Greens' Senators Dissenting Report

1.1 The Senate Community Affairs Legislation Committee majority report on this Bill ("the Report") does not give enough attention to concerns that have been identified about the impact of the Bill on athletes and their families who are not deliberately trying to cheat or use performance enhancing drugs in sporting competitions.

1.2 Unless amendments are made, the Bill as it stands may punish the wrong people as penalties for inadvertent breaches will double and athletes rather than prohibited persons may be penalised.

1.3 Although the intent of the Bill is to protect athletes, as submitters from the legal profession and athletes' representatives noted, while there is universal support for anti-doping legislation, the Bill is drafted in ways that may punish innocent athletes and not those responsible for anti-doping infringements.

1.4 The WADA Code, which is designed to address illegal use of performance enhancing drugs, has the potential to penalise the wrong people. There may be other ways to ensure Australian team sports comply with international anti-doping requirements while maintaining Australia's reputation as a leader in anti-doping.

Prohibited Association and Personnel Support definitions are broad and ill-defined

1.5 As the Department of Health outlined in their submission, the Bill introduces a new 'prohibited association' anti-doping rule violation that is designed to address athletes support personnel who may operate outside of the umbrella of national sporting organisation's anti-doping policy.[1]

1.6 The wording and definition of who constitutes 'support personnel' and what constitutes a prohibited association is vague and the provisions in the legislations are broad. The Bill may have unintended consequences by capturing family members and innocent people. Many submitters, even those supporting the Bill, agreed that the wording needs redrafting.

1.7 Asked about the vague wording in the Bill, Mr Brian Roe, Manager of Ethics and Integrity, Athletics Australia, agreed the Bill could be re-drafted:

> **Mr Roe:** We would be content if the legislation was so written, as long as it catches the people who should not be hanging around athletes or participating in the sport during their period of time then we are happy with it. If that requires some more drafting we would be happy to talk about it…
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> **…**I agree with your contention that it is broadly written and that those people could be caught by the legislation…I think we would also be happy

1 Department of Health, *Submission 4*, p 209.

> if further work was done and some appropriate wording was brought forward…[2] (Hansard, p 5)

1.8 The Commercial Bar Association of Victoria raised concerns with the wording of the Prohibited Association and Personnel Support clauses, pointing out that the broad and vague terms would include parents of young non-professional athletes as well as those involved in deliberate doping. They outlined their principle objections to the personnel support definitions:

> We fail to see how parents or other persons working with or treating or assisting an athlete fall into that category. We do not object to the primary matters—and there are semiprofessional people, if I can call it, who have been involved in sporting clubs. We agree with those changes. It is just that it has gone too far…because, as the submissions highlight, you then say that if the parent is involved in working with, or participating, or preparing [inaudible] sports competition—as every parent of every swimmer does, by driving them to training and dealing with their dietary requirements—under the definition they are assisting that athlete and preparing that athlete for sports competition. So they are caught. My proposition is that the rest of it is fine, but, when you get to deal with parents, it is a fundamental breach of their human rights, and it is misconceived. No-one in any of the submissions before you has explained why parents have been included in this category and what special arrangements should be put in for parents. [3]

1.9 Senator Di Natale questioned why the broad definitions outlining the grounds for prohibited association also include 'professional misconduct'. In questioning with legal experts, this terminology was also found to be unclear and vague.

> **Senator DI NATALE:** Just finally, under the professional misconduct clause someone can be prohibited not just if they have been banned or convicted of a crime that would constitute a doping violation but also if they have been sanctioned for professional misconduct. I am not really sure what that means.
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> **Mr Nolan:** Neither am I.[4]

1.10 The Law Institute of Victoria recommended that the Bill be amended with tighter definitions so that innocent people are not captured by legislation designed to catch professional drug cheats. They added that ceding increased powers to the CEO of ASADA was not an effective filter that would ensure the policy is fairly implemented.

> We would be much more satisfied with a much tighter definition of what those categories are, rather than simply a blind, in our respectful submission, reliance on the ASADA CEO being the filter for what is a reasonable prosecution and what is not. Certainly, we accept the principle that athletes ought not to associate with dopers, and the clear example is

2 Mr Brian Roe, *Committee Hansard*, 17 October 2014, pp 4-5.

3 Mr Terry Nolan QC, *Committee Hansard*, 17 October 2014, pp 9-10.

4 Mr Terry Nolan QC, *Committee Hansard*, 17 October 2014, p 12.

> people subject to bans at a particular time; but then it is the category beyond that that gives us some concern.[5]

1.11 The thrust of the proposition put forward by the Law Institute of Victoria and the Commercial Bar Association of Victoria was that the Bill penalises athletes for their associations and a more effective way to address anti-doping violations would be to amend the Crimes Act as most of the offences involve prohibited substances. Amending the Crimes Act, rather than penalising athletes, would put the pressure back on drug traffickers rather than athletes.

