The Senate

Rural and Regional Affairs and Transport Legislation Committee

Australian Sports Anti-Doping Authority Amendment Bill 2013

March 2013

ISBN 978-1-74229-780-4

This document was prepared by the Senate Standing Committee on Rural and Regional Affairs and Transport and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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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.

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.

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.

Chapter 1

Introduction

Conduct of the Inquiry

1.1 The Australian Sports Anti-Doping Authority Amendment Bill 2013 (the bill) was introduced and read a first time in the Senate on 6 February 2013. On 7 February, on the recommendation of the Selection of Bills Committee, the Senate referred the bill to the Rural and Regional Affairs and Transport Legislation Committee (the committee) for inquiry and report by 12 March 2013.

1.2 The reasons for the referral were that the bill had not been released as a draft for public comment and that its legal aspects should be scrutinised to ensure that there would be no unintended consequences arising from the proposed changes.[1]

1.3 In accordance with its usual practice, the committee advertised the inquiry on its website. The committee also contacted a number of organisations and invited them to make submissions. Sixteen submissions were received, as shown in Appendix 1.

1.4 The committee held a public hearing in Canberra on Friday, 1 March 2013. A list of witnesses who appeared at the hearing may be found at Appendix 2. A copy of the proof Hansard transcript of the hearing has been posted to the committee's website. The references to the pages of the Hansard transcript made in this report are to the proof Hansard, which may differ from those of the official transcript.

Purpose of the bill

1.5 The purpose of the bill is to amend the *Australian Sports Anti-Doping Authority Act 2006* (the Act) to strengthen the Australian Sports Anti-Doping Authority's (ASADA) investigation functions and to enhance information sharing arrangements with other government agencies. In addition, the bill clarifies certain definitions in the Act, clarifies conflict of interest provisions for members of anti-doping bodies established under the Act and confirms the statutory period for commencing action against an athlete in relation to possible anti-doping rule violations.[2]

Structure of the report

1.6 The remaining chapters of this report are:

- Chapter 2, which covers the background to the bill and its key provisions; and

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1 Senate Selection of Bills Committee, *Report No. 1 of 2013*, 7 February 2013, Appendix 1.

2 Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment Bill 2013, p. 2.

- Chapter 3, which discusses key issues raised during the inquiry.

Acknowledgements

1.7 The committee thanks those individuals and organisations who made submissions in the limited time available, and also those who gave oral evidence. Their input greatly assisted the committee in its inquiry.

Chapter 2

Background

Use of performance enhancing drugs

2.1 The Australian Crime Commission's recent report *Organised Crime and Drugs in Sport* identified widespread use of performance enhancing and image enhancing drugs among professional athletes.[1] The use of performance enhancing drugs appears to be increasing. The Australian Customs and Border Protection Service informed the committee that:

> Since 2009 Australia has seen a significant increase in the number of attempted illegal importations of [performance and image enhancing drugs], including steroids and human growth hormones. In 2011-12 Customs and Border Protection made a record 6,126 steroid detections and 2,595 hormones detections. The majority of these detections were made in the international mail stream. These trends reflect an increasing domestic demand and an increasing ability for individuals to obtain [performance and image enhancing drugs] via online forums from low cost source countries.[2]

2.2 The Australian Crime Commission submitted that its recent *Organised Crime and Drugs in Sport* report demonstrated that the threat posed by the performance enhancing drugs market and related criminal activities to the integrity of sport in Australia, and organised crime attempts to infiltrate the professional sports sector in Australia, is current, crosses sporting codes and is evolving.[3]

The Australian Sports Anti-Doping Authority

2.3 The Australian Sports Anti-Doping Authority (ASADA) was established by the *Australian Sports Anti-Doping Authority Act 2006*. ASADA combined the anti-doping functions then carried out by the Australian Sports Drug Agency and the educative and other functions undertaken by the Australian Sports Commission (ASC). The Authority was also given limited investigative and prosecutorial powers in relation to anti-doping rule violations.

Background to the Government's role in sports anti-doping activities

2.4 The Department of Regional Australia, Local Government, Arts and Sport (the department) informed the committee that the Australian Government has had a

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1 Australian Crime Commission, *Submission 11*, p. [1]. The term "performance enhancing drugs" will be used throughout this report to cover both performance enhancing and image enhancing drugs.

