

Submission in Response to the Inquiry into
the *Australian Sports Anti-Doping Authority
Amendment (Sport Integrity Australia) Bill
2019*

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January 2020

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1. Introduction

The Senate Community Affairs Legislation Committee has called for written submissions on amendments to the *Australian Sports Anti-Doping Authority Act 2006* under the *Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019* (the Bill). A key recommendation from the *Report of the Review of Australia's Sports Integrity Arrangements* (Wood Review) is the establishment of a National Sport Integrity Commission to act as a central agency to undertake the functions necessary to support proposed reforms in responding to threats to sports integrity in Australia.

The Bill sets out provisions regarding the establishment and functions of the Sport Integrity Australia (SIA) as the relevant enforcement body. SIA will nationally coordinate all elements of the sports integrity threat response including prevention, monitoring and detection, investigation and enforcement.¹

This submission examines the role of government as a state actor engaged in regulating to prevent and respond to sports integrity threats in Australia. As such, the Bill is one of the legal regulatory mechanism deployed by the Australian Commonwealth Government (ACG) as the state actor exercising legislative power to achieve the purpose and objectives outlined in the Government's response to the Wood Review.² The overall purpose of the Bill and the establishment of the SIA is to 'coordinate a national approach to matters relating to sports integrity in Australia, including preventing and addressing threats to sports integrity'.³

This submission identifies the following areas for further consideration, namely:

1. that the constitutional basis of the Bill be reviewed to determine whether the exercise of the external affairs power under the Commonwealth Constitution provides the legal authority to support the Bill in the absence of a specific 'sports integrity' treaty or convention covering other threats to sports integrity (excluding the existing anti