidence and, further, that the Authority must operate under the Government's investigative guidelines.¹⁵ The Department stated that there are very clear and well-established Australian investigation guidelines which must be taken into account by the CEO before notices are issued or a person is invited to an interview.¹⁶ Ms Andruska stated that ASADA 'would never have gone ahead without having a substantial amount of evidence and a brief that was prepared...'¹⁷

3.15 Mr Speed, representing COMPPS, stated in relation to the CEO's power to issue a notice that:

On reflection, we suggest that the threshold surrounding the chief executive's decision to issue a notice be revised so that there is greater transparency and protection around the process. We suggest we need some provisions to protect against arbitrary and ill-informed use of the power to issue a notice. Of course, we are very supportive of the current chief executive of ASADA. All of the sports have good relationships with ASADA, but this legislation will go well into the future. The current requirement is that the CEO must have a reasonable belief that the person has information, documents or things that may be relevant to the administration of the National Anti-doping Scheme. We suggest that, as a minimum, a process similar to the Australian Crime Commission Act be included whereby the CEO is required to record written reasons for the issuing of a notice. Perhaps, we would go so far as to agree with the AAA submission that the grant of coercive powers be limited to cases where there

13 Ms Elen Perdikogiannis, Australian Sports Anti-Doping Authority, *Committee Hansard*, 1 March 2013, p. 57.

14 Ms Elen Perdikogiannis, Australian Sports Anti-Doping Authority, *Committee Hansard*, 1 March 2013, p. 59.

15 Ms Aurora Andruska, Chief Executive Officer, Australian Sports Anti-Doping Authority, *Committee Hansard*, 1 March 2013, p. 58.

16 Mr Richard Eccles, Department of Regional Australia, Local Government, Arts and Sport, *Committee Hansard*, 1 March 2013, p. 57.

17 Ms Aurora Andruska, Chief Executive Officer, ASADA, *Committee Hansard*, 1 March 2013, p. 58; see also Ms Elen Perdikogiannis, General Manager, ASADA, *Committee Hansard*, 1 March 2013, p. 59.

is a probable cause to believe that the anti-doping regulations have been violated and that the coercive powers are necessary to investigate that violation.¹⁸

3.16 In answer to a question from the committee concerning the process that the Australian Crime Commission (ACC) must undertake before it may use its coercive powers, Mr Lawler, the Chief Executive Officer stated:

It is quite a lengthy process. The first part of the process or the governance around the use of the coercive powers sits with the board of the Australian Crime Commission. That is the 15 leaders of law enforcement in this country who approve under the ACC Act either a special operation or a special investigation. The term 'special' relates to an investigation where the coercive powers can be utilised under that particular determination as approved by the board. That is quite a formal document and it is supported by quite detailed and wide-ranging information to support the particular criminal activity and the board has two legal tests to apply in the case of a special operation or a special investigation, they being different. A special operation is for gathering intelligence and a special investigation is for gathering evidence. One is an intelligence activity and the other is designed for prosecution ultimately.

Those tests...go to the intent that traditional law enforcement is or is likely to be ineffective. So it puts the application of the powers at the top end of criminality—if I can call it that—where traditional law enforcement efforts against the particular threat or target have not been successful. Once those determinations are approved, officers of the ACC can apply to an independent examiner. An independent examiner is a statutory appointee who is independent of the commission for the exercise of those powers and a large number of those examiners are either former judicial officers or have a very long service in the legal world in some context or other.