2 Australian Customs and Border Protection Service, *Submission 16*, p. 1.

3 Australian Crime Commission, *Submission 11*, p. 1.

role in sports drug testing since 1985 when the Anti-Drugs Campaign of the ASC was established. Since that time, successive Australian Governments have enhanced Australia's anti-doping arrangements. The department and the Australian Olympic Committee submitted that Australia is considered to have one of the most advanced anti-doping arrangements in the world.[4]

2.5 Ms Catherine Ordway, a lecturer in Sports Governance at the University of Canberra, provided the following information concerning the recent history of the Government's anti-doping activities:

> In 2004, a new statutory authority was proposed to replace the Australian Sports Drug Agency (ASDA), to be called the Australian Sports Anti-Doping Authority (ASADA). ASDA was the original National Anti-Doping Organisation for Australia. ASDA was established by the *Australian Sports Drug Agency Act 1990*, and became a statutory authority in 1991. ASADA replaced ASDA on 14 March 2006. The creation of ASADA was a key recommendation of the 2004 Anderson inquiry into the use of drugs by Australia's track cycling team.[5]

2.6 Ms Ordway informed the committee that the report of the Anderson inquiry had recommended, with respect to the investigation of doping offences in Australian sport, that 'there should be a body which is quite independent of the AIS and of the Australian Sports Commission and of the sporting bodies themselves with the power and duty to investigate suspected infractions such as substance abuse and to carry the prosecution of persons against whom evidence is obtained'.[6]

2.7 Significantly, when it was originally established, ASADA was given the power to investigate doping allegations and present anti-doping cases at hearings of tribunals established under the World Anti-Doping Code (the Code). As Ms Ordway observed, the establishment of ASADA helped the then Government fulfil its international treaty obligations under the UNESCO International Anti-Doping Convention.[7] The UNESCO convention requires state parties to implement arrangements that are consistent with the principles of the Code.[8] Mr Schwab of the Australian Athletes Association (AAA), remarked that 'ASADA is a creature of

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4 Department of Regional Australia, Local Government, Arts and Sport, *Submission 12*, p. 1; Mr John Coates, President, Australian Olympic Committee, *Committee Hansard*, 1 March 2013, p. 25.

5 Ms Catherine Ordway, *Submission 14*, p. 2.

6 The Honourable R Anderson QC, 'Second Stage Report to the Australian Sports Commission and to Cycling Australia', (Anderson Report), Canberra, 27 October 2004, Department of Communications, Information Technology and the Arts, 2004, http://fulltext.ausport.gov.au/fulltext/2004/feddep/Anderson_report.asp. Referred to in Ms Catherine Ordway, *Submission 14*, p. 2.

7 Ms Catherine Ordway, *Submission 14*, p. 2.

8 Department of Regional Australia, Local Government, Arts and Sports, *Submission 12*, p. 2.

WADA [World Anti-Doping Agency]'.[9] The establishment of ASDA 'was also in keeping with the growth in non-policing public sector agencies performing investigative functions'.[10]

The bill

2.8 The Government has indicated in the explanatory memorandum to the bill that the current methods for detecting doping in athletes, namely blood and urine tests, are no longer adequate to detect sophisticated doping cases. It is therefore proposed that ASADA be provided with investigative techniques and intelligence gathering powers to identify athletes and support personnel who may be using prohibited performance enhancing substances and methods.[11]

2.9 The additional powers would give the Chief Executive Officer of ASADA the power to issue disclosure notices that would compel persons to cooperate in ASADA's investigations. Persons served with a disclosure notice would be required to cooperate by answering questions, giving information or providing materials, documents or things. ASADA would be able to retain this material which might be used in proceedings that arise under or in relation to the ASADA Act or Regulations. Civil penalties apply for failure to comply with disclosure notices.[12] This subject, along with the associated topics of the limitation of the right against self-incrimination and the reversal of the onus of proof, are discussed in the following chapter.

2.10 The Government also intends that the current information sharing arrangements between ASADA and other Government agencies be extended to allow the Agency to obtain information from Australia Post about individuals' current addresses and about post office box registrations. The proposed changes would not allow ASADA to intercept or examine the contents of any mail item.[13]

2.11 Other changes proposed include: clarifying that the role of the Anti-Doping Rule Violation Panel is to make findings that an athlete or supporting person has possibly committed an anti-doping rule violation; additional provisions to address possible conflicts of interest for members of the Panel and the Australian Sports Drug

9 Mr Brendan Schwab, General Secretary, Australian Athletes' Alliance, *Committee Hansard*, 1 March 2013, p. 22.

10 Ms Ordway, *Submission 14*, p. 3.

11 See Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment Bill 2013, p. 2.

12 Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment Bill 2013, p. 2.

13 Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment Bill 2013, p. 3.

