

The Senate

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Community Affairs  
Legislation Committee

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Australian Sports Anti-Doping Authority  
Amendment Bill 2014 [Provisions]

October 2014

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# MEMBERSHIP OF THE COMMITTEE

## 44<sup>th</sup> Parliament

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### Participating members for this inquiry

Senator Richard Di Natale	Victoria, AG
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# TABLE OF CONTENTS

<b>Membership of the Committee .....</b>	<b>iii</b>
<b>Abbreviations .....</b>	<b>vii</b>
<b>List of Recommendations .....</b>	<b>ix</b>
<b>Chapter 1</b>	
<b>Introduction .....</b>	<b>1</b>
Referral .....	1
Purpose of the Bill .....	1
Conduct of the inquiry .....	2
Background.....	2
Key provisions of the Bill.....	3
Consideration by other committees .....	6
Acknowledgement.....	7
Notes on references .....	7
<b>Chapter 2</b>	
<b>Key issues.....</b>	<b>9</b>
New 'prohibited person' Anti-Doping Rule Violation.....	10
Extended limitations period.....	13
Enhanced information management provisions .....	14
Other issues .....	15
Implications of not passing the Bill.....	20
Committee View.....	21
<b>Greens' Senators Dissenting Report .....</b>	<b>23</b>
Prohibited Association and Personnel Support definitions are broad and ill-defined.....	23
Unfair elements in the Bill .....	25

WADA Code may not be the best model to respond to anti-doping..... 26  
Penalties are not justified..... 27  
Conforming to WADA Code..... 28  
Concerns about ASADA resourcing and capacity ..... 29

**Appendix 1**

**Submissions and additional information received by the Committee ..... 33**

**Appendix 2**

**Public hearings..... 35**

# ABBREVIATIONS

AA	Athletics Australia
AAA	Australian Athletes' Alliance
AAT	Administrative Appeals Tribunal
Act	<i>Australian Sports and Anti-doping Authority Act 2006</i>
ADO	Anti-Doping Organisation
ADRV	Anti-Doping Rule Violation
ADV RP	Anti-Doping Rule Violation Panel
AFL	Australian Football League
AOC	Australian Olympic Committee
ASADA	Australian Sports and Anti-Doping Authority
ASC	Australian Sports Commission
ASDMAC	Australian Sports Drug Medical Advisory Committee
Bill	Australian Sports Anti-Doping Authority Amendment Bill 2014
CAS	Court of Arbitration in Sport
CEO	Chief Executive Officer
Code	World Anti-Doping Code
CommBar	Commercial Bar Association of Victoria
Convention	International Convention Against Doping in Sport
Department	Department of Health
EM	Explanatory Memorandum
ICCPR	International Covenant on Civil and Political Rights
LIV	Law Institute of Victoria
NADO	National Anti-Doping Organisation

NAD scheme	National Anti-Doping Scheme
NRL	National Rugby League
NSO	National Sporting Organisation
PJCHR	Parliamentary Joint Committee on Human Rights
TUE	Therapeutic Use Exemption
UNESCO	United Nations Educational, Scientific and Cultural Organisation
USA	United States of America
WADA	World Anti-Doping Agency

# **LIST OF RECOMMENDATIONS**

## **Recommendation 1**

**2.63 The committee recommends that the Bill be passed.**



# Chapter 1

## Introduction

### Referral

1.1 On 16 July 2014, the Australian Sports Anti-Doping Authority Amendment Bill 2014 (Bill) was introduced by the Minister for Health and Minister for Sport, the Hon Peter Dutton MP.<sup>1</sup>

1.2 On 28 August 2014, pursuant to a recommendation of the Selection of Bills Committee, the Senate referred the provisions of the Bill to the Community Affairs Legislation Committee (committee) for inquiry and report by 27 October 2014.<sup>2</sup>

### Purpose of the Bill

1.3 The Bill seeks to align Australia's anti-doping legislation with the revised World Anti-Doping Code (Code) and international standards that will come into force on 1 January 2015.<sup>3</sup> The Bill would amend the *Australian Sports and Anti-Doping Authority Act 2006* (Act) to:

- authorise the making of regulations to allow the Australian Sports and Anti-Doping Authority Chief Executive Officer (ASADA CEO) to implement a new prohibited association Anti-Doping Rule Violation (ADRV);
- extend the time period in which action on a possible ADRV must commence from eight to 10 years from the date the violation is asserted to have occurred;
- expand the membership of the Australian Sports Drug Medical Advisory Committee (ASDMAC) to allow for the appointment of three members for the sole purpose of reviewing decisions, where requested, in relation to applications for therapeutic use exemptions (TUEs);
- require that at least one ASDMAC primary member possess general experience in the care and treatment of athletes with impairments;
- simplify information sharing provisions in the Act to improve the exchange between relevant stakeholders of information that would assist in identifying and substantiating doping violations;
- require that ASADA maintain a public record of ADRVs to be known as the 'violations list';
- remove the requirement for the ADRV Panel to maintain a Register of Findings; and

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1 House of Representatives, *Votes and Proceedings*, No. 57, 16 July 2014, p. 709.

2 *Journals of the Senate*, No. 48–28 August 2014, p. 1341.

3 See new subsection 54(2AA) which would implement a requirement in the revised International Standard for Therapeutic Use Exemptions.

- allow the ASADA CEO to respond to public comments attributed to an athlete, other person or their representatives with respect to a doping matter.

### **Conduct of the inquiry**

1.4 Details of the inquiry were made available on the committee's website.<sup>4</sup> The committee also contacted 52 organisations and individuals inviting submissions to the inquiry by 3 October 2014. Submissions were received from 11 organisations, as detailed in Appendix 1.

1.5 A public hearing was held in Canberra on 17 October 2014. The witness list for the hearing is available in Appendix 2.

### **Background**

1.6 The global harmonisation of anti-doping policies and practices is led by the World Anti-Doping Agency (WADA). WADA is responsible for review and development of the World Anti-Doping Code (Code) and is tasked with overseeing acceptance, implementation and compliance with it.

1.7 The Code is a non-government document that applies only to members of sports organisations. The International Convention Against Doping in Sport (Convention) helps to ensure the effectiveness of the Code by providing the legal framework for the formalisation of global anti-doping rules, policies and guidelines.<sup>5</sup>

#### ***Australia's obligations under the Convention***

1.8 As a signatory to the Convention, the Australian Government has made a commitment to abide by the principles of the Code. While the Convention affords signatories some flexibility as to how governments give effect to the Convention, either by way of legislation, regulation, policies or administrative practices, signatory governments are required to take specific action to:

- restrict the availability of prohibited substances or methods to athletes (except for legitimate medical purposes), including measures against trafficking;
- facilitate doping controls and support national testing programmes;
- withhold financial support from athletes and athlete support personnel who commit an anti-doping rule violation, or from sporting organisations that are not in compliance with the Code;
- encourage producers and distributors of nutritional supplements to establish 'best practice' in the labelling, marketing and distribution of products which might contain prohibited substances; and

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4 See Standing Committee for Community Affairs website, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs)

5 United Nations Educational, Scientific and Cultural Organisation (UNESCO), International Convention against Doping in Sport, <http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/> (accessed 21 October 2014).

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- support the provision of anti-doping education to athletes and the wider sporting community.<sup>6</sup>

### ***Review of the Code***

1.9 WADA initiated a comprehensive review of the Code in November 2011. The review involved extensive stakeholder consultation<sup>7</sup> and WADA sought advice on the international human rights implications of revisions to the code from former President of the European Court of Human Rights, Mr Jean-Paul Costa.<sup>8</sup>

1.10 The revised code was adopted by the international anti-doping community at the World Conference on Doping in Sport in Johannesburg, South Africa in November 2013.

1.11 Key changes to the Code include:

- higher penalties for serious anti-doping rule violations;
- the addition of two new anti-doping rule violations;
- smaller targeted testing of samples;
- development of seamless information-sharing arrangements between relevant national and international government agencies and improved information flows with sporting organisations; and
- greater use of intelligence gathering and investigations in detection strategies.

1.12 Following adoption of the Code, international sporting federations, governments and anti-doping organisations are obliged to update their anti-doping policies, rules and legislation to reflect the revisions to the Code by 1 January 2015.

### **Key provisions of the Bill**

1.13 The majority of legislative amendments required to give effect to the revised Code will need to be made to the ASADA Regulations (regulations) along with changes to the anti-doping policies of National Sporting Organisations (NSOs). Amendments proposed in the Bill are required to facilitate amendments to the regulations. These amendments will in turn enable NSOs to meet their anti-doping obligations, both to their respective international sporting federation and as a condition of Australian Government funding through a single Code-compliant anti-doping policy.<sup>9</sup>

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6 UNESCO, International Convention against Doping in Sport, <http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/> (accessed 21 October 2014).

7 *Explanatory Memorandum* (EM), p. 5.

8 EM, p. 1.

9 EM, p. 2.

***Schedule 1: Prohibited association***

1.14 Schedule 1 of the Bill provides for the making of regulations that enable the ASADA CEO to implement the new prohibited association ADRV that has been included in the revised WADA Code.<sup>10</sup>

1.15 Amendments in Schedule 1 would amend the definition of 'athlete' and 'support person' consistent with the definition in the Code. This amendment aligns with new Article 2.10 of the Code.<sup>11</sup>

***Schedule 2: Australian Sports Drug Medical Advisory Committee***

1.16 Schedule 2 of the Bill would increase the membership of the ASDMAC to enable the Minister to appoint three members with the sole function of reviewing ASDMAC decisions in relation to applications for TUEs.

1.17 This amendment would satisfy the requirement in the Code that anti-doping organisations provide for domestic review of decisions on TUEs.<sup>12</sup> The Explanatory Memorandum to the Bill (EM) states that, while there is a clear authority for the ASDMAC to approve TUE applications in Australia, currently the only recourse for an athlete to challenge a decision is to WADA.<sup>13</sup>

1.18 The proposed amendments seek to 'quarantine' the review members from the ASDMAC decision-making process, by distinguishing between ASDMAC primary members and ASDMAC review members, to facilitate independent review of the initial decision.<sup>14</sup> New subsection 65(1A) would provide for regulations to make different provision in relation to meetings of the ASDMAC Chair, ASDMAC primary members and ASDMAC review members.

1.19 New subsection 54(2AA) would make it a requirement that at least one primary member of the ASDMAC should have experience in the care and treatment of athletes with an impairment. This amendment reflects a requirement in the revised International Standard for TUEs.<sup>15</sup> The Department of Health has advised that while the current ASDMAC membership meets this requirement of the revised Code, it is appropriate to legislate to make this a mandatory consideration.<sup>16</sup>

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10 New paragraph 13(1)(fa) of the Bill would provide for the inclusion of authority in the National Anti-Doping scheme for the ASADA Chief Executive Officer (CEO) to commence the new prohibited association ADRV by notifying an athlete or other person that an association with a particular person in a professional or sports related capacity may be a possible ADRV.

11 EM, p. 6.

12 See Article 4.4, *World Anti-Doping Code* (WADA Code), 2015, pp 31–32.

13 EM, p. 3.

14 EM, p. 3.

15 World Anti-Doping Code, *International Standard Therapeutic Use Exemptions*, January 2015, Article 5.2.a, p. 12.

16 Department of Health, *Submission 4*, p. 6.

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**Schedule 3: Violations list**

1.20 Item 16 of Schedule 3 of the Bill requires the CEO of ASADA to establish and maintain a Violations List consistent with Article 14 of the Code. The EM states that while it is current practice for ASADA to report on its website the details of an ADRV once a matter is finalised, the amendments in Schedule 3 seek to regulate this practice through the Violations List.<sup>17</sup>

1.21 The EM states that the Violations List will include the names and other personal details of athletes and athlete support persons who have committed an ADRV.<sup>18</sup> The EM clarifies that an athlete's name will not be published on the Violations List until after the ADRV process has been completed and the athlete has had the opportunity to appeal the decision. The details of the ADRV will remain on the Violations List for the term of the athlete's period of ineligibility.<sup>19</sup>

1.22 The Bill provides discretion for the ASADA CEO not to place the details of a violation on the Violations List in certain circumstances, including:

- a first violation by a person under the age of 18 years;
- where publication may compromise an ongoing investigation; and
- when WADA has authorised the non-inclusion of information under the Code.<sup>20</sup>

1.23 The proposed amendments would also provide for the removal of the current requirement for ASADA to maintain a register of findings<sup>21</sup> and would provide for the ADRV to make an 'assertion' that it is possible an anti-doping rule violation has been committed. Athletes and athlete support persons would continue to be able to seek review by the Administrative Appeals Tribunal (AAT) of an assertion made by the ADRV.<sup>22</sup>

**Schedule 4: information management**

1.24 The revised Code emphasises the need for effective information flows between government agencies, sporting bodies and anti-doping organisations. The Bill would repeal current sections of the Act which distinguish between National Anti-Doping scheme personal information, NAD scheme contract personal information and protected Customs information, and re-structure the information sharing provisions around a single concept of 'protected information'.<sup>23</sup>

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17 EM, p. 7.

18 EM, p. 4.

19 EM, p. 12.

20 EM, p. 12.

21 See subsection 13(1)(i) of the *Australian Sports Anti-Doping Authority Act 2006* (Act)

22 Australian Sports Anti-Doping Authority, *Submission 7*, p. 4.

23 EM, p. 3.

1.25 The Bill would authorise disclosure of 'protected information' in certain circumstances. New sections 68A to 68E set out the circumstances in which the ASADA CEO may disclose 'protected information'.

1.26 New section 68E would authorise the ASADA CEO to disclose 'protected information' in response to public comments attributed to an athlete, support person or representative of an athlete or support person, consistent with Article 14.3.5 of the Code.<sup>24</sup> The EM explains that ASADA will continue to be prevented from providing information publicly on the specific facts of a pending case.<sup>25</sup> The EM states that, while existing legislation prevents public comment by ASADA on specific facts of a pending case, it does not recognise expressly the exception provided in Article 14.3.5 of the Code. The EM states '[a] public comment may be required from ASADA to correct or clarify facts where an athlete or their representative initiates discussion publicly about his or her case'.<sup>26</sup>

1.27 Proposed section 67 will make it an offence, with a maximum penalty of two years' imprisonment, to disclose information unless it is an authorised disclosure. The EM states that authorised disclosures will be prescribed in the Act and regulations.

#### ***Schedule 5: increasing limitation period***

1.28 Amendments in Schedule 5 of the Bill will increase the period of time within which authorities may commence action in relation to a possible ADRV to 10 years. Currently, action on a possible ADRV must be commenced within eight years from the date the violation is asserted to have occurred. Under the revised WADA Code, from 1 January 2015 authorities will have up to 10 years within which to commence action. These amendments are intended to align with Article 17 of the Code.<sup>27</sup>

1.29 The EM states that this change will improve the scope for anti-doping agencies to uncover sophisticated doping programs and provide greater scope for retrospective analysis of stored samples as new technologies to identify substances are developed.<sup>28</sup>

#### **Consideration by other committees**

1.30 The Senate Standing Committee for the Scrutiny of Bills considered the Bill in its Alert Digest No. 10 of 2014. While the committee considered the reversal of the onus of proof in proposed subsection 67(2) and privacy considerations in relation to proposed sections 68A-68E, the committee did not seek further information from the Minister.<sup>29</sup>

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24 EM, p. 24.

25 EM, p. 11.

26 EM, p. 4.

27 EM, p. 6.

28 EM, p. 2.

29 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 10/14*, p. 2.

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1.31 The Parliamentary Joint Committee on Human Rights (PJCHR) considered the Bill in its Tenth Report and commented on the following aspects of the Bill:

- the provision to permit the ASADA CEO to implement the new prohibited association ADRV and the desirability of including clarification of the scope of the ADRV in the Act rather than the regulations;
- the potential for the new ADRV to have the effect of imposing an additional penalty on individuals who have already been convicted and served their sentence; and
- the compatibility of the proposed extension of the limitation period with the right to freedom of association.

1.32 The PJCHR sought clarification from the Minister on each of these points.<sup>30</sup>

### **Acknowledgement**

1.33 The committee thanks those individuals and organisations who made submissions to the inquiry and gave evidence at the public hearing.

### **Notes on references**

1.34 Reference to the committee *Hansard* is to the proof *Hansard*. Page numbers may vary between the proof *Hansard* and the official *Hansard* transcript.

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30 To date the PJCHR has not published a response from the Minister.



# Chapter 2

## Key issues

2.1 The proposed amendments in the Australian Sports Anti-Doping Authority Amendment Bill 2014 (Bill) are intended to facilitate the implementation of a suite of measures contained in the 2015 World Anti-Doping Code (Code). These measures seek to address the increasingly sophisticated and complex means through which doping in sport occurs.

2.2 Witnesses to the inquiry recognised the importance of effective anti-doping policies and practices for the benefit of the health and wellbeing of athletes, as well as the integrity of sports, and expressed broad support for the measures in the Bill. The committee heard that the WADA Code plays an important role in providing a basis for the harmonisation of international anti-doping efforts.<sup>1</sup>

2.3 While concerns were raised with regard to some measures, submitters generally emphasised the importance of preventing doping in sport and accepted the need for Australia to meet its international obligations. The committee notes the support expressed for the following measures in the Bill:

- amendments in Schedule 2 relating to the Australian Sports Drug Medical Advisory Committee (ASDMAC); and
- amendments in Schedule 3 relating to the introduction of a Violations List, the removal of the current Register of Findings and the provision for the Anti-Doping Rule Violation Panel (ADRVP) to make an 'assertion' of a violation of the anti-doping rules, rather than a finding.<sup>2</sup>

2.4 This chapter discusses the following key issues raised in relation to the Bill:

- the new 'prohibited person' Anti-Doping Rule Violation (ADRV);
- the proposed extended limitations period; and
- the enhanced information management provisions.

2.5 The chapter also discusses a number of other issues raised during the inquiry that do not relate specifically to the measures in the Bill, but are relevant to the implementation of the revised Code. These include:

- strengthened sanctions in the Code;
- Australia's whereabouts testing policies;

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1 See for example: Mr Simon Hollingsworth, Chief Executive Officer, Australian Sports Commission, *Committee Hansard*, 17 October 2014, p. 20.

2 The Commercial Bar Association of Victoria (CommBar) submitted that the Bill should be amended to remove the right of appeal to the Administrative Appeals Tribunal with regard to a decision by the Australian Sports Drug Medical Advisory Committee to assert a violation of the anti-doping rules: *Submission 8*, p. 14.

- athletes' access to legal representation;
- the adequacy of ASADA's resources; and
- the effectiveness of the Code.

### **New 'prohibited person' Anti-Doping Rule Violation**

2.6 The provisions in the Bill that would give effect to the 'prohibited association' Anti-Doping Rule Violation (ADRV) were the subject of considerable discussion during the inquiry.

2.7 As noted in Chapter 1, the new ADRV will apply to an athlete who associates 'in a professional or sports-related capacity with an athlete support person who is serving a period of ineligibility or who has been convicted of a crime or sanctioned for professional misconduct for activity that otherwise would constitute a doping violation'.<sup>3</sup> The new ADRV reflects the international anti-doping community's decision to take action to protect sports and athletes from support persons who orchestrate systematic doping programs.<sup>4</sup>

2.8 While submitters acknowledged the need to curtail the influence of people with a proven history of doping and the capacity to facilitate systematic doping programs, concerns were expressed that the provisions in the Bill that would give effect to the 'prohibited association' ADRV are unduly broad and that key terms are poorly defined.<sup>5</sup> The Commercial Bar Association of Victoria (CommBar) submitted that the scope of the provisions in the revised Code exceed that stated aim and would encompass volunteers, parents, friends or untrained persons.<sup>6</sup>

2.9 The Law Institute of Victoria (LIV) submitted that there is a lack of clarity regarding the term 'professionally disciplined' and the extent to which such action is subject to the same onus of proof, burdens of evidence or appeal rights as an ADRV hearing.<sup>7</sup>

2.10 The Australian Athletes' Alliance (AAA) expressed concern that the terms 'professional' and 'sports-related capacity' are broad and 'encompass a range of activities that have only a tenuous link to sports generally and doping specifically'.<sup>8</sup> AAA also expressed concern that the onus is on the athlete to demonstrate that an association with a 'support person' does not fall within the scope of the provisions.

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3 *Explanatory Memorandum* (EM), p. 2. See also Article 2.10, *World Anti-Doping Code* (the Code), pp 23–24.

4 House of Representatives, *Hansard*, 16 July 2014, p. 8073.

5 See Law Institute of Victoria, *Submission 1*, p. [2]; Australian Athletes' Alliance, *Submission 6*, pp 3–4.

6 *Submission 8*, p. 3.

7 *Submission 1*, p. [2].

8 *Submission 6*, p. 3.

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AAA submitted that the onus in such circumstances should rest with ASADA or the relevant anti-doping body.<sup>9</sup>

2.11 In response to these concerns, a representative of the Department of Health (the Department) stated that there appears to be some misunderstanding regarding the scope of the provisions and provided the following explanation:

Firstly, the association which might be the subject of a prohibition must be in a professional sports related capacity. So there are limitations around that prohibition to start off with. It is not meant to interfere with the day-to-day interactions between individuals outside of those particular provisions. It is targeted at athlete support personnel, and that is quite a significant point because, when we start talking about [anti-doping rule] violations, they are [anti-doping rule] violations relevant to athlete support personnel. That is not all of the [anti-doping rule] violations in the new code; there are 10 of them.<sup>10</sup>

2.12 The representative further explained that:

The athlete must reasonably be able to avoid the association, and in submissions to the [anti-doping] organisation, which is probably ASADA in this case, they will be able to identify that they cannot reasonably avoid that association. The athlete support person must have committed an [anti-doping rule] violation, or have been found in a criminal, professional or disciplinary hearing to have engaged in conduct that would have constituted an [anti-doping rule] violation. As to examples that we have heard—for example, recreational use of marijuana: under the ADRVs, that is not currently a rule violation for athlete support personnel...unless...you can demonstrate that that is in connection with the athlete. For example, if somebody had cannabis at an event for provision to an athlete, you might be able to make that case.<sup>11</sup>

2.13 The Department explained that the mere fact that a finding has been made in relation to a person either through a criminal proceeding, or a professional disciplinary proceeding, is not sufficient of itself to trigger proceedings in relation to the new ADRV:

The finding against the person in one of those contexts has to be a finding that, if they had done that action within the jurisdiction of the WADA code, it would be a rule violation. That they may have been professionally sanctioned or criminally prosecuted is neither here nor there except insofar as it brings to light that the person did certain things. If those things were done in the jurisdiction of the WADA code and were then found to be doping violations, then we are talking, then we are caught.<sup>12</sup>

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9 *Submission 6*, p. 4.

10 Mr Andrew Godkin, First Assistant Secretary, Office for Sport, *Committee Hansard*, 17 October 2014, p. 28.

11 Mr Godkin, *Committee Hansard*, p. 28.

12 Mr David Learmonth, Deputy Secretary, *Committee Hansard*, p. 30.

2.14 The committee notes that while the Code specifically recognises that the role of athlete support personnel may be fulfilled by a family member, the Code provides a number of safeguards. First, the athlete must be able to reasonably avoid the association and will have the opportunity to demonstrate that this is not the case. Second, the prohibition on association would apply only within a sports related or professional context. A representative of the Department clarified:

If they were registered as a coach and subject to the sports rules and the antidoping rules, then if they committed a violation, they would be sanctioned as per the normal arrangement and they would be banned from sport. It does not mean that they cannot associate. If they are outside the [anti-doping] organisation and they were found to be guilty of some sort of an offence which would have constituted an ADRV, they can be given disqualified status, but the actual point of operation is that the athlete cannot associate with that person for sports-related or professional reasons.<sup>13</sup>

2.15 A representative of the Department also advised that the Code provides examples and guidance on what is to be considered sports-related for professional reasons.<sup>14</sup>

2.16 In response to concerns that the amendments in Schedule 1 of the Bill require clarification in order to more accurately reflect the intent of the Code, the Department assured the committee that Australia is bound to replicate Article 2.10(2) of the Code within the ASADA regulations. Mr Andrew Godkin, First Assistant Secretary, Office of Sport, told the committee:

There is no confusion here. [Article 2.10.2 of the Code] is quite clear. It says 'if the person has been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of antidoping rules if code compliant rules had been applicable to such person'. That is in section [2.10.2] of the code[.] Under the code, we have no option but to completely replicate those within our own regulations. That is what the regulations will state.<sup>15</sup>

2.17 ASADA advised the committee that in order to find that a 'support person' is a prohibited person, ASADA would need to examine the person's conduct against each of the elements of the offence. Ms Bronwyn Fagan, Director—Legal Services, told the committee:

We would need to be able to show that that person had satisfied all of the elements of the offence in order for them to have been found to commit the criminal offence or the professional misconduct that would have been an [anti-doping rule] violation.<sup>16</sup>

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13 Mr Godkin, *Committee Hansard*, p. 33.

14 Mr Learmonth, *Committee Hansard*, p. 33.

15 *Committee Hansard*, p. 31.

16 *Committee Hansard*, p. 32.

2.18 The committee notes that the new ADRV would be subject to the same appeal rights as other ADRVs through the Federal Court, the Administrative Appeals Tribunal (AAT) and the Court of Arbitration in Sport (CAS).<sup>17</sup>

2.19 AAA also expressed concern that Section 2.10 of the revised Code is incompatible with the right to freedom of association guaranteed in Article 22 of the International Covenant on Civil and Political Rights (ICCPR).<sup>18</sup>

2.20 In its examination of the Bill, the Parliamentary Joint Committee on Human Rights (PJCHR) noted that any risk of impermissible limitation of the right to freedom of association is proposed to be minimised through the inclusion of a provision in the ASADA Regulation to the effect that the new ADRV only applies insofar as it is not inconsistent with Article 22 of the ICCPR.

2.21 The PJCHR described this requirement as an important and necessary safeguard to ensure that the measure operates compatibly with the right to freedom of association. However, the PJCHR also stated:

Given its importance in ensuring that the legislation is compatible with Australia's human rights obligations, the committee considers that it would be preferable for the 'reading down' provision to be contained in the bill rather than be prescribed by [delegated] legislation.<sup>19</sup>

### **Extended limitations period**

2.22 The AAA expressed concern regarding the measures proposed in Schedule 5 of the Bill to increase the period in which action in relation to a possible ADRV may commence from eight to 10 years, describing the changes as disproportionate. AAA noted that limitation periods in civil actions are generally six years or less and that longer limitation periods exist only for aggravated crimes. AAA argued that insufficient justification is offered to support the extension of the limitation period.<sup>20</sup>

2.23 The committee notes that the PJCHR considered the extent to which this measure might engage and limit the right to a fair hearing, noting:

In human rights terms, limitations periods may be understood as preserving the 'equality of arms' of parties to litigation, insofar as they prevent a defendant being required to defend a charge or suit in circumstances where their ability to do so has been compromised by the passage of time.<sup>21</sup>

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17 Mr Learmonth, *Committee Hansard*, p. 32.

18 *Submission 6*, p. 4.

19 *Tenth Report of the 44<sup>th</sup> Parliament* (Tenth Report), p. 5.

20 *Submission 6*, p. 5.

21 Parliamentary Joint Committee on Human Rights (PJCHR), Tenth Report, p. 5. The PJCHR noted that the statement of compatibility did not provide an assessment of the compatibility with human rights and sought advice from the Minister for Sport.

2.24 Other witnesses expressed support for the increase, noting advances in medical testing and analytical services.<sup>22</sup>

2.25 The committee notes ASADA's advice that the proposed increase in the limitations period is not intended to be either oppressive or to enable the passage of time to prejudice the position of the National Anti-Doping Organisation, the athlete or the athlete support person. Mr Ben McDevitt, Chief Executive Officer –ASADA, told the committee that the extension of the limitations period would enable science and technology to 'catch up' and, as a result, people who cheat will take a significant gamble:

The reality is that athletes who choose to dope can roll the dice on whether they will be able to remain undetected for a decade. We know what we are dealing with here are extremely sophisticated substances and extremely sophisticated screening methods and methods to avoid detection. We currently keep samples for eight years. Keeping the samples for 10 years will allow a better chance for technology to catch up and for us to catch cheats.<sup>23</sup>

### **Enhanced information management provisions**

2.26 As noted in Chapter 1, new section 68 authorises the disclosure of information by an entrusted person in the following circumstances:

- for the purpose of the Act or a legislative instrument made under the Act;
- as required or permitted under the Code; or
- for the purposes of the performance of the functions or the exercise of the powers of the ASADA CEO, the ADRVP, the ASDMAC or the ASADA Advisory Group.<sup>24</sup>

2.27 The committee notes that while submitters generally expressed support for these provisions, some submitters expressed concern regarding the adequacy of safeguards in relation to the release of personal information.

2.28 The AAA stated that, despite certain protections in the legislation, the discretion afforded to the ASADA CEO is broad. The AAA expressed concern that that the provision as drafted 'does not provide an adequate check against the possibility that the integrity of the ASADA CEO is compromised in anyway.'<sup>25</sup>

2.29 CommBar expressed support for the disclosure of information provided for in Schedule 4, but stated:

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22 See for example: Mr Brian Roe, Manager, Ethics and Integrity, Athletics Australia (AA), *Committee Hansard*, p. 1; Mr John Coates AC, President, Australian Olympic Committee (AOC), *Committee Hansard*, p. 19; CommBar, *Submission 8*, p. 18.

23 Mr Ben McDevitt, *Committee Hansard*, p. 27.

24 EM, p. 23.

25 *Submission 6*, p. 6.

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CommBar believes that paragraph 68(3)(g) is inappropriate. It is the disclosure of information relating to athletes which affects the rights of athletes. It is CommBar's view that if such information is to be disclosed then express powers should be given in the ASADA Act and not in the Regulations.<sup>26</sup>

2.30 The committee notes that neither the PJCHR or the Senate Scrutiny of Bills Committee expressed concern regarding this provision in their consideration of the Bill.<sup>27</sup>

2.31 The committee also notes the significant role these provisions will play in supporting ASADA's ability to investigate possible violations. Mr McDevitt told the committee:

The second point that I think is really good for ASADA is the move towards intelligence and information sharing and an investigations focus. Let's face it: testing detects, on average, I think, between one and two per cent. We had the head of WADA recently say that he thought the rate of doping was as high as 25 per cent, which is quite extraordinary. So there is a significant gap there.

We also have eight violations which...simply cannot be proven [through presence in urine or blood of a banned substance]. So we have to have information sharing. We have to have intelligence. We have to have tools beyond simply collecting urine and blood samples if we are really serious about dealing with doping in this country. That is another area where I think we will have significant benefit.<sup>28</sup>

### **Other issues**

2.32 Submitters took the opportunity presented by the inquiry to raise a range of issues related to the implementation of the Code that fall outside the specific measures contained in the Bill, including: strengthened sanctions; Australia's whereabouts testing policies; athlete's access to legal representation; ASADA's resources and the effectiveness of the Code.

#### ***Strengthened sanctions***

2.33 The AAA expressed concern regarding the impact of strengthened sanctions in the revised Code. In particular, the AAA noted that revised Article 10.2 of the Code will raise the period of ineligibility from two to four years where:

- the substance is a Prohibited Substance, unless the Athlete can establish that the violation was not intentional; or

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26 *Submission 8*, p. 17.

27 See PJCHR, Tenth Report, pp 1-6 and Senate Scrutiny of Bills Committee, *Alert Digest 10/14*, p. 2.

28 *Committee Hansard*, p. 28.

- the substance is a Specified Substance and the relevant Anti-Doping Organisation (ADO) can prove the violation was intentional.<sup>29</sup>

2.34 Where an athlete can prove that the use of a Prohibited Substance was not intentional, or the relevant ADO cannot prove the intention in relation to a Specified Substance, the period of ineligibility will be two years.<sup>30</sup>

2.35 The AAA argued that this increased sanction is disproportionately high and is incompatible with the principles of Australian employment law and basic fairness. Mr Ian Prendergast, Board Member, told the committee:

[C]urrently the minimum sanction for an athlete who takes a non-specified substance such as thymosin beta-4—which is the allegation in the Essendon case—through no fault of his or her own is one year, which is 50 per cent of the otherwise applicable sanction of two years. 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.<sup>31</sup>

2.36 The committee notes that the increase in sanctions provided for in the Code will be implemented by individual National Sporting Organisations (NSOs) under their respective anti-doping policies in accordance with the Code.

#### *Australia's whereabouts testing policies*

2.37 Athletics Australia (AA) took the opportunity to argue for an amendment to the regulations with regard to Australia's implementation of whereabouts filing and testing. Under the National Anti-Doping (NAD) scheme, certain athletes are required to provide current and accurate information to meet whereabouts filing requirements which in turn enable athletes to be located for testing.

2.38 AA outlined for the committee some practical difficulties associated with the administration of these requirements and suggested that these difficulties could be addressed by adopting approaches to whereabouts testing employed in other countries. AA told the committee:

There is one area that we have pursued with ASADA in the past which we would like to see covered in the regulations attached to this legislation or the existing legislation, if that is more appropriate. It concerns additional notice given to athletes in the case of whereabouts testing. At the moment, each athlete on the testing list has to nominate one hour per day when they are available for testing.

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29 See Article 10.2.1 of the Code.

30 See Article 10.2.2 of the Code.

31 *Committee Hansard*, p. 14.

In many other countries—in many comparable countries, in fact—there is a regulation which allows the tester to ring the athlete on the mobile phone during the last five minutes of that hour. That does not comprise the integrity of the process because obviously, if you are only giving an athlete five minutes to discover themselves, they do not have time to relocate from somewhere else or to catheterise themselves if they are devious or whatever. So we would like to see that policy.<sup>32</sup>

2.39 Mr McDevitt noted the extent to which WADA has responded to feedback from stakeholders in the revised Code citing the following example:

The window in which an athlete may accumulate three whereabouts failings, which is where there are failures to attend or there are missed tests, which will trigger an anti-doping rule violation, has been reduced from 18 months to 12 months.<sup>33</sup>

### ***Athletes' access to legal representation***

2.40 A number of submitters to the inquiry expressed concern regarding the ability of athletes to meet costs associated with responding to allegations of ADRVs under the Code.

2.41 The LIV argued that the majority of athletes have limited resources at their disposal to respond to an alleged violation.<sup>34</sup> LIV also noted that for a number of violations under the Code, athletes bear an evidentiary burden. LIV submitted that, with this in mind, consideration should be given to providing 'countervailing protections for athletes to defend themselves properly, and hence have guaranteed access to legal representation'.<sup>35</sup>

2.42 AA expressed concern that CAS has become the sole option for hearing and resolving ADRVs. AA argued that:

CAS has become extremely slow in administering, hearing and resolving the majority of cases and almost invariably senior counsel are involved in hearing the matters and representing parties.

2.43 AA urged further consideration of this issue, stating that:

AA is considering an alternative method to be incorporated within its new Anti-Doping Policy which will come into effect on 1 January 2015 but inevitably either on appeal or in some cases in the first instance there will still be a reliance on CAS or a similar public tribunal.<sup>36</sup>

2.44 Speaking as the President of CAS, Mr John Coates AC, President, Australian Olympic Committee (AOC), told the committee that the sport of athletics has adopted a different approach to other sports:

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32 Mr Brian Roe, Manager, Ethics and Integrity, *Committee Hansard*, p. 1.

33 *Committee Hansard*, p. 26.

34 Mr Roe, *Committee Hansard*, p. 7.

35 *Submission 1*, p. [2].

36 *Submission 5*, p. 4.

The others all hear at an international level and if you want to appeal from that you get to appeal to the CAS in the appeal division, which is free. You pay your \$1000 filing fee and the court costs are free. So we are in discussion with athletics, the international body, that they are creating a problem for their international athletes who test positive. That is the problem. It is that sport.<sup>37</sup>

2.45 Mr Coates also advised that CAS provides legal aid to athletes, which includes the provision of pro bono legal advice.<sup>38</sup>

### ***ASADA resources***

2.46 The committee received evidence which suggested that ASADA may have insufficient resources to undertake its role and that this has had a negative impact on ASADA's performance.

2.47 AA emphasised the importance of ASADA having at its disposal the requisite resources to undertake its role efficiently and effectively. AA told the committee:

[T]here have been examples of long delays. We are sure that is not because ASADA was not interested; it was because they did not have the resourcing and manpower to deal with those cases. Our international federation deals with 211 countries, not all of whom have such a complex, fair and judicial legal system as we do. So a lot of other countries move more quickly and unilaterally than our system allows. Our international federation is anxious that things be dealt with more quickly, and so are we. We do not want those cases to be held up.

Similarly, we want to ensure that there are adequate funds to ensure that ASADA can continue its excellent work in educating. This has to be a constant thing because in our sport there is new talent coming in every day. Those kids need to be educated. We want to make sure that ASADA are continuing those programs and that there are some funds available to a sport like ours to enable us to continue to employ the part-time education officer that we do at the moment.<sup>39</sup>

2.48 The committee notes AA's evidence regarding the importance of maintaining adequate funding for testing. Mr Brian Roe, Manager, Ethics and Integrity, said:

Whilst we agree absolutely with the move towards more investigative testing, we would not want a situation where the empirical testing both in and out of competition stops, because that is a powerful deterrent in its own right—not the testing but simply the threat of it.<sup>40</sup>

2.49 In response to questions about the adequacy of ASADA's resources, Mr McDevitt acknowledged the need to find efficiencies:

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37 *Committee Hansard*, p. 20.

38 *Committee Hansard*, p. 20.

39 *Committee Hansard*, pp 3–4.

40 *Committee Hansard*, pp 3–4.

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We live under the same fiscal constraint as every other agency across the Commonwealth. You are right, it is a significant brief and body of work that we have responsibility for. We did have a surge in our resources to be able to cope with Cobia—the investigation into the AFL and the NRL. We are now going back to the sort of levels that we were at pre-Cobia. We are looking at the best way to get efficiencies. We are reducing our testing numbers and putting that resourcing into investigations and intelligence, and that sort of thing.<sup>41</sup>

2.50 The committee notes Mr McDevitt's evidence during the inquiry that the Bill, particularly as regards the extended limitations period and enhanced information management, would make ASADA's job 'quite a bit easier' and the level of comfort he felt as ASADA CEO moving into the new operating model under the Code with the agency's current level of resources.<sup>42</sup>

### *Effectiveness of the Code*

2.51 The AAA argued that the Code and current ASADA processes do not provide an effective framework for preventing doping in sport and disputed claims of a global consensus for the revised Code, stating that the consensus does not include the world's player associations. The AAA told the committee:

The WADA code is ineffective in preventing doping. Our submission goes into this in some detail. WADA says publicly that doping is a double-digit proportion. There is no evidence for that statement. The test results, which have resulted in anti-doping violations, as set out in our submission, show the incredible gulf that exists between the problem as stated by WADA and the outcomes of its regime.<sup>43</sup>

2.52 The AAA submitted that the way to address this is to provide for a greater role for athletes to address anti-doping through collective bargaining, a model it argued has been used successfully by major professional sports in the United States. The AAA stated that such a collective bargaining model would be tailored to the needs of a particular sport and athletic career path. Penalties would be managed through individual case management.<sup>44</sup> Further:

Provision through collective bargaining would properly acknowledge the duties that leagues and clubs owe athletes as their employers, including in 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. We have seen this highlighted in the situation at Cronulla and Essendon, where there were concerns so great that the sports themselves imposed sanctions due to the

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41 *Committee Hansard*, p. 37.

42 *Committee Hansard*, p. 27 and p. 37.

43 Mr Brendan Schwab, General Secretary, Australian Athletes' Alliance, *Committee Hansard*, p. 13.

44 Mr Schwab, *Committee Hansard*, p. 14.

failure of those employers to provide a safe workplace for their employees.<sup>45</sup>

2.53 However, the majority of submitters indicated broad support for the Code and acknowledged its importance in creating a uniform code for sporting organisations both domestically and internationally.

### **Implications of not passing the Bill**

2.54 In its submission to the inquiry, the Department noted that, if the amendments in the Bill are not enacted, Australia's anti-doping arrangements will not reflect the Code and will be deemed by WADA as non-compliant. A consequence of this would be that Australia's anti-doping provisions would fall out of step with global anti-doping arrangements, potentially resulting in practical difficulties such as:

- differing obligations for NSOs between their International Federation and Australian anti-doping legislation, including different anti-doping violations, sanctions and athlete reporting requirements;
- the ASADA CEO would be required to consider and approve a sport's anti-doping policy, but would not have the jurisdiction to enforce aspects of the policy;
- the ADRVP would be required to consider possible violations against a different framework to that operated by NSOs; and
- Australia's competitiveness may be disadvantaged and its eligibility to host major international sporting events could be called into question.<sup>46</sup>

2.55 The AOC and the Australian Sports Commission (ASC) expressed concern that if the Bill were not to be passed sports and athletes would find themselves in a difficult position. The Chief Executive of the Australian Sports Commission, Mr Simon Hollingsworth, explained:

[I]f the bill were not to go through in its current form, national sporting organisations would be placed in a situation where they would be required to comply with their international federations and organisations like the International Olympic Committee and the Australian Olympic Committee, which would be different to the legislative framework that would exist in Australia.<sup>47</sup>

2.56 In its submission, the AOC noted the Australian Government's commitment to supporting sport in Australia, including staging world class major sporting events. The AOC submitted:

In order to continue this longstanding commitment, any staging of future Olympic Games, World Championships and other major international

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45 Mr Schwab, *Committee Hansard*, p. 14.

46 *Submission 4*, p. 5.

47 *Committee Hansard*, p. 20.

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events in Australia, such as the Asian Football Cup in January 2015 and the Commonwealth Games in 2018, must be Code compliant.<sup>48</sup>

### **Committee View**

2.57 The committee notes that submissions to the inquiry stressed the importance of Australia taking a strong stance on drug use in sport for the benefit of all athletes and the importance of protecting Australia's integrity as a sporting nation. The majority of submissions expressed support both for the revised Code and for the measures in the Bill to facilitate the implementation of the Code.

2.58 The committee has been mindful throughout this inquiry that the Bill before it contains only a subset of the changes required to give effect to the revised Code. A number of the concerns raised in evidence to the committee relate to amendments that will need to be made to the ASADA regulations and to the anti-doping policies of NSOs.

2.59 The committee also notes that while the Code requires that certain Articles must be incorporated into each anti-doping organisation's rules without substantive change,<sup>49</sup> the Code affords ASADA a degree of flexibility in implementing the revised requirements. The Code is:

[I]ntended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented.<sup>50</sup>

2.60 The concerns raised in regard to the new 'prohibited association' ADRV appear to stem from certain misconceptions around the practical application of the ADRV. The committee considers that these misconceptions reflect in part a lack of detail in the Bill and the EM as to the practical application of the new measures. The committee notes the Department's advice that this detail is to be provided in the amended regulations which are currently being drafted.<sup>51</sup> While those regulations will be subject to parliamentary scrutiny, it is regrettable that the committee has not been able to view the draft regulations at the same time as it is considering the Bill. However, the committee notes the Department's assurance that the regulations will replicate the ADRVs that are in the revised Code.<sup>52</sup>

2.61 The committee notes concerns raised during the inquiry regarding the effectiveness of current processes both in addressing the use of drugs in sport and in protecting the rights of individual athletes and support personnel.<sup>53</sup> While the

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48 *Submission 2*, p. 4.

49 See Article 23.2.2 of the Code.

50 World Anti-Doping Agency, *World Anti-Doping Code 2015 (WADC)*, p.11.

51 Mr Godkin, *Committee Hansard*, p. 31.

52 Mr Godkin, *Committee Hansard*, p. 31.

53 See for example: Exercise and Sports Science Australia, *Submission 10*; National LGBTI Health Alliance, *Submission 3*.

committee considers that there may be merit in a more fundamental review of Australia's anti-doping framework at some point in the future, the committee considers that the inquiry into this Bill is not the appropriate avenue for such a review. The time constraints surrounding Australia's obligation to implement the revised Code by 1 January 2015, together with the significant consequences that would flow from a failure to comply with this obligation underscore this.

2.62 Finally, the committee notes that the fundamental purpose of the Code is to support clean athletes in their various disciplines by creating a fair playing field and providing certainty. The measures in this Bill are ultimately aimed at ensuring Australia's clean athletes can compete with confidence and certainty both in Australia and on the world stage.

### **Recommendation 1**

**2.63 The committee recommends that the Bill be passed.**

**Senator Zed Seselja**

**Chair**

# 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.<sup>1</sup>

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...

...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

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

if further work was done and some appropriate wording was brought forward...<sup>2</sup> (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.<sup>3</sup>

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.

**Mr Nolan:** Neither am I.<sup>4</sup>

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

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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.

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

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 concede 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.<sup>6</sup>

### **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..<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

### **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.<sup>10</sup>

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

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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%).<sup>11</sup>

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.<sup>12</sup>

### **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

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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.<sup>13</sup>

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.<sup>14</sup>

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'.<sup>15</sup>

### **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 Predergast, *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.”<sup>16</sup>

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.<sup>17</sup>

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.<sup>18</sup>

### **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

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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.<sup>19</sup>

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.<sup>20</sup>

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.<sup>21</sup>

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.<sup>22</sup>

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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**



# **APPENDIX 1**

## **Submissions and additional information received by the Committee**

### **Submissions**

- 1 Law Institute of Victoria
- 2 Australian Olympic Committee (plus an attachment)
- 3 National LGBTI Health Alliance
- 4 Department of Health
- 5 Athletics Australia
- 6 Australian Athletes' Alliance
- 7 Australian Sports Anti-Doping Authority
- 8 Commercial Bar Association of Victoria
- 9 ACT Government
- 10 Exercise and Sports Science Australia
- 11 Australian Sports Commission
- 12 Mr Paul Myers

### **Additional Information**

- 1 Comparison of Sanctions for Violations - 2009 and 2015 WADA Codes, received from Department of Health, 22 October 2014

### **Correspondence**

- 1 Correspondence from Australian and New Zealand Sports Law Association, received 8 October 2014

**Tabled Documents**

- 1** Guidelines on Legal Aid before the Court of Arbitration for Sport, tabled by Australian Olympic Committee, at Canberra public hearing 17 October 2014
  
- 2** Email correspondence between Australian Olympic Committee and World Anti-Doping Agency, tabled by Australian Olympic Committee, at Canberra public hearing 17 October 2014

# **APPENDIX 2**

## **Public hearings**

*Friday 17 October 2014*

*Parliament House, Canberra*

### **Witnesses**

#### **Australian Sports Commission**

HOLLINGSWORTH, Mr Simon, Chief Executive Officer  
BARRETT, Mr Paul, Corporate Counsel

#### **Australian Sports Anti-Doping Authority**

McDEVITT, Mr Ben, AM, APM, Chief Executive Officer  
BURGESS, Mr Trevor, National Manager of Operations  
FAGAN, Ms Bronwyn, Director, Legal Services

#### **Australian Olympic Committee**

COATES, Mr John Dowling, AC, President  
De JONG, Ms Fiona Bernadette, Secretary General

#### **Australian Athletes' Alliance**

GARNSEY, Mr David, Chairman  
PRENDERGAST, Mr Ian, Board Member  
SCHWAB, Mr Brendan, General Secretary

#### **Department of Health**

LEARMONTH, Mr David, Deputy Secretary  
MORRIS, Mr Greg, Acting Assistant Secretary, Office for Sport  
GODKIN, Mr Andrew, First Assistant Secretary, Office for Sport

#### **Law Institute of Victoria**

HORVATH, Mr Paul Francis, Committee Member, Sports Law Committee  
REDMAN, Mr Richard, Committee Member, Sports Law Committee

#### **Commercial Bar Association of Victoria**

NOLAN, Mr Anthony QC (Tony), Chair, Sports Section

#### **Athletics Australia**

ROE, Mr Brian Stuart, Manager, Ethics and Integrity