APPEDIX 3

Parliamentary Joint Committee on Human Rights

Second Report of 2013

Minister's Response and Committee's Commentary

SENATOR THE HON KATE LUNDY

MINISTER FOR SPORT
MINISTER FOR MULTICULTURAL AFFAIRS
MINISTER ASSISTING FOR INDUSTRY AND INNOVATION
SENATOR FOR THE A.C.T

27 FEB 2013

B13/111

The Hon Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100, Parliament House
CANBERRA ACT 2600

Dear ~~Mr Jenkins~~ Harry

Thank you for your letter of 13 February 2013 regarding the Australian Sports Anti-Doping Authority Amendment Bill 2013 (the Bill) which amends the *Australian Sports Anti-Doping Authority Act 2006*.

I note the Parliamentary Joint Committee on Human Rights (the Committee) has assessed the Bill against Australia's international obligations under the International Covenant on Civil and Political Rights (ICCPR) and seeks clarification on a number of matters. While information on the specific matters raised is provided below, I would highlight the importance of having rigorous and effective anti-doping arrangements that seek to protect those values which sport can so powerfully convey to the broader community.

There is no place in sport for those who cheat through doping. The harmful health effects of using prohibited substances and methods is well known, along with the potential for doping to undermine the important values that sport promotes within the community (such as the spirit of cooperation, honesty, fair play and dedication). Most Australians participate in and follow a range of sports in the belief that these sports are free of doping. This can be significantly compromised and possibly irrevocably damaged if they believe athletes are not competing on their merits.

Australia's anti-doping arrangements give effect to our international obligations under the UNESCO International Convention Against Doping in Sport (the UNESCO Convention). Chiefly, the UNESCO Convention requires States Parties to implement arrangements that are consistent with the principles of the World Anti-Doping Code (the Code). The Code is an internationally-accepted arrangement, which provides the framework for harmonised anti-doping policies, rules and regulations across both the global sporting movement and Governments.

Civil Penalty Orders

1.12 Whether the proposed civil penalty provisions are considered to involve 'criminal charges' under article 14 of the ICCPR and are required to be dealt with in proceedings which observe the guarantees applicable to criminal proceedings.

The imposition of a 'civil penalty' under part 8A of the Bill was assessed by the Department of Regional Australia, Local Government, Arts and Sport as a civil charge for the purposes of Article 14 of the ICCPR. This is based on consideration of those factors used under international human rights law to determine whether a civil penalty constitutes a criminal charge. These factors include: the classification of the Act in domestic law, the nature of the offence, the purpose of the penalty and the nature and severity of the penalty.

The proposed penalty provisions in the Bill are classified as civil penalties under Australian domestic law. A failure to comply with a disclosure notice that is issued by the Australian Sports Anti-Doping Authority (ASADA) Chief Executive Officer (CEO) becomes a debt payable to the Commonwealth. It does not result in a criminal conviction and the person will not have a criminal conviction recorded against them in the event that a Court determines to impose a fine for a breach of the relevant provision.

The final decision on whether a person is found to have contravened a civil penalty provision, and the decision on the amount of the penalty to be imposed, rests with the relevant court. The Bill sets out a number of factors that a court must take into account when determining a penalty (new section 73B).

Reference was made to the potential penalties that may result from separate contraventions for each day the contravention of a civil penalty provision continues. The maximum penalty prescribed in the Bill (up to 30 penalty units for natural persons and up to five times that amount for a body corporate) is in accordance with the *Guide to Framing Commonwealth Offences* while the approach to the continuing contravention of a civil penalty provision is consistent with the approach adopted in other Commonwealth legislation.

Double Jeopardy

1.15 Whether the proposed new section 73K is consistent with article 14(7) of the ICCPR in allowing criminal proceedings to be brought in respect of conduct which has already been the subject of a civil penalty order.

New section 73K is considered to be consistent with article 14(7) of the ICCPR as the civil penalty provisions are not characterised as 'criminal' for the purposes of Article 14 of the ICCPR.

As civil penalty provisions are not characterised as criminal for the purposes of Article 14 there is no potential for double trial or double punishment for the same conduct under new section 73K.

Right not to Incriminate Oneself

1.22 Whether proposed new section 13(D)(2)(f) is consistent:

- *With the right not to incriminate oneself under article 14(3)(g), if such proceedings are 'criminal' under international human rights law; or*
- *With the right to a fair hearing under article 14(1) of the ICCPR, if such proceedings are 'civil' under international human rights law.*
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As noted previously, this penalty was assessed as a civil charge for the purposes of Article 14 of the ICCPR. Accordingly, my response relates to the second dot point.