Medical Advisory Committee; and providing for a statute of limitations of eight years.[14]

Parliamentary scrutiny committees' reports

2.12 Two scrutiny committees of the Parliament, which have a specific role to examine bills to ensure their compatibility with human rights or personal rights and liberties, have examined the bill. A summary of their examinations may be found in the following paragraphs.

Parliamentary Joint Committee on Human Rights

2.13 The Parliamentary Joint Committee on Human Rights (PJCHR) expedited its report on the bill so that this committee might be assisted in its inquiry.[15] The PJCHR's report identified the following matters in relation to the bill.

2.14 The PJCHR noted that a statement of compatibility with human rights that was provided with the bill concluded that the bill is compatible with human rights. The statement of compatibility states that 'the bill promotes the right to enjoy culture as it seeks to protect the integrity of sport in Australia by enforcing anti-doping rules' and argues that the enjoyment of the right to culture would be significantly eroded '[s]hould Australians lose the belief that sporting contests in this country take place on a level playing field'.[16]

2.15 The PJCHR examined the civil penalty provisions of the Bill and sought clarification from the minister as to whether the civil penalty provisions are 'considered to involve "criminal charges" under article 14 of the ICCPR [International Convention on Civil and Political Rights] and are required to be dealt with in proceedings which observe the guarantees applicable to criminal proceedings'. In addition, it noted the provisions of proposed sections 73H and 73K and the potential for double trial or double punishment for the same conduct. The PJCHR therefore sought clarification from the minister as to whether the provisions are consistent with the ICCPR.[17]

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14 Explanatory Memorandum, Australian Sports Anti-Doping Authority Amendment Bill 2013, p. 3.

15 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, Executive Summary, p. ix.

16 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. 2.

17 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, pp 3–4.

2.16 The limitation of the right not incriminate oneself was examined by the PJCHR which found that proposed section 13D is 'generally consistent with the right not to incriminate oneself'. However, the PJCHR indicated that it intended to write to the minister to ask whether proposed paragraph 13D(2)(f) – which provides that answers, information or documents given may be used against the person in civil proceedings under the Act – is consistent with the ICCPR in relation to:

- the right not to incriminate oneself, if such proceedings are 'criminal' under international human rights law; or
- with the right to a fair hearing, if such proceedings are 'civil' under international human rights law.[18]

2.17 The PJCHR also commented that the statement of compatibility states that the bill may operate to limit the right to be presumed innocent as it imposes an evidential burden on the defendant in relation to a range of matters. It noted the explanation made in relation to proposed provisions regarding failure to comply with disclosure notice[19] and mistakes of fact[20] and concluded 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'.[21]

2.18 The PJCHR also examined the bill in relation to the right not to be subject to arbitrary or unlawful interference with privacy. It reported that in light of the explanation provided in the statement of compatibility, the bill does not appear to give rise to any human rights privacy concerns.[22]

2.19 The PJCHR sought further information from the minister in relation to the provisions imposing a civil penalty on any person for failing to comply with a disclosure notice and the right not to be subject to arbitrary or unlawful interference with family life. The PJCHR sought information from the minister regarding the right to freedom of association and freedom of expression in relation to restrictions on

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18 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. 5.

19 Proposed section 13C, Australian Sports Anti-Doping Authority Amendment Bill 2013.

20 Proposed section 73Q, Australian Sports Anti-Doping Authority Amendment Bill 2013.

21 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.

22 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. 7.

members of the Australian Sports Drug Medical Advisory Committee liaising with others and contributing to deliberations or discussions.[23]

2.20 Shortly before finalising its report, the committee received from the PJCHR, the minister's responses to the matters raised and associated commentary by the PJCHR. Due to timing constraints, the committee was not able to fully consider this material as part of this inquiry. The minister's responses and the PJCHR commentary can be found at Appendix 3.

Senate Standing Committee for the Scrutiny of Bills

2.21 In its Alert Digest No. 2 of 2013, the Scrutiny of Bills Committee (the Scrutiny Committee) reported that it had sought the minister's advice in relation to a range of provisions in the Bill, as follows:

- *privacy – delegation of legislative power:* it was noted that proposed paragraph 13(1)(ea) provides that the NAD Scheme must provide authority for the CEO to be able to request a specified person to attend an interview, give information and/or produce documents or things. The CEO must have a 'reasonable belief' that the requested things may be relevant to the administration of the NAD Scheme. Proposed section 13A provides the authority for the NAD Scheme to establish a system for the issuing of disclosure notices. The Scrutiny Committee noted the comments in the statement of compatibility that amendments to the regulations will provide further protections around the issuing of disclosure notices.