1.12 The CEO of ASADA, while strongly supportive of the Bill, did conceded that there is some concern about the interpretation of the wording related to people who would be captured by the Prohibited Association definition. Mr McDevitt acknowledged that there are checks and balances and the situation may rarely arise, but the need for better defined legislation was a point he recognised.

> My sense is that, in reality, this particular violation would be used in a very judicious and sparing manner. There are checks and balances. Certainly for me, this is totally about the protection of the athlete from those who might be out there seeking to move among sports and ply their wares. Perhaps in the wording we do not have the clarity that you might seek; but we do have checks and balances, we do have a lot of discretion in terms of this particular violation. As the CEO, I would see this as something that would be used very judiciously and sparingly.[6]

Unfair elements in the Bill

1.13 Mr Paul Horvath from the Law Institute of Victoria was critical of the broad definitions in the Bill and the imprecise wording which would unintentionally catch athletes who would be unable to defend themselves:

> …in addition to the legislation needing to be fair, we say that it needs to be precise…we are concerned about the breadth of that definition and the fact that that will catch people unintentionally and lead to prosecutions which, as we say, athletes are not positioned to defend..[7]

1.14 Mr Horvath cited examples of accusations of use of banned substances by high-profile athletes. Some high profile athletes were able to defend themselves as they were well resourced, such as Ian Thorpe (a testosterone-based allegation); Michael Rogers (consumed contaminated meat) and Samantha Riley (took a headache tablet). The fact that these athletes had high level legal representation meant that they could defend themselves against allegations of offences that could end their careers. The Bill, however, could make it very difficult for under-resourced athletes to defend themselves and this could unfairly end their careers. As Mr Horvath put it:

> So their ability to defend themselves against these sorts of allegations is extremely limited. We say that that must critically be borne in mind when

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5 Mr Paul Horvath, *Committee Hansard*, 17 October 2014, p 10.

6 Mr Ben McDevitt, *Committee Hansard*, 17 October 2014, p 31.

7 Mr Paul Horvath, *Committee Hansard*, 17 October 2014, p 7.

> removing the right to presumption of innocence. So we urge the Senate and the parliament to seek to apply and to introduce a method by which athletes can have a certainty of defending themselves against these very serious allegations, which can often end careers.[8]

1.15 The Australian Athletes' Alliance (AAA), which represents Australia's eight major player associations and over 3,500 elite athletes in Australia, opposed the Bill on a number of grounds, principally that the Bill does not protect the rights of 'clean' athletes who would be subjected to an ineffective anti-doping regime. As the General Secretary of the AAA explained, Athletes would:

> …be subject to regulations which are ineffective, which violate their fundamental rights and also which are underpinned by a philosophy which sees athletes as the problem and not the solution.[9]

WADA Code may not be the best model to respond to anti-doping.

1.16 There appears to be a gulf between the problem of doping and cheating in sport and the outcomes the Bill claims it will achieve.

1.17 Evidence presented by Australian Athletes' Alliance suggests that there are other ways to address anti-doping in team sports, such as collective bargaining and through employment contracts. Football and other sporting clubs are employers and have provisions ensuring they provide a safe workplace. This type of collective bargaining operates in the United States where some sports, such as the NFL, have not signed up to the WADA Code and yet the US does not suffer any penalties or have any difficulties participating in Olympic and international sports.

1.18 AAA General Secretary, Brendan Schwab, questioned WADA's ability to prevent anti-doping, and by extension, the effectiveness of Australia signing up to the WADA Code. In their submission, the AAA clearly defined their objections: they do not consider the WADA Code "to be a fair and effective governing model to prevent doping"; it impinges on human and employment rights and the Code does not achieve its anti-doping purposes.[10]

1.19 It is worth recording the AAA submission on the effectiveness of the WADA Code. The AAA submission cites UNI Sport Pro, which represents 80,000 athletes world-wide. The data provided to the inquiry showed:

- There are no consistent reporting standards of anti-doping rule violations ("ADRVs") by national anti-doping organisations ("NADOs"). Many NADOs do not report at all;
- Of 277,928 tests conducted in 2009 based on the incomplete available data, 758 were positive (0.27%);
- Of 258,267 tests conducted in 2010, 1393 were positive (0.53%); and

8 Mr Paul Horvath, *Committee Hansard*, 17 October 2014, p 7.

9 Mr Brendan Schwab, *Committee Hansard*, 17 October 2014, p 13.

10 Australian Athletes' Alliance, *Submission 6*, p 111.

- Three out of 2216 out-of-competition tests were positive (0.13%).
- Only 9 out of 49 European NADOs reported out of competition testing results in 2010. Of the 17,166 tests, there were only 28 violations (0.16%).[11]

1.20 The AAA contends that there exists an "incredible gulf" between the problem as stated by WADA and the "outcomes of its regime." Therefore there is no basis for agreeing to the WADA Code through the passage of the Bill and the limitations the Bill imposes are neither necessary nor proportionate.