...That is the second point in the process. The next issue is that the examiner is presented effectively with an affidavit or a statement of facts and needs to satisfy themselves, based on some legal tests within the ACC Act, that an examination should be conducted. The examiner is required to record the reasons as to why such an examination should be conducted or the summons issued. If they are satisfied that those thresholds have been met, the summons will be duly issued. Once the summons is issued, a person to be summonsed before the ACC hearing is entitled to legal representation and to be represented in the hearing. They are afforded strict secrecy and confidentiality around their appearance to the extent that it is an offence punishable by imprisonment for an officer of the ACC to disclose who may have been called before an ACC hearing and it is an offence for the person so summonsed to disclose that as well. We find that a very important mechanism in providing assurances to people who come before the commission, including some who come voluntarily but want that

18 Mr Malcolm Speed, Coalition of Major Professional and Participation Sports, *Committee Hansard*, 1 March, 2013, p. 9.

protection and secrecy around their appearance for a whole range of reasons that are probably pretty self-evident.¹⁹

3.17 Mr Lawler observed that the ACC operates in the Criminal Code context whereas ASADA operates in a civil and administrative context. He understood that there are checks and balances in the ASADA legislation, including confidentiality provisions; that the Ombudsman has the ability to oversee the CEO's decision making; and that there is provision for judicial review.²⁰

3.18 Mr Lawler's understanding was confirmed by the department in a supplementary submission. In relation to the issuing of disclosure statements, the department submitted that:

- Issuing of disclosure notices can only occur if the CEO has a reasonable belief that the individual concerned has information, documents or things that may be relevant to the administration of the NAD Scheme.
- The CEO's reasonable belief will stem from intelligence obtained by ASADA under the NAD Scheme.
- As a matter of administrative practice, the reasons which underpin the application of that discretion are to be properly recorded at the time of the decision.
- The CEO is also bound by other Commonwealth provisions such as the Australian Government Investigations Standards.
- The Bill makes clear that the power to issue a disclosure notice cannot be delegated beyond the Senior Executive Service level within ASADA.²¹

3.19 The department also submitted that Sections 71 and 72 of the Act which protect privacy and confidentiality will apply to the issuing of disclosure notices.²²

Committee view

3.20 The committee acknowledges the checks and balances in the ASADA legislation and the statement in the statement of compatibility that it is the Government's intention to provide further protections around the issuing of disclosure notices in amendments to the regulations. It suggests, however, that the minister might consider whether more transparency might not be appropriate in the issuing of disclosure notices in light of the serious possible consequences for athletes and others.

19 Mr John Lawler, Chief Executive Officer, Australian Crime Commission, *Committee Hansard*, 1 March 2013, pp 40–41.

20 Mr John Lawler, Chief Executive Officer, Australian Crime Commission, *Committee Hansard*, 1 March 2013, p. 41.

21 Department of Regional Australia, Local Government, Arts and Sport, *Supplementary Submission*, p. 7.

22 Department of Regional Australia, Local Government, Arts and Sport, *Supplementary Submission*, p. 6.

Recommendation 1

3.21 In light of the serious possible consequences for athletes and others, the committee recommends that the Government consider additional transparency options in the issuing of disclosure notices.

3.22 The committee is also of the view that there should be a mechanism in the legislation to ensure that the Parliament is regularly informed about the general use of the new coercive powers. In this regard the committee suggests that the Government consider amendments requiring ASADA to report annually to the Parliament on its use of disclosure notices. The provision of that report to the Parliament would enable the Parliament and the public to know how often ASADA is using the new coercive powers and whether the use of these powers has resulted in identifying ADRVs. The report would provide an additional transparency mechanism to balance the provision of this significant new power. Any information provided would necessarily need to be de-identified to protect individuals' privacy.

Recommendation 2

3.23 The committee recommends that the Government consider amendments which would require ASADA to report annually to the Parliament on its use of disclosure notices.

Abrogation of the privilege against self-incrimination

3.24 The bill proposes to insert a new section 13D into the Act to enhance ASADA's investigative functions. Section 13D will apply when a disclosure notice has been issued by ASADA's Chief Executive Officer requiring a person to attend an interview and answer questions or produce information, documents or things. Subsection 13D(1) provides that a person receiving a disclosure notice cannot claim the right against self-incrimination or that they might expose themselves to a penalty if they refuse to respond to the notice.

