Dissenting Report of Coalition Senators

Introduction

1.1 Australians of all ages, and from all walks of life – whether as participants or spectators - take pleasure in Australia's sporting achievements. Sport is more than just a pastime; is one of the things that defines our way of life and is integral to our national character. For that reason, the deservedly high reputation of Australian sport needs to be protected.

1.2 In recent years, the problem of drugs in sport has become a matter of growing public concern. For that reason, in 2006 the Howard Government passed the Australian Sports Anti-Doping Authority Act, to create a statutory authority with sweeping powers to investigate and expose the presence of drugs in sport.

1.3 As the Committee heard from several witnesses to the present hearing, Australia is regarded as a world leader in the field. Indeed, since 2007, a distinguished Australian, the Hon John Fahey, a former Premier of New South Wales and senior Minister in the Howard Government, has led the international peak body, the World Anti-Doping Authority. It is clear that Australia is internationally renowned for both leadership and best practice.

The Bill

1.4 It is important to appreciate that under the existing ASADA Act, ASADA already has extensive, invasive powers. Those powers require, in particular, that athletes submit to drug testing administered by ASADA, and impose penalties for failure to co-operate. The Bill currently under consideration would expand those powers in a number of important respects. In particular:

- new coercive powers are introduced requiring athletes and other persons to attend an interview in order to answer questions, and to provide documents and other information to ASADA [proposed s. 13A];
- remove the privilege against self-incrimination [proposed s. 13D];
- introduce a civil penalty regime [proposed Part 8A];
- remove, in relation to an alleged contravention, the requirement of ASADA to prove the state of mind (for example intention or knowledge) of the alleged contravener [proposed s. 73P];
- arguably, remove lawyer/client privilege, while also violating doctor/patient confidentiality.

1.5 Some statutes contain the same or similar provisions. One witness pointed to the provisions which govern corporate regulators, such as the Australian Securities

and Investments Commission.[1] Coalition Senators accept that, in certain cases, draconian provisions which remove or reverse traditional privileges and immunities are justified by a higher public interest in law enforcement. Nevertheless, we are concerned at the increasing tendency to regard the abrogation of traditional rights as the norm, rather than the exception. We, on the contrary, believe that it is for the Executive Government which seeks such measures, to justify in each case why it is necessary.

1.6 Another problem with the Bill is the apparently unlimited scope of the new powers of coercion, given the vagueness of the definition of NAD (National Anti-Doping) Scheme.

The Evidence

1.7 In the case of ASADA, the Committee heard no persuasive evidence that such a necessity exists. On the contrary, we heard from both Mr John Coates, the President of the Australian Olympic Committee, and Mr Simon Hollingsworth, the CEO of the Australian Sports Commission, that under the existing legislation Australia is "a world leader" in the field,[2] and that the current Australian practice is world's best practice.

1.8 Nor was there any evidence that the amendments were necessary for Australia to fulfil or keep pace with our international obligations. For instance, the President of the Australian Olympic Committee, Mr John Coates (who supported the amendments) said, in response from a question by a Government Senator:

> **Senator THORP:** Is it your understanding of the legislation we are dealing with today that that would mean we are compliant with the principles of the World Anti-Doping Code?
>
> **Mr COATES:** We are compliant the way it is now. … We are not being told to do this by WADA.[3]

1.9 ASADA itself was unable to provide any persuasive evidence of the insufficiency of its existing powers. The CEO of ASADA, Ms Aurora Andruska, having originally asserted that about a quarter of doping violations went undetected, when pressed, changed her evidence in an important respect:

> Had we been able to have those conversations my estimate is that, instead of 30 anti-doping rule violations in the 12 months, there probably would have been another 10, in round figures. So because we were not able to have those conversations with people, 25 per cent of anti-doping rule violations were not uncovered.
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> **Senator DI NATALE:** On what basis do you make that statement? We have been here all day, and we finally get to the crux of the matter!

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1 Hansard, p. 25.

