



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

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Membership of the committee

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Functions of the committee

The Committee has the following functions:

- a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

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Abbreviations

Abbreviation	Definition
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Convention on the Elimination of all forms of Racial Discrimination
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FRLI	Federal Register of Legislative Instruments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

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Executive Summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights (as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*) of the Australian Sports Anti-Doping Authority Amendment Bill 2013.

This bill was introduced in the Senate on 6 February 2013.

In the normal course of events, the Parliamentary Joint Committee on Human Rights (the committee) would not table its comments on bills introduced during the sitting week commencing 5 February 2013 until Wednesday 13 March 2013.

However, the committee notes that this bill was referred to the Senate Rural and Regional Affairs and Transport Legislation Committee (RRAT Committee) for inquiry and report by 12 March 2013. The committee has therefore decided to expedite its consideration of this bill to assist the RRAT Committee.

The committee has identified a number of human rights matters in relation to this bill. The committee has raised similar concerns in relation to bills considered in its previous reports. The committee's intention in publishing its comments on this bill at this earlier opportunity is purely to ensure that the RRAT Committee has the benefit of these comments early in its consideration of this bill. The committee hopes that this will also result in the Minister's response to the committee's comments on the bill being available to the RRAT Committee prior to the conclusion of its inquiry.

Mr Harry Jenkins MP
Chair

Australian Sports Anti-Doping Authority Amendment Bill 2013

Introduced into the Senate on 6 February 2013

Portfolio: Sport

Committee view

1.1 The committee seeks clarification 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. It also seeks further clarification on the application of the bill's provisions on the right not to incriminate oneself.

1.2 The committee seeks further information from the Minister as to 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.

1.3 In addition, the committee seeks further information as to 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.

Overview

1.4 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.

Compatibility with human rights

1.5 This bill is accompanied by a self-contained statement of compatibility which states that the bill engages the following rights: the right to enjoy and benefit from culture, the right to protection from arbitrary interferences with privacy, the right to

the presumption of innocence and the right to be free from self-incrimination.¹ It concludes that the bill is compatible with human rights.

1.6 The committee reiterates its view that statements of compatibility are essential to the consideration of human rights in the legislative process and expects statements to contain an assessment of whether proposed legislation is compatible with human rights.² The committee notes that a number of provisions in the bill raise human rights concerns (as set out below) that were not examined in the statement of compatibility.

1.7 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. The statement of compatibility argues that enjoyment of the right to culture could be significantly eroded '[s]hould Australians lose the belief that sporting contests in this country take place on a level playing field'.³

Civil penalty orders

1.8 The bill introduces a new Part 8A into the *Australian Sports Anti-Doping Authority Act 2006* in relation to civil penalty enforcement provisions. This Part uses the same terms as those provided for in the Regulatory Powers (Standard Provisions) Bill 2012⁴ which is currently before the House of Representatives. In its *Sixth Report*,⁵ the committee made a number of comments in relation to human rights issues arising from the Regulatory Powers (Standard Provisions) Bill 2012 and in relation to bills that either draw directly on those powers or replicate them.⁶ Because the present bill uses the same civil penalty enforcement provisions, the committee's review of the present bill's civil penalties provisions provide it with the opportunity to supplement its comments on the Regulatory Powers (Standard Provisions) Bill by examining its application in a specific context. This examination may also give rise to comments that are of more general application to the provisions of the Regulatory Powers (Standard Provisions) Bill 2012.

1.9 The statement of compatibility makes no reference to whether the guarantees relating specifically to criminal proceedings contained in article 14 of the

1 See article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); article 17 of the International Covenant on Civil and Political Rights (ICCPR), and articles 14(2) and (3) of the ICCPR.

2 See PJCHR, Practice Note 1, September 2012.

3 Statement of compatibility, p. ii.

4 See Divisions 2-4 of Part 4 of the Regulatory Powers (Standard Provisions) Bill 2012.

5 PJCHR, Sixth Report, paras 1.92 to 1.105.

6 See, eg, the committee's discussion in its *First Report of 2013*, paras 1.201-1.215.

International Covenant on Civil and Political Rights (ICCPR) apply to the imposition of the new civil penalty provisions. Rather, the statement of compatibility lists article 14 of the ICCPR as being engaged by the bill without commenting on whether the civil penalties are a 'criminal charge' for the purpose of article 14.

1.10 As the committee has previously noted,⁷ the imposition of a 'civil penalty' may constitute the determination of a 'criminal charge' within the meaning of article 14 of the ICCPR. In determining whether the imposition of a penalty for particular conduct involves the determination of a 'criminal charge', international jurisprudence has identified the following factors to be taken into account: the classification of the act in domestic law, the nature of the offence, the purpose of the penalty, and the nature and the severity of the penalty. Classification as 'civil' under Australian law is not determinative. Where a prohibition is general in application, where the penalty is punitive and intended to deter (rather than award compensation for loss), and any financial penalty is significant, it may well be classified as involving a criminal charge and penalty for the purposes of article 14 of the ICCPR.