3.25 The Government states in the explanatory memorandum that this approach is necessary as anti-doping investigations are often significantly hampered, or in some cases completely obstructed, by a person's refusal to provide information if the person believes that they may implicate themselves in an ADRV. Subsection 13D(1) will ensure that a person with information that may assist in an anti-doping investigation is required to provide that information.²³

3.26 Subsection 13D(2) provides use and derivative use immunities, which will ensure that any information, answers given, documents or things provided as the result of a disclosure notice, will be inadmissible as evidence against the person in criminal proceedings, except in relation to providing false or misleading information or documents. The reason for this provision is set down in the explanatory memorandum

23 *Explanatory Memorandum*, p. 8.

which states that the primary intent of the bill is to assist ASADA in its investigations into possible ADRVs and not to expose individuals to other civil or criminal proceedings.²⁴ The explanatory memorandum states further that:

Information, answers, documents or things provided in response to a disclosure notice will also be inadmissible as evidence against the person in civil proceedings unless the proceedings [are] under, or arising out of, the ASADA Act or regulations. This would mean that the material obtained under a disclosure notice could not be used in other civil litigation, for example, an action by a sponsor to recover sponsorship money from an athlete who had been found by a sport tribunal to have committed an anti-doping rule violation.²⁵

3.27 The Australian Crime Commission (ACC) and the Australian Sports Commission supported the intent of the bill to increase ASADA's investigative powers, with the ACC stating that the limitation to ASADA's investigative powers is 'a significant disadvantage when dealing with persons who have a vested interest in concealing their activities'.²⁶ Mr John Coates, President, AOC, acknowledged that the bill proposed the introduction of extraordinary powers but commented that they were necessary because of the 'ineffectiveness of the current testing regime in catching all the cheats'.²⁷

3.28 Other witnesses, including the Law Institute Victorian (LIV), the Australian Athletes Alliance (AAA) and the Commercial Bar Association of Victoria (CommBar) raised concerns with section 13D. The LIV 'wholly' opposed the introduction of the provision because 'the right not to self-incriminate is a widely accepted, and is a basic human right' which should not be abrogated.

3.29 The AAA referred to the Attorney-General's Department's guide on framing Commonwealth offences, infringement notices and enforcement powers. That publication recognises that the right against self-incrimination is 'enshrined' in Australian common law and the removal of the privilege represents a 'serious loss of personal liberty' and thus should only be enacted for 'serious offences and to situation where they are absolutely necessary'. The AAA argued that there is no evidence that the investigation of doping offences are more difficult, or that the offence of doping is more serious, than other matters which are investigated without undermining the right against self-incrimination.²⁸

24 *Explanatory Memorandum*, p. 8.

25 *Explanatory Memorandum*, p. 8.

26 Australian Crime Commission, *Submission 11*, p. 2; Australian Sports Commission, *Submission 13*, p. 1.

27 Mr John Coates, President, AOC, *Committee Hansard*, 1 March 2013, p. 29.

28 Australian Athletes Alliance, *Submission 6*, p. 5.

3.30 CommBar submitted that limitations [of human rights] are only recognised as being permissible if there are reasonable limits that can be justified in a free and democratic society based upon human dignity, equality and freedom.²⁹ CommBar stated that it did not support the provision as there is no information to suggest that criminal investigations by bodies such as the Federal Police and ACC have been impeded under existing powers. CommBar considered that the Government had not provided justification for the waiver of fundamental principles of common law and human rights.³⁰

3.31 In the bill's statement of compatibility with human rights the Government stated that it is necessary to abrogate this right to ensure that possible doping offences can be properly investigated. The Government stated that there is 'currently no reason for a person of interest to provide information to ASADA that may assist in building a doping case against an athlete'.³¹

3.32 There are precedents for legislation to abrogate the privilege against self-incrimination, although these almost always include provisions for use and immunity use immunities. In one case cited by ASADA, it was stated that the Fair Work Ombudsman can require people to produce documents and there is no immunity based on privilege against self-incrimination.³²

3.33 The AAA and LIV stated that they did not consider the immunities included in subsection 13D(2) provide sufficient protection for athletes.³³ The AAA commented:

These immunities are insufficient because the impact of any proceeding based on evidence adduced in the denial of this privilege could have substantial and devastating effects on the person at issue, such as the loss of his or her livelihood. The inflexible and harsh mandatory penalties applicable under the WADA Code are highly relevant in this regard.³⁴

3.34 However, the ACC considered that subsection 13D(2) 'achieves an appropriate balance between compelling the production of information and the protection of an individual's rights and reputation'.³⁵ Similarly, Mr Coates, AOC,

29 Commercial Bar Association of Victoria, *Submission 9*, p. 4.

30 Commercial Bar Association of Victoria, *Submission 9*, p. 5.

31 *Statement of Compatibility with Human Rights*, Australian Sports Anti-Doping Authority Explanatory Memorandum, Appendix, p. iv.

32 Ms Elen Perdikogiannis, General Manager, Australian Sports Anti-Doping Authority, *Committee Hansard*, 1 March 2013, p. 62.

33 Law Institute of Victoria, *Submission 3*, p. 1; Australian Athletes Alliance, *Submission 6*, p. 5.

34 Australian Athletes Alliance, *Submission 6*, p. 5.

35 Australian Crime Commission, *Submission 11*, p. 2.

stated that the legislation 'protects the athlete in terms of privacy until such time as they have determined that there is a violation'.³⁶

Committee view

3.35 The committee acknowledges the concerns raised by several submitters, such as CommBar and LIV, regarding the proposal to remove the privilege against self-incrimination. The committee also acknowledges the counter view posed by organisations, including the AOC and the ACC, which supports the bill in this regard.

3.36 Furthermore, the committee notes the authoritative comments made by PJCHR and the Scrutiny Committee, the former of which found that the proposed section is 'generally consistent with the right not to incriminate oneself'. Nevertheless the committee is mindful that the PJCHR and the Scrutiny Committee have sought clarification from the minister on this matter (see chapter 2). The committee notes that the minister has provided responses to the PJCHR and expects that she will address the issues identified by the Scrutiny of Bills Committee before the bill is debated in the Senate.

'Evidential burden' and failure to comply

3.37 The bill amends section 4 of the Act to insert a new definition of 'evidential burden'. The explanatory memorandum states that the definition of 'evidential burden' means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. This applies to disclosure notices issued by ASADA – if a person who claims that he or she does not have information, documents, materials or things in response to a disclosure notice, the burden of demonstrating that the person does not in fact possess them, rests with the person concerned.³⁷

3.38 Some submitters opposed the reversal of the burden of proof provisions.³⁸ The Australian Paralympic Committee (APC) stated that it considered, given the extensive investigative and information sharing arrangements already available to ASADA and the proposal for their extension, 'the shifting of this burden might be an unreasonable step'. The APC went on to state that the bill implicitly confers an assumption of guilt when it may be reasonable for a person to have a genuine basis to claim non-possession but no reasonable way of proving that beyond their declaration.³⁹ The LIV also considered that the burden of proof should rest with ASADA to establish that a person has the item or knowledge which they are purported to have.⁴⁰

36 Mr John Coates, President, AOC, *Committee Hansard*, 1 March 2013, p. 29.

37 *Explanatory Memorandum*, p. 6.

38 For example the Australian Athletes Alliance, *Submission 6*, p. 5.

39 Australian Paralympic Committee, *Submission 2*, p. 2.

40 Law Institute of Victoria, *Submission 3*, p. 1.

3.39 The AAA also raised concerns about the reversal of the onus of proof, submitting that:

Under the proposed legislation, someone who is compelled to produce information, documents, or things that he/she does not possess, bears the unreasonable onus of proving a negative — that he/she is not in possession of such knowledge or said document/thing. If the person cannot perform the potentially impossible task of proving that he/she does not know something and/or does not possess something, he/she is subject to a sanction of 30 penalty units (more than \$5,000) per day that he/she does not produce what he/she does not possess.