2 Mr Coates, Hansard, p. 24; Mr Hollingsworth, Hansard p. 51.

3 Hansard p. 25.

> **Ms Andruska:** I am taking it on the basis that in all the cases that we took forward and asked if we could come and talk to them and have an interview, we would never have gone ahead without having a substantial amount of evidence and a brief that was prepared et cetera—the process that we need to go through. In 55 per cent of the cases, where people agreed to talk to us, we were able to take forward that anti-doping rule violation. In 45 per cent, we were not able to because they did want to talk to us.
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> **Senator BRANDIS:** Applying those figures, because your conclusion is suppositious, you say that there were approximately 10 cases in which you could not take it forward for want of these powers. Is that right?
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> **Ms Andruska:** Yes.
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> Senator BRANDIS: But that presumes that had the powers been available to you and had you used them, that would have disclosed a breach. Because you did not have the powers, you never knew whether there was a breach or not. So you are assuming that you would have discovered a breach. So it is not 10 cases at all. It is 10 possible cases.
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> **Ms Andruska:** I agree.[4]

1.10 As well, the peak Australian sporting bodies have been active in enforcing codes of practice within their own sports to deal with the menace of drugs. All major sporting organizations require, for instance, their elite athletes to enter into agreements to observe strict behavioural protocols, which include prohibitions against the use of non-WADA compliant substances and illicit drugs. This is a condition of their selection and participation. An example is the Australian Olympic Committee Team Agreement, which was tabled by the witnesses from the AOC.[5]

Summary and Conclusions

1.11 Where the evidence before the Committee was that:

- Australia's existing legislation is already world's best practice and we are a world leader in the field;
- Australia is already compliant with all of its WADA obligations and is not being pressed by WADA to make these changes;
- There is little evidence that ASADA's existing powers are insufficient, and such evidence as there is, is speculative; and
- Athletes and sports professionals already have onerous compliance obligations under their existing contracts

it is difficult to conclude that the new, invasive powers of ASADA are necessary.

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4 Hansard, p. 58.

5 Hansard, p. 24.

1.12 Of course, all law enforcement and regulatory bodies would like greater powers. In the case of demonstrated need, they should be given them. But it is for the Parliament to assess, on the basis of a careful consideration of the evidence placed before it, whether such additional powers are necessary. It appears to Coalition Senators, on the basis of the evidence summarized in paragraph 10, that the need for such new powers has not been made out.

1.13 Coalition Senators accept that some of the measures proposed by the Bill are desirable – for instance, the extension of the limitation period to 8 years, and provisions for enhanced information-sharing between ASADA and policing agencies. Nevertheless, the provisions which comprise the core of the Bill, prescribing a significantly more invasive regime without any demonstrated need to do so, should not, for the reasons we have given, be passed.

The WADA Code review

1.14 Nevertheless, we are impressed by the argument, which the witnesses from the sporting organizations, ASADA, and the Australian Crime Commission pressed on us, that Australia must stay "ahead of the game" when it comes to doping in sport, rather than playing "catch up". There is an obvious common sense in that view. But it has to be grounded in some rational basis for concluding that Australia is at risk of falling behind.

1.15 The Committee was told by witnesses from the Australian Athletes' Alliance that at the moment, there is a comprehensive review of the WADA Code underway, which is expected to be completed by the end of this year.[6] In the absence of any persuasive evidence for the urgency of this legislation – or, indeed, the demonstrated need for the removal from athletes and sports personnel of traditional rights and immunities – it seems to us to be sensible to wait, at least, until the WADA Code review is available. The extent to which further reform is necessary to ensure that Australia is compliant with world's best practice, in light of that review, could more sensibly be assessed at that time.

Recommendation 1

That consideration of the Bill be deferred until after the current WADA Code review is available.

6 Hansard, p. 16

Senator the Hon. Bill Heffernan
Deputy Chair
Liberal Senator for New South Wales

Senator the Hon George Brandis
Liberal Senator for Queensland

Senator Cory Bernardi
Liberal Senator for South Australia

Senator Sean Edwards
Liberal Senator for South Australia