  The Committee sought an explanation from the minister as to whether the protections pertaining to the issuing of disclosure notices can be included in the bill, given the importance of these additional safeguards;

- *privacy and property rights:* it was noted that proposed subsection 13B(2) empowers the CEO to take and retain 'for as long as necessary' documents and things produced in response to a disclosure notice. The Scrutiny Committee sought the minister's advice as to whether consideration has been given to including a maximum time limit and a requirement to review the need to retain disclosed documents and things at regular intervals;

- *coercive powers:* the Scrutiny Committee sought the advice of the minister in relation to the inclusion of a provision in the Act that provides for a stated time to comply with a disclosure notice. This would be in line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and is an important protection;

- *self-incrimination:* it was noted that the use and derivative use immunities in relation to criminal proceedings are common in Commonwealth legislation

23 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. 8.

where the privilege against self-incrimination is abrogated. However, the Scrutiny Committee stated that it is less clear why the exception to the use and derivative use immunities in relation to civil proceedings is appropriate. It sought the minister's advice in this regard;

- *reversal of onus of proof:* in relation to proposed subsection 13C(2), the Scrutiny Committee stated that it is not easy to establish what is not in one's knowledge of possession, but that this appears to have been recognised in the explanatory memorandum in that a statutory declaration would be sufficient. The Scrutiny Committee, however, was concerned to ensure that this option would be effective in practice. It sought the ministers advice 'as to whether the view expressed in the [statement of compliance] that 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 13C(2)';
- *fair trial:* the Scrutiny Committee pointed to the comments of the Human Rights Committee in relation to proposed sections 73G and 73K (see paragraph 2.15 above);
- *infringement notice scheme:* proposed section 80 authorises the regulations to provide for an infringement notice scheme to be made as an alternative to civil proceedings in relation to a failure to comply with a disclosure notice. The Scrutiny Committee commented that, in order to assess whether the proposed scheme is appropriate, it had sought advice from the minister as to why the scheme is necessary and whether it is appropriate to provide for the scheme in regulations rather than being included in primary legislation; and
- *privacy:* in relation to information sharing, subsections 68(2) and 68(5) provide that a written notice must be given to a person to whom information is related if that information is shared with a sporting administration body. Proposed subsection 68(5A) provides that the notification requirements do not apply if the CEO is satisfied that a current investigation into possible violations will be prejudiced by complying with the notification requirement. The Scrutiny Committee noted that broad powers were being provided to the CEO and that additional safeguards could apply without undermining the effectiveness of the provision. The minister's advice was sought on appropriate limitations on this power or whether its use should be subject to reporting requirements.[24]

2.22 At the time of writing, the Scrutiny Committee had not received responses from the minister regarding the matters raised.

24 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2013*, 27 February 2013, pp 4-11.

2.23 Some of the issues identified in the scrutiny committees' publications were also of concern to witnesses in the current inquiry. These issues are discussed in the following chapter of the report.

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 sporing 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:

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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]

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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]

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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

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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.

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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]

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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,

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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]

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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]

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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

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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

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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

Australian Greens Dissenting Report

Australian Sports Anti-Doping Authority Amendment Bill 2013

1.1 The Australian Greens place a high value on sport and the integrity of sport in Australia. Recent developments, including the doping scandals that rocked the cycling community and recent allegations affecting the major football codes, have raised some serious concerns about whether the integrity of Australian sport is under threat. The Australian Greens therefore considered the merits of the Australian Sports Anti-Doping Authority Amendment Bill 2013 very carefully in this context.

1.2 During the course of the inquiry into this bill numerous concerns were raised with its provisions. The new powers this bill would grant to ASADA were described as "broad" and "sweeping" in nature and were greeted with scepticism by many in the legal fraternity including the Victorian Commercial Bar Association which described the provisions granting coercive powers as "unwarranted", "an unjustified infringement of the athletes' human rights" and "an unacceptable grant of unfettered powers to the CEO of ASADA".

1.3 The Australian Greens also note concerns from the Scrutiny of Bills Committee, the Parliamentary Joint Committee on Human Rights and others around issues such as privacy, the reversal of the onus of proof, the potential to compromise a fair trial, and the unprecedented nature of coercive powers to investigate matters that do not generally involve criminal activity.

1.4 The Australian Greens share many of these concerns. It became clear during the course of the inquiry that this bill represents an unprecedented expansion of ASADA's powers and overturns some fundamental legal principles. As such it would significantly reduce the freedom of Australian sportspeople. The question then hinges on the benefits to the integrity of sport that would accrue from these coercive powers. No clear evidence was presented to the Committee that this would have a measurable impact on the integrity of Australian sport.