1.21 In evidence presented by the Department of Health, there was an admission that the Bill was targeting athletes in lieu of being able to curb the suppliers of banned substances. When asked about the prohibitive association and other measures, the Department conceded:

> What we are dealing with here primarily is people who are outside the jurisdictions of sport, so we are trying to curb their influence by saying that athletes themselves cannot associate with those people under those prescribed arrangements.[12]

Penalties are not justified

1.22 The Bill penalises athletes when the target should be those who peddle and promote illegal drugs in sport. The stipulated penalties – which double from 2 to 4 years the ban on athletes – go too far and will capture non-Olympic athletes who are essentially innocent of deliberate doping infringements. The proposed changes in the Bill will increase the penalty for no-fault ingestion of a non-specified substance from 1 year to 2 years. It was further noted that bans proposed in the legislation will be career ending, and while this may be acceptable in Olympic and World Championships which operate on 2 - 4 years cycles, the bans are considered by some to be too harsh for athletes competing in Australian domestic team sports.

1.23 No justification or evidence was presented explaining why penalties should be increased to 2 and 4 years.

1.24 Mr Schwab submitted that the proposed penalties, especially for athletes not found to be deliberately 'doping', would be career ending. These penalties were designed for Olympic and individual professional athletes and not for Australian domestic team players. Mr Schwab recommended other avenues to address the misuse of drugs in Australian team sports. He posed the question thus:

> We simply ask why should a player suffer a career-ending penalty when everyone involved in the procedure agrees that he or she is (a) not a cheat and (b) had no significant fault to play in that violation. This bill, because of the new WADA code, increases that ban from one year to two years. Provision through collective bargaining would properly acknowledge the duties that leagues and clubs owe athletes as their employers, including in

11 Australian Athletes' Alliance, *Submission 6*, p 112.

12 Mr Andrew Godkin, *Committee Hansard*, 17 October 2014, p 29.

> relation to the provision of a safe workplace. The obligations of employees to obey the reasonable directions of their employers would be acknowledged. There is a very different dynamic in professional team sports from that which exists in sports for individual athletes.[13]

1.25 The General Manager, Player Relations, AFL Players Association, Mr Ian Predergast, submitted that the Bill's penalties are not compatible with Australian employment law and the doubling of penalties for athletes not deliberately cheating or using performance enhancing drugs are excessive.

> We believe that this is disproportionately high, especially for professional athletes, given the circumstances that they are employed under. The bill, by reflecting the changes to the WADA Code, effectively doubles this penalty. This applicable sanction will increase to four years, meaning that a professional athlete will lose two years of employment in his or her industry, even if he or she is at no fault for taking the non-specified substance. As a result, the new sanctions are incompatible with the principles of Australian employment law and basic fairness.[14]

1.26 The severity of the proposed increase in penalties was underlined by Mr Schwab, who pointed out that the WADA Code and the ASADA Bill Amendments were designed to capture drug cheats at Olympic and International competition and may not be in the best interests of some Australian domestic sporting competitions. The WADA code was a one-size-fits-all that lacks relevance to Australian domestic competitions.

> The underlying point of the WADA code is that this one-size-fits-all approach is the way to go. We have gone to four-year bans because of the Olympic cycle. The Olympic cycle is not relevant to the AFL. It is not relevant to the NRL. In my major sport, professional football, a four-year ban would deny the player 160 to 170 competition days, which is not the case for the Olympics and would certainly be career ending. A two-year ban is career ending for, I would say, 99 per cent of players. That is the reality that is before the committee and we are saying, 'Let's not lose this basic reality in the high rhetoric of that, which informs much of the debate around antidoping'.[15]

Conforming to WADA Code

1.27 Testimony from the AOC and ASC was based on the WADA Code and there was concern expressed as to why Australia should automatically sign up to WADA and implement changes to the WADA code. International athletes associations, representing 80,000 athletes world-wide, oppose the WADA compliance proposals. The rhetoric that this legislation is "to protect athletes" is at odds with the athletes' representative organisations, who oppose the Bill.

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13 Mr Brendan Schwab, *Committee Hansard*, 17 October 2014, p 14.

14 Mr Ian Prendergast, *Committee Hansard*, 17 October 2014, p 14.

15 Mr Brendan Schwab, *Committee Hansard*, 17 October 2014, p 17.

1.28 Mr Paul Horvath, Committee Member, Sports Law Committee, Law Institute of Victoria submitted that Australia should not simply follow the WADA Code, in particular the way it changes the presumption of innocence.