The appropriate procedure would be to place the onus of proof on ASADA.⁴¹

3.40 The AOC stated that the arrangement envisaged in the bill is the same as that in the Australian Security and Investment Commission rules and that:

What is the big problem, if you have received a notice from ASADA, with having to go and front up? The explanatory memorandum says that, if you do not have the document that they are after, swear a statutory declaration to that effect. It is very simple.⁴²

3.41 In its supplementary submission the department stated that:

Under the bill, and in accordance with the World Anti-Doping Code (the Code), the burden of proof for establishing an anti-doping rule violation still rests with ASADA.⁴³

Committee view

3.42 The committee acknowledges the concerns raised by several submitters, such as the AAA and the APC, regarding reversal of the burden of proof provisions. The committee also acknowledges the counter view posed by organisations, including the AOC, which supports the bill in this regard.

3.43 The committee also notes the comments made by PJCHR which state that 'in light of this explanation that these matters are peculiarly within the defendant's knowledge, and as the burden is limited to an evidential burden only and not a legal burden, the limitation on the presumption of innocence is reasonable and proportionate'.⁴⁴

41 Australian Athletes Alliance, *Submission 6*, p. 5,

42 Mr John Coates, President, AOC, *Committee Hansard*, 1 March 2013, p. 24.

43 Department of Regional Australia, Local Government, Arts and Sport, *Supplementary Submission*, p. 2.

44 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Australian Sports Anti-Doping Authority Amendment Bill 2013*, Second Report of 2013, February 2013, p. 6.

3.44 Finally in this regard, the committee notes that the Scrutiny Committee has sought the minister's advice as to whether a statutory declaration would be sufficient for these purposes has been accepted by the courts and, if not, whether consideration has been given to making it clear in the bill that such evidence would be sufficient to discharge the evidential burden imposed on a person under proposed subsection. At the time of tabling of this committee's report, the Scrutiny Committee had not received a response from the minister on this matter.

Penalties

3.45 Proposed new sections 73A to 73E introduce civil penalties for the contravention of the requirements of disclosure notices.⁴⁵

3.46 The AOC supported the imposition of penalties for failure to comply with a notice but questioned whether civil penalties will be sufficient to compel compliance when non-compliance will simply amount to a debt payable. The AOC stated that athletes are being increasingly well rewarded financially and a penalty of \$5,100 for failure to comply with a disclosure notice is inconsequential. The AOC submitted that:

...the legislation should also provide expressly that the failure to comply will give rise to an adverse inference against the person, on which the [Anti-Doping Rule Violation Panel] may make its decision or otherwise act.⁴⁶

3.47 Mr Nolan, representing CommBar, stated that:

We [members of the sports section of the Commercial Bar of Victoria] provide both paid and pro bono services, more particularly pro bono services to athletes. This service is offered particularly in relation to drug cases, because contrary to the impression created today most athletes are not professional athletes. Most athletes caught by this act are amateur athletes dependent upon their parents or a sport scholarship which, last time I checked, was about \$12,500 per annum. Incidentally, when one is talking about penalties, it must be remembered if an athlete has a sport scholarship and is found guilty of a doping offence, that athlete is required to refund that scholarship, which is a substantial impost upon the athlete over and above any other penalty.⁴⁷

3.48 The AOC submitted that the sanctions for a failure to comply with a disclosure notice should involve a criminal penalty to demonstrate the seriousness with which compliance should be considered by the Government and by the

45 Australian Sports Anti-Doping Authority Amendment Bill 2013, Explanatory Memorandum, p. 9.

46 Australian Olympic Committee, *Submission 7*, p. 6.

47 Mr Anthony Nolan, Sports Section, Commercial Bar of Victoria, *Committee Hansard*, 1 March 2013, p. 33.

community. The AOC further submitted that criminal penalties should also apply to the truthfulness of the information provided.⁴⁸

3.49 The committee was informed that sports organisations make or intend to make provision for athletes with whom they have agreements to sign statutory declarations that they have not breached an anti-doping code.⁴⁹ The making of a false declaration would invoke criminal sanctions.