While maintaining a rigorous and effective anti-doping regime, the rights of athletes are respected. The civil proceedings under the *Australian Sports Anti-Doping Authority Act 2006* refer to the hearings that are held to determine whether a breach of anti-doping rules has occurred and the period that an athlete or athlete support person, as defined under the National Anti-Doping (NAD) Scheme, is ineligible from competing in sport. These hearings are conducted under the auspices of the athlete's national sporting organisation and in accordance with the principles of a right to fair hearing including a right to examine and cross examine witnesses and the right to be legally represented. This is undertaken through the Court of Arbitration for Sport or the individual sport tribunal.

Right not to be subject to arbitrary or unlawful interference with family life

1.32 Whether the provision imposing a civil penalty on any person for failing to comply with a disclosure notice engages the right not to be subject to arbitrary or unlawful interference with the family.

The ASADA CEO cannot arbitrarily issue a disclosure notice to any person including the family members of an athlete. In order to issue a disclosure notice, the ASADA CEO must reasonably believe that the person 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.

To reflect the significance of this power, only the CEO or delegated Senior Executive Service Officer can issue a disclosure notice. As a matter of administrative practice the reasons which underpin the application of that discretion will be properly recorded at the time of the decision.

Moreover, the purpose of the disclosure notice is to allow the discovery of information that may establish a breach of anti-doping rules under the contract that athletes have with their sport and consequently allow for imposition of relevant sanctions under the terms of the contract. The evidence collected under a disclosure notice will not be used in any criminal prosecutions.

The NAD Scheme will be amended to ensure that appropriate protocols are put in place to protect the rights of people under the age of 18. This will include, for example, the right for the person to have their legal guardian present during an interview.
It is also noted that, under Clause 1.07 of the NAD Scheme which reflects the World Anti-Doping Code, a support person can be any person who helps an athlete to prepare for a sports competition. Family members often fulfil the role of support person to the athlete, potentially making them subject to the NAD Scheme.

Freedom of Association and Freedom of Expression
1.35 Whether restrictions on members of the ASDMAC liaising with others and contributing to deliberations or discussions are consistent with the right to freedom of expression and freedom of association in articles 19 and 22 of the ICCPR.

The purpose of this amendment is not to limit an individual's freedom of association or expression. Rather, this amendment aims to avoid any conflict of interests issues that may arise from someone having privileged knowledge gained in the course of their membership on the Australian Sports Drug Medical Advisory Committee (ASDMAC). ASDMAC performs an important function under Australia's anti-doping arrangements. It assesses and approves applications from athletes to use prohibited substances for a legitimate therapeutic purpose. This facilitates an athlete's right to access an otherwise prohibited substance or method to treat a medical condition.

The primary aim of this amendment is to ensure that an ASDMAC member does not provide information or evidence that they have gained in that role to support a person who is the subject of consideration of the Anti-Doping Rule Violation Panel (the Panel) or involved in proceedings before other bodies (e.g. a sporting tribunal) in respect of a matter over which the member would have conflicted knowledge.

The amendment also requires an ASDMAC member not to take part in any deliberations or decisions of a sporting administration body in relation to an anti-doping matter such as appearing as a witness in any proceeding before a tribunal. This amendment is designed to prevent an ASDMAC member, who may be approached in a private capacity, to provide evidence before a sporting tribunal in a case in which the member, through their role with ASDMAC, has inside knowledge.

Australian Sports Anti-Doping Authority Amendment Regulation 2012
In addition to the issues raised in your letter, I note that the Committee tabled its first report of 2013 on 6 February 2013. The report included the Committee's examination of the Australian Sports Anti-Doping Authority Amendment Regulation 2012 (the Regulations). The following is a response to a query raised by the Committee in that report:

Compatibility with Human Rights
2.11 In particular, regulations that provide that the Panel may make entries on the Register of Findings about an athlete, including their name, date of birth, and the nature of the finding against them in relation to an anti-doping rule violation, engages, and appears to limit, the right to privacy. Regulations that enable information to be made available to relevant sporting organisations and 'details of other parties that will be notified on the entry on the Register' also appear to limit this right. Information is needed to explain if this limitation is reasonable, necessary and proportionate to achieve a legitimate aim.

The Register of Findings is not publicly available. Placing a finding on the Register of Findings however, is a trigger to allow a number of notifications to be made and these are currently provided for under the NAD Scheme.