1.5 Furthermore, no evidence was given to suggest there are fundamental weaknesses in the Australian anti-doping system. The inquiry made it clear that Australia is already considered a world leader in anti-doping, noting that an Australian is current head of the World Anti-Doping Authority, and that Australia already meets all requirements under the WADA testing and investigation protocols.

1.6 Witnesses who gave evidence on behalf of Australian athletes suggested that these new powers could have the perverse effect of decreasing cooperation with investigations by making the relationship between athletes and ASADA more adversarial.

1.7 Some evidence also made it clear that testing alone is not a sufficient deterrent or detection mechanism when it comes to controlling doping in sports. The Australian Greens support an investigative approach into tackling the problem of doping in

sports. The Authority and police agencies should be adequately resourced to conduct investigations. However it is not clear that granting these new powers will materially impact the effectiveness of current investigations.

1.8 Noting the above concerns the Australian Greens cannot recommend the Bill in its current form.

Recommendation 1

That the bill not be passed.

Senator Richard Di Natale
Australian Greens Senator for Victoria

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.
>
> **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.
>
> **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?
>
> **Ms Andruska:** Yes.
>
> 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.
>
> **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

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Mr Robin Willcourt MB.BS, FRANZCOG, FACOG
2	Australian Paralympic Committee
3	Law Institute of Victoria
4	Exercise and Sports Science Australia
5	Sports Medicine Australia
6	Australian Athletes Alliance
7	Australian Olympic Committee
8	The Coalition of Major Professional and Participation Sports
9	Commercial Bar Association of Victoria
10	The AustralAsian Academy of Anti-Ageing Medicine
11	Australian Crime Commission
12	Department of Regional Australia, Local Government, Arts and Sport
13	Australian Sports Commission
14	Ms Catherine Ordway
15	The Australian Psychological Society
16	Australian Customs and Border Protection Service

Additional Information Received

- Received on 14 February 2013, from the Parliamentary Joint Committee on Human Rights. Letter.
- Received on 6 March 2013, from the Australian Sports Commission. Answers to Questions taken on Notice on 1 March 2013.
- Received on 7 March 2013, from the Office for Sport, Department of Regional Australia, Local Government, Arts and Sport.

TABLED DOCUMENTS

- Tabled by Mr John Coates, President, Australian Olympic Committee on 1 March 2013 in Canberra. 2014 Australian Olympic Winter Team, Membership Agreement- Athletes.

APPENDIX 2

Public Hearings and Witnesses

1 March 2013, Canberra, ACT

- ABRAHAMS, Mr Michael, Legal Counsel, Australian Cricketers' Association
  Australian Athletes Alliance
- ANDRUSKA, Ms Aurora, Chief Executive Officer,
  Australian Sports Anti-Doping Authority
- BARRETT, Mr Paul, Director, Legal,
  Australian Sports Commission
- COATES, Mr John Dowling, President,
  Australian Olympic Committee
- COLE, Ms Natasha, Assistant Secretary, National Integrity of Sport Unit,
  Department of Regional Australia, Local Government, Arts and Sport
- CROW, Ms Kimberley, Chair, Athletes' Commission,
  Australian Olympic Committee
- ECCLES, Mr Richard, Deputy Secretary,
  Department of Regional Australia, Local Government, Arts and Sport
- FINNIS, Mr Matthew, Board Member, Australian Athletes' Alliance and Chief Executive Officer, AFL Players' Association
- HARVEY, Mr Ronald George, Vice-President,
  Australian Olympic Committee
- HOBSON-POWELL, Mrs Anita, Executive Officer,
  Exercise and Sports Science Australia
- HOLLINGSWORTH, Mr Simon, Chief Executive Officer,
  Australian Sports Commission
- HORVATH, Mr Paul, Chair, Sports Law Committee of the Law Institute of Victoria
- JEVTOVIC, Mr Paul, APM, Executive Director, Intervention and Prevention,
  Australian Crime Commission
- LAWLER, Mr John, AM APM, Chief Executive Officer,
  Australian Crime Commission

- MONTGOMERY, Mr Peter Guy, Vice-President,
  Australian Olympic Committee

- NOLAN, Mr Anthony, SC, Chair, Sports Section,
  Commercial Bar Association of Victoria

- PERDIKOGIANNIS, Ms Elen, General Manager, Anti-Doping Programs and Legal Services, Australian Sports Anti-Doping Authority

- ROWE, Mr Bill, First Assistant Secretary, Office for Sport,
  Department of Regional Australia, Local Government, Arts and Sport

- SCHWAB, Mr Brendan, General Secretary,
  Australian Athletes' Alliance

- SPEED, Mr Malcolm, Executive Director,
  Coalition of Major Professional and Participation Sports

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.*
-

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.