Committee view

3.50 The committee notes the views of submitters on the adequacy of the bill's penalty provisions. In the committee's view the civil penalties included in the bill are a suitable starting point to deter the types of activities targeted by this bill. Further consideration of the appropriateness of the penalties may be required once the legislation has operated for several years.

Common law privileges

3.51 Some witnesses submitted that the bill might infringe the common law privileges between persons and their lawyers and/or doctors. For example, the LIV submitted that the bill is silent on this issue and sought clarification that the implementation of the new legislation would not infringe on these common law rights.⁵⁰ Similarly, the AAA submitted that lawyer-client and doctor-patient privilege should be explicitly recognised in the Act.⁵¹

Lawyer-Client Privilege

3.52 Ms Perdikogiannis, representing ASADA, provided the following reply to a question concerning the common-law right of client legal privilege:

Ms Perdikogiannis: ...there has been a lot of discussion this morning about client legal privilege having been overridden by the bill. That is certainly not the intention of the bill. Client legal privilege is a common-law right.

Senator Brandis: But it is able to be abrogated by statute.

Ms Perdikogiannis: But that would need to be done by clear and expressed words, Senator, so I think it is worth noting that persons whom we interview will be able to claim client legal privilege where that exists.

Senator Brandis: So your evidence, as you understand it, is that there is nothing in statute to abrogate client privilege?

48 Australian Olympic Committee, *Submission 7*, p. 7.

49 Mr John Coates, Australian Olympic Committee, *Committee Hansard*, 1 March 2013, p. 25.

50 Law Institute of Victoria, *Submission 3*, p. 1.

51 Australian Athletes Alliance, *Submission 6*, p. 6.

Ms Perdikogiannis: That is my evidence.⁵²

Medical privilege

3.53 In relation to medical privilege, Ms Perdikogiannis stated that:

In terms of medical privilege, I think that is not absolute now. So, unlike client legal privilege which exists in the common law, medical doctor-patient privilege is something that is regulated by statute. The thing I would say about that is that, from an ASADA investigation of anti-doping rule violations point of view, our interest, in terms of medical practitioners, would be as to persons who are engaging in doping behaviour. We are not interested in the GP of an athlete. We are not interested in trawling through athletes' medical records in the event that we might find something. We are not intending to go fishing. This is really about those cases. Take the Dr Ferrari case, if we go back to Lance Armstrong. Here was a medical practitioner who had created a doping program for members of the US Postal cycling team. It is that kind of person that we are interested in.⁵³

3.54 The Australian Psychological Society commented on the importance of doctor-patient confidentiality:

Psychologists take their commitment to client confidentiality very seriously, and while confidentiality is never absolute, psychologists disclose confidential information obtained in the course of their provision of psychological services only under very specific circumstances. Any statutory reporting requirement to breach this commitment would risk deterring athletes from seeking the very services and support they might need to acknowledge and address any substance-related health and behavioural issues.⁵⁴

Committee view

3.55 The committee notes the concerns expressed by various submitters regarding the common law privileges between persons and their lawyers and/or doctors.

3.56 The committee is satisfied with the evidence provided by ASADA officials that there is no limitation in the bill with respect to client legal privilege.

3.57 The committee also notes ASADA officials' evidence in relation to medical privilege, and in particular ASADA's intended use of the new powers to investigate sports medicine professionals who may be engaging in doping behaviour rather than to obtain information from of an athlete's medical practitioner. The committee would

52 Ms Elen Perdikogiannis, General Manager, Australian Sports Anti-Doping Authority, *Committee Hansard*, 1 March 2013, p. 61.

53 Ms Elen Perdikogiannis, General Manager, Australian Sports Anti-Doping Authority, *Committee Hansard*, 1 March 2013, p. 61.

54 Australian Psychological Society, *Submission 15*, pp 3–4.

support any further clarification the Government may be able to provide on this matter.

Recommendation 3

3.58 The committee recommends that, subject to the recommendations contained elsewhere in this report, the Senate pass the Australian Sports Anti-Doping Authority Amendment Bill 2013.

**Senator Glenn Sterle
Chair**