The details of a possible anti-doping rule violation recorded on the Register of Findings are referred under the privacy provisions in the NAD Scheme to the relevant sporting administration body so an Infraction Notice can be issued and a hearing arranged to determine whether or not a violation has been committed and the applicable sanction under the terms of the sporting administration body's Anti-Doping Policy.

There are also appeal provisions available to a person whose name is placed on the Register of Findings. For example, if the Panel determines to make an entry onto the Register of Findings, an athlete to whom the entry relates is entitled to appeal the Panel's decision to the Administrative Appeals Tribunal (AAT).

Clause 4.22 of the NAD Scheme sets out the circumstances where the CEO is authorised to publish information on and related to the Register of Findings. The CEO can do this only if publication is in the public interest and the matter has been finally determined by a sport or sporting tribunal including the completion of all appeal periods or the AAT has finalised the matter.

Thank you for the opportunity to provide clarification on the matters you have raised. Should you require any further assistance, please contact Ms Natasha Cole, Assistant Secretary, National Integrity in Sport Unit, on 6210 2705 or by email at natasha.cole@pmc.gov.au.

Yours sincerely

Kate Lundy

Australian Sports Anti-Doping Authority Amendment Bill 2013

Introduced into the Senate on 6 February 2013; before Senate
Portfolio: Sport
PJCHR comments: Report 2/13 , tabled on 13 February 2013
Ministerial response dated: 27 February 2013

Committee view

1.1 The committee thanks the Minister for her detailed response.

1.2 The committee remains concerned that subjecting a person to a penalty for failing to comply with a disclosure notice, without allowing for any exceptions, may interfere with the right to respect for family life. The committee suggests that consideration be given to allowing family members to raise an objection to complying with a disclosure notice if to do so may cause harm to the person or their family relationship, rather than being immediately subject to a civil penalty order.

1.3 The committee has decided to defer finalising its views on the fair trial implications of the civil penalty provisions in the bill to enable closer examination of the issues in light of the information provided.

1.4 The committee notes the Minister's responses in relation to freedom of association and freedom of expression which adequately addresses the committee's concerns and makes no further comments on those aspects of the bill.

Background

1.5 This bill seeks to amend the *Australian Sports Anti-Doping Authority Act 2006* to strengthen the Australian Sports Anti-Doping Authority's (ASADA) investigation functions and to enhance information sharing arrangements with other government agencies. In particular, it provides the Chief Executive Officer (CEO) of ASADA the power to issue a disclosure notice compelling persons of interest to assist ASADA's investigations. Failure to comply with the notice subjects the person to a civil penalty. It also introduces a number of provisions relating to the enforcement of the civil penalty.

1.6 The committee sought clarification and further information from the Minister as to:

- whether the minimum guarantees in criminal proceedings apply to the bill's new civil penalty provisions and, if so, whether the new provisions allowing criminal proceedings to commence regardless of whether a

civil penalty order has been made for the same conduct, are consistent with the right not to be tried or punished twice for the same offence;

- the application of the bill's provisions on the right not to incriminate oneself;
- whether provisions compelling any person, including the family member of an athlete, to answer questions or produce information or documents, engages the right not to be subject to arbitrary or unlawful interference with the family; and
- whether restrictions on members of the Australian Sports Drug Medical Advisory Committee on whom they may liaise with, and what discussions they may contribute to, are consistent with the rights to freedom of expression and freedom of association

1.7 The Minister's response is attached.

Committee's response

1.8 The committee notes the Minister's comments that a disclosure notice requiring a person to give information can only be issued when the person issuing it 'reasonably believes' that a person has information that may be relevant to the administration of the national anti-doping scheme. However, the committee remains concerned that applying this obligation without exception may interfere with the right to respect for family life as family members could be subject to a civil penalty for failing to provide information or documents in relation to their spouse, partner, parent or child.

1.9 As the bill engages and limits the right to a family life, the key issue is whether the limitation is reasonable, necessary and proportionate to achieve a legitimate objective. The committee accepts that the provisions pursue the legitimate aim of investigating potential breaches of anti-doping rules. However, the committee considers that the provisions, in not allowing a person to object to a disclosure notice on the basis that the information sought relates to a family member, do not appear to be proportionate to the aim sought to be achieved, and therefore may not accord with the right to a family life.

1.10 The committee suggests that consideration be given to allowing family members to raise an objection to complying with a disclosure notice if to do so may cause harm to the person or their family relationship, rather than being immediately subject to a civil penalty order.