> The WADA Code is strict liability and harsh in its operation. ASADA stringently prosecutes any detected breach. Guilt is presumed under that legislation."[16]

1.29 Mr Tony Nolan QC, Chair of the Sports Section of the Commercial Bar Association of Victoria, also presented a strong case against implementing changes simply because WADA says everyone has to comply with their revised policies.

> I have never thought that to be a sensible way to conduct legislation changes, because of course in Australia we have to review whether the changes comply with other international conventions and principles.[17]

1.30 It was also pointed out by the AAA that in the United States, some professional sports address anti-doping issues in team sports through collectively bargaining, and yet the United States participates in Olympic activities and international sports. Mr Ian Predergast, General Manager, Player Relations, AFL Players Association, also noted that some anti-doping measures implemented by the AFL actually go further than the WADA Code.[18]

Concerns about ASADA resourcing and capacity

1.31 Even WADA has been critical of ASADA's time delays and inability to provide speedy resolutions to anti-doping cases. The 18 month delay in investigating the NRL and concerns about confidentiality were alluded to by several submitters in regards to increasing ASADA's powers through this Bill.

1.32 Tony Nolan highlighted the relatively few cases of doping in Australian sport, submitting that either there are not many banned drugs in sport or ASADA has been incompetent in catching the drug cheats. The statistics presented bring to the fore the very few cases of doping – which calls into question the need to massively increase penalties and powers given the relatively small problem confronting Australian sport.

> In 2011-12 there were 10,596 tests, according to the annual report, and only 13 positive results. If one adds in the outstanding year's results—because there is always a period of delay—another 11, that makes only 24 positive tests. So, out of 10,500 tests, there were 24 positive results, where six were for cannabis. It does not take much, even for barristers, to work out the percentages: 24 out of 10,500 means 0.226 per cent, or two in 1,000. It is 18 positive results if one ignores the cannabis cases—because it has been included, really, for non-performance-enhancing reasons; it has always been the subject of debate, whether it should or should not be in the guide

16 Mr Paul Horvath, *Committee Hansard*, 17 October 2014, p 7.

17 Mr Terry Nolan QC, *Committee Hansard*, 17 October 2014, p 8.

18 Mr Ian Prendergast, *Committee Hansard*, 17 October 2014, p 14.

> for two of the three reasons to be included as a prohibited substance—which comes down to 0.169 per cent.[19]

1.33 Mr Nolan further submitted that ASADA were asking for increased powers even though they had not demonstrated an ability to investigate and prosecute cases in a timely and reasonable manner. The Inquiry heard evidence of 14 and 18 month waits for cases to be prosecuted. Mr Redman from the Law Institute of Victoria pointed out that in other countries cases are heard within a few days, whereas in Australia they can take months.[20]

1.34 ASADA has not demonstrated they have the resources and ability to implement the measures in this Bill and the evidence of doping in Australia does not justify some of the measures in the Bill, such as the doubling of penalties. The Chairman of the AAA, David Garnsey, outlined their concerns with ASADA being given additional powers:

> If ASADA is to be vested with further powers, in addition to the coercive powers which were granted to it in 2013, then in the AAA's submission it must have the confidence of the public and indeed the key stakeholders, including the athletes, for that to happen. It is our submission that that is not the case today.[21]

1.35 A key concern raised was around confidentiality. Mr Garnsey from the AAA outlined their concerns about how the media were able to accurately report on confidential ASADA investigations:

> But it was not just the length of time that was taken; it was also the lack of any confidentiality within that process, which apparently is guaranteed under the WADA Code and under the accompanying legislation in Australia. We got a blow-by-blow description of what was happening in that investigation through the daily media. It should never have been open to the media to have access to that sort of information—and not only that: it was also reported as fact what was about to happen in the investigation, which subsequently proved to be quite accurate down the track. That information was in the possession of the media but not in the possession even of the very legal representatives who were acting for the athletes within that investigation. All those matters were of massive concern to representatives of those athletes going forward.[22]

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19 Mr Terry Nolan QC, *Committee Hansard*, 17 October 2014, p 8.

20 Mr Richard Redman, *Committee Hansard*, 17 October 2014, p 11.

21 Mr David Garnsey, *Committee Hansard*, 17 October 2014, p 16.

22 Mr David Garnsey, *Committee Hansard*, 17 October 2014, p 16.

Recommendation

1.36 The Greens members of the Committee recommend that a more thorough and wide-ranging inquiry be held into ASADA and the WADA Code before this Bill is voted on.

Senator Rachel Siewert **Senator Richard Di Natale**