Appendix 1

Correspondence

THE HON PETER DUTTON MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

Ref No: MC14-011393

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair Dean,

Thank you for your correspondence of 26 August 2015 providing the Parliamentary Joint Committee on Human Rights assessment of the Australian Sports Anti-Doping Authority Amendment Bill 2014 (the Bill).

The purpose of the Bill is to amend the *Australian Sports Anti-Doping Authority Act 2006* (the ASADA Act) to give effect to Australia's international anti-doping treaty obligations under the UNESCO International Convention Against Doping in Sport (UNESCO Convention).

There are over 170 Governments which have ratified the UNESCO Convention. The UNESCO Convention requires State Parties to implement anti-doping programmes and activities consistent with the principles of the World Anti-Doping Code (Code). With recent revisions to the Code, I am obliged to bring forward these legislative amendments to align Australia's anti-doping arrangements with the revised Code.

The revisions to the Code were ratified by the international anti-doping community at the World Conference Against Doping in Sport in Johannesburg in November 2013. The adoption of these revisions followed a comprehensive two-year review that included three phases of consultation with stakeholders. This included athletes, coaches, sports administrators, law enforcement authorities and governments. Throughout these processes, there was wide acknowledgement that the changes to the Code are necessary to ensure the Code remained an effective mechanism for countering modern doping practices.

I note that one of the key themes throughout the Code Review process was the need to protect the rights of athletes and ensure procedural fairness is observed. The World Anti-Doping Agency engaged Mr Jean-Paul Costa, a former President of the European Court of Human Rights, to provide advice on the international human rights aspects of the proposed revisions throughout the review process. Mr Costa's final opinion on the revised Code was tabled at the World Conference in November 2013.

Advice provided by Mr Costa in early 2013 prompted the World Anti-Doping Agency to re-work both the article covering the Prohibited Association anti-doping rule violation (ADRV) and the limitation period for commencing the ADRV process to better align the revised wording with international human rights laws. At the conference, Mr Costa supported the final specification of these provisions.

As noted earlier, Australia has ratified the UNESCO Convention with commits us to abide by the Code. Australia is unable to selectively apply specific provisions of the Code and still expect to be considered compliant in the global commitment to provide a harmonised anti-doping framework. This is why such an extensive consultation process was undertaken to develop the revised 2015 Code.

Whilst there may be some minor areas that are points of difference to governments, the overall benefit in having an international agreement that harmonises anti-doping arrangements around the world far outweighs the impact of individual provisions that we may have considered that could have been settled differently. In doing so, the Code defines what constitutes an ADRV, details a uniform list of substances prohibited from sport, specifies a framework for pursuing and handling allegations of doping and implements a consistent set of sanctions for violations.

In relation to the specific issues you have raised, I note the following:

(a) *The committee recommends that the Bill be amended to include a requirement that the new anti-doping rule violation will apply only insofar as it is consistent with the right to freedom of association protected under Article 22 of the ICCPR.*

The placement of this limitation on the operation of the Prohibited Association ADRV in the Regulations reflects our legislative framework. While the Bill provides for the National Anti-Doping scheme to authorise the Chief Executive Officer to notify an athlete or other person with respect to a violation, the provisions relating to this violation will be largely contained in the Australian Sports Anti-Doping Authority Regulations. Accordingly, it was considered most reasonable to place the limitation on the violation with respect to Article 22 of the International Covenant on Civil and Political Rights in the Regulations.

Nevertheless, I am prepared to re-visit the placement of this provision if and when amendments to the ASADA Act are next being developed.

(b) *The previous limitation period of eight years is considerably longer than the statutory limitation periods that apply in relation to other contractual or civil law claims in Australia, and the proposed period of 10 years is even longer. The committee requests the advice of the Minister for Sport as to the compatibility of the Bill with the right to a fair hearing, and particularly:*

- *whether there is a rational connection between the limitation and the legitimate objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

In implementing these amendments, the Australian Government is meeting its international treaty obligation to abide by the principles of the revised Code.

Generally, anti-doping agencies do not have the same investigative capacity as law enforcement authorities. As evidenced in recent cases, it can take anti-doping authorities a significant amount of time to uncover sophisticated doping programmes. In particular, stakeholders were influenced by the time taken to establish a sustainable doping case against Mr Lance Armstrong. Hence, the Code was revised to provide agencies with more time to expose such practices.

Some substances that are prohibited from sport are currently undetectable. This amendment also provides greater scope to undertake retrospective analysis of stored samples as new technologies to identify prohibited substances are developed.

It should also be noted that the extension of the time period for commencing the anti-doping rule violation process does not reduce the level of proof required to confirm an ADRV. The operation of this provision does not override the need for there to be sufficient evidence to:

- prompt the ASADA Chief Executive to invite the person to make a submission in relation to a possible ADRV;
- allow the Anti-Doping Rule Violation Panel to make an assessment of whether a possible ADRV has occurred; and
- enable a Hearing Panel to be comfortably satisfied that a violation has occurred.

(c) *The Committee seeks the advice of the Minister for Sport as to whether the prohibited association ADRV is compatible with the prohibition on retrospective criminal laws.*

In implementing the Prohibited Association ADRV, the Australian Government is meeting its international treaty obligation to abide by the principles of the revised Code.

In its report into *Organised Crime and Drugs in Sport*, the Australian Crime Commission highlighted the involvement of sports scientists, doctors, pharmacists, criminal gangs and anti-ageing clinics in the supply of performance and image enhancing drugs. The Prohibited Association ADRV will be the only mechanism available to anti-doping authorities to curb the influence of those professionals operating outside the umbrella of a national sporting organisation from using their expertise to facilitate doping. It aims to deter athletes from associating with outsiders who have demonstrated the capability to facilitate doping in sport but are beyond the reach of officials as they are not bound by an anti-doping policy.