1.11 Proposed new section 13C of the bill provides that failure to comply with a disclosure notice within the time required in the notice is subject to a penalty of 30 penalty units, or \$5,100. In enforcing a civil penalty order, proposed new section 73B provides that a pecuniary penalty may be imposed that, for natural persons is the same as the civil penalty provision, but for body corporates, can be up to five times more than the civil penalty (so up to \$25,500). In addition, proposed new section 73N provides that if a provision requires something to be done within a particular period of time, a person will commit a separate contravention each day the contravention occurs. So, for example, if a person is ten days late in providing information under the disclosure notice, they could be liable for a civil penalty of up to \$51,000, as they would be liable for a contravention each day until they complied with the notice.

1.12 The committee intends to write to the Minister to seek clarification as to 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.

Double jeopardy

1.13 Proposed new section 73H does not permit civil proceedings to be brought against a person for contravention of a civil penalty provision if the person has already been convicted of a criminal offence constituted by the same or substantially similar conduct. However, proposed new section 73K provides that criminal

7 See PJCHR, *Fifth Report of 2012*, paras 1.21-1.26 and PJCHR, *First Report of 2013*, para 1.206.

proceedings can be commenced regardless of whether a civil penalty order has been made against a person 'for conduct that is the same, or substantially the same'.

1.14 If proceedings in relation to some or all civil penalties are 'criminal', then this would appear to involve the potential for double trial or double punishment for the same conduct, contrary to article 14(7) of the ICCPR, which provides:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

1.15 The committee intends to write to the Minister to seek clarification (if the proposed civil penalty provisions are properly characterised as 'criminal' for the purpose of article 14 of the ICCPR) as to whether 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.

Right not to incriminate oneself

1.16 The statement of compatibility notes that the bill operates to limit the right not to incriminate oneself⁸ by abrogating the right in relation to a person answering questions or providing documents/things under a disclosure notice. Proposed new section 13D provides that a person is not excused from answering a question or giving information or producing documents if it might tend to incriminate the person. The statement of compatibility states that it is necessary to abrogate this right to ensure that possible doping offences can be properly investigated, noting 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'.⁹

1.17 However, proposed new subsection 13D(2) provides that information, answers and documents given or produced under this section is subject to a use and derivative use immunity, which means that it cannot be used either directly or indirectly as evidence against the person in court proceedings (criminal or civil). This is subject to a standard exception in relation to prosecution for offences for the provision of false and misleading information or documents.

1.18 Despite this broad guarantee, proposed new paragraph 13D(2)(f) does not exclude the possibility that the information or documents disclosed by the person (or further evidentiary material derived from them) may be used in civil proceedings against the person under the Act. This possibility is explicitly recognised by the explanatory memorandum and the statement of compatibility. In this respect the

8 See article 14(3)(g) of ICCPR.

9 Statement of compatibility, p. iv.

bill's grant of use and derivative use immunity diverges from a number of other such grants of immunity in bills recently considered by the committee where the right of persons not to incriminate themselves has been abrogated.

1.19 The explanatory memorandum notes that the effect of the provision is that material elicited in this way 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.'¹⁰ However, no details are provided of the types of civil proceedings that may be brought under the Act and whether allowing the use of material obtained from someone compelled to give it would be consistent with article 14 of the ICCPR.

1.20 If any such proceedings are 'criminal' for the purposes of international human rights law, this would engage the right not to incriminate oneself under article 14(3)(g). If the proceedings in question are 'civil' proceedings for the purposes of international human rights law, it is possible that the provision may still be viewed as affecting the right of a person to a fair hearing under article 14(1) of the ICCPR.

1.21 The committee considers that proposed new section 13D, which compels the answering of a question, the giving of information or production of a document/thing, but which also provides a use and derivative use immunity, is generally consistent with the right not to incriminate oneself.

1.22 However, the committee notes that proposed new paragraph 13(D)(2)(f) provides that any answers, information or documentation given may be used against the person in civil proceedings under the *Australian Sports Anti-Doping Authority Act 2006*. The committee intends to write to the Minister to ask whether proposed new section 13D(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.**

Right to the presumption of innocence

1.23 The statement of compatibility notes 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. Proposed new section 13C provides that if the CEO of ASADA gives a person a disclosure notice requiring them to attend an interview, give specific information or produce documents or things, that person will be subject to a civil penalty if they fail to do so within the period specified in the notice. New

10 Explanatory memorandum, p. 8.

subsection 13C(2) places an evidential burden on the person who has been issued with the notice to show that they do not possess the information, document or thing and they have taken all reasonable steps to obtain it and have been unable to do so. The statement of compatibility states:

It is appropriate for the burden of proof to be placed on a defendant in this case as it will be within the knowledge of the defendant as to whether they have what is being requested. Imposing the burden of proof on ASADA would be extremely difficult or expensive whereas it could be readily and cheaply provided by the recipient of the disclosure note. In practical terms, evidential burden may be satisfied if the person signs a document of legal standing that they do not have the required material (e.g. statutory declaration).¹¹

1.24 Proposed new section 73Q also provides that a person is not liable to have a civil penalty order made against them if they were under a mistaken belief that certain facts were different. A person wanting to rely on this defence bears an evidential burden to demonstrate that they were under this mistaken, but reasonable, belief and had those facts existed the conduct would not have contravened the provision. The statement of compatibility provides that '[t]his clause is reasonable and proportionate because the defendant will have the requisite knowledge to adduce evidence of the Mistake of Fact'.¹²

1.25 The committee considers 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.

Right not to be subject to arbitrary or unlawful interference with privacy

1.26 The statement of compatibility identifies that a number of provisions in the bill engage the right not to be subject to arbitrary or unlawful interference with privacy (article 17 of the ICCPR). In particular, the CEO of ASADA is authorised to issue a disclosure notice requiring a person to answer questions, or produce information or documents as specified. The CEO is also authorised to disclose information, documents or things obtained in relation to the administration of the national anti-doping scheme for the purposes of, or in connection with, the administration of that scheme. In addition, amendments to the *Australian Postal Corporation Act 1989* allow for disclosure of information by Australia Post employees to the CEO of ASADA for the purposes of administering the national anti-doping scheme.

11 Statement of compatibility p. v.

12 Statement of compatibility p. v.

1.27 The statement of compatibility justifies these limitations on the right to privacy:

These clauses are reasonable, necessary and proportionate to the legitimate aim of catching doping cheats, particularly given the safeguards that already exist in the *Australian Sports Anti-Doping Authority Act 2006*. Section 71 of the Act already provides for the protection of [national anti-doping] scheme personal information while Section 73 preserves the operation of the *Privacy Act 1988*.

1.28 The statement of compatibility goes on to note:

Amendments to the ASADA regulations following passage of these legislative amendments will provide further protections around the issuing of a disclosure notice such as specifying what information must be included in a disclosure note.

1.29 The committee considers in light of this explanation that the bill does not appear to give rise to any human rights privacy concerns. The committee notes that it will examine any subsequent delegated legislation for compatibility with human rights. It also notes that questions as to whether further protections around the issuing of a notice are best placed in primary or secondary legislation is a matter the Scrutiny of Bills Committee is empowered to consider.

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

1.30 While not identified in the statement of compatibility, the provisions requiring a person issued with a disclosure notice to attend an interview to answer questions or provide information or documents may engage the right not to be subject to arbitrary or unlawful interference with family life.¹³

1.31 Any person that the CEO of ASADA reasonably believes has information, documents or things that may be relevant to the administration of the national anti-doping scheme can be issued with a disclosure notice.¹⁴ The explanatory memorandum notes that a person issued with a notice 'can be any person, not just an athlete or athlete support person'.¹⁵ This could require an athlete's family members, such as their spouse, parent or child, to answer questions about their family member's alleged drug use. However, there is nothing to enable a person issued with a disclosure notice to object on the basis that they are being asked to provide information in respect of their family member. This is in contrast, for example, to the *Evidence Act 1995*, which provides that when a person is the spouse,

13 See article 17 of the ICCPR.

14 See Schedule 1, item 7 and item 9 (new section 13A).

15 Explanatory memorandum, page 7.

de facto partner, parent or child of a defendant they may object to giving evidence as a witness for the prosecution and if the court finds that harm might be caused to the person, or to the relationship between the person and the defendant, the court may rule that the person not be compelled to give evidence.¹⁶

1.32 The committee intends to write to the Minister to seek further information as to 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 in article 17 of the ICCPR.

Freedom of association and freedom of expression

1.33 The bill¹⁷ also seeks to amend the *Australian Sports Anti-Doping Authority Act 2006* to restrict members of the Australian Sports Drug Medical Advisory Committee (ASDMAC) from liaising with others outside the Committee on matters under the national anti-doping scheme. It also restricts Committee members from taking part in any deliberations or decisions of a sporting administration body in relation to a matter arising out of the national anti-doping scheme, without the prior written consent of the CEO of ASADA.

1.34 Articles 19 and 22 of the ICCPR provide that everyone has the right to freedom of expression, including the freedom to 'seek, receive and impart information and ideas of all kinds', and the right to freedom of association with others. While the rights to free expression and association may be limited, the statement of compatibility does not identify these rights or justify any restrictions on the activities of members of the ASDMAC.

1.35 The committee intends to write to the Minister to seek information as to 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.

16 See section 18 of the *Evidence Act 1995*.

17 See Schedule 3, item 13 of the bill.