The Committee has made several references to coaches. In most cases, coaches will be subject to the anti-doping policy in their sport. In this situation, coaches who are found to have committed an ADRV will be sanctioned, making them ineligible from participating in sport in any role for the period of their ineligibility. To avoid a prohibited association violation, an athlete would not associate with that coach for the period of the coach's ineligibility from sport. In other words, the current penalty for an ADRV already prevents a coach from associating with athletes for the period of ineligibility.

This also applies to any other support persons who are subject to a sport's anti-doping policy and found to have violated the sport's anti-doping rules. In relation to the example in the report, a sanctioned athlete would not be allowed to enter into the coaching profession until their period of ineligibility is over.

The revised Code will also make it a violation for an athlete to associate in a professional or sports-related capacity with a person who is not subject to a sports anti-doping policy and is found guilty of a crime or professional misconduct for an action that would have constituted an ADRV. Any association by an athlete with such a person (a prohibited person) for six years could incur a Prohibited Association violation.

My understanding is that the prohibition on retrospective criminal laws requires that laws must not impose criminal liability for acts that were not criminal offences at the time they were committed and that laws must not impose greater punishments than those which would have been available at the time the acts were done.

This violation does not impose a sanction directly on a prohibited person, rather the athlete who continues to associate with them in a professional or sport-related capacity when advised they should desist. It does not prevent the prohibited person from working in their profession; however, athletes are discouraged from associating with them in a professional or sport-related capacity.

A person would only be considered a 'prohibited person' for actions that occur after 1 January 2015 (subject to the passage of the Bill). Furthermore, under the revised Code, the person is given the opportunity to explain why they should not be classified as a prohibited person.

At the end of the day, athletes rely completely and faithfully on the technical knowledge of various support people to enable them to compete in the international and national sporting arena. These are positions of trust and great responsibility. For the athlete's sake, it is important to limit the scope for them to build relationships with people who persuade them into doping.

In conclusion, noting the concerns raised, it should be remembered that the implementation of the Bill is designed to protect the rights of all clean athletes to pursue sport on a level playing field and without compromise from those unethical individuals who place winning above all moral and health considerations.

I trust this response is of assistance and welcome the Committee's final assessment of the Bill.

Yours sincerely

PETER DUTTON

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Senator Dean Smith
Chair
Parliamentary Joint Standing Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Response to questions received from Parliamentary Joint Committee on Human Rights

Thank you for your letters of 26 August 2014 in which further information was requested on the following bill and legislative instrument:

- *Migration Legislation Amendment Bill (No. 1) 2014*; and
- *Migration Amendment (2014 Measures No. 1) Regulation 2014* [F2014L00286].

My response to your requests is attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
19/9/2014

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] – Schedule 1

"The committee therefore seeks the further advice of the Minister for Immigration and Border Protection as to the compatibility of these measures with the right to a fair hearing."

I acknowledge the Committee's advice that there is an internationally recognised human right to seek asylum. I note, however, that the measures relating to PIC 4020 do not purport to interfere with that right. In any case, PIC 4020 does not apply to Refugee and Humanitarian visa subclasses, so the identity measures in the PIC have no impact on those seeking asylum.

With regard to compatibility with the right to a fair hearing, as a preliminary point, people whose visa applications are refused on the basis of failing to satisfy PIC 4020 are afforded procedural fairness prior to a refusal decision being made. Where a delegate is not initially satisfied of a person's identity, and that lack of satisfaction would be the reason, or part of the reason, for refusing to grant a visa, this information is provided to the person, and the person is invited to comment on it.

Departmental officers act in accordance with the common law and provide a similar degree of procedural fairness to offshore visa applicants as applies under section 57 of the Migration Act to onshore applicants. Section 57 applies only in respect of an application for a visa that can be granted when an applicant is in the migration zone and for which there is provision for merits review in respect of the decision to refuse to grant the visa.

I also note that in Schedule 6 to the Migration Legislation Amendment Bill (No. 1) 2014, which has now been passed in the House of Representatives and the Senate, it is proposed to remove the distinction between applications for visas which can be granted when the applicant is in the migration zone and which are subject to merits review, and applications for other types of visas. The amendments will commence on a day to be fixed by Proclamation.

There is no impediment for people whose visa applications are refused on the basis of failing to satisfy PIC 4020 from making an application to the Migration Review Tribunal (MRT) for review on the merits of that refusal decision, if the decision is one provided for under section 338 of the Migration Act. If an application to the MRT is made, and the person receives an adverse decision, they are also able to make an application for judicial review of the MRT's decision. In certain circumstances, it is also open for a person to make an application for judicial review where MRT review is not available to them. The amendments to PIC 4020 do not affect this right.

The measures are consistent with the right to a fair hearing.

"Accordingly, the committee requests the advice of the Minister for Immigration and Border Protection on whether the measure meets the standards of the quality of law test for human rights purposes."

As noted in my response to the Committee's Seventh Report, the government does not consider that the amendments interfere with human rights and thus the quality of law test for human rights purposes is not relevant.

With regard to information on how an applicant may satisfy me as to their identity, my department provides publicly accessible information to assist people in providing evidence of their identity. Visa application forms provide instructions on how an applicant must establish identity, including specific documents that may be provided as evidence of their identity. In addition, my department's Procedures Advice Manual provides policy guidance on what the department considers satisfactory evidence for identity purposes, case law examples and case studies, and the department's website provides an overview of PIC 4020, including the fact that providing bogus documents or information that is false or misleading may result in a visa application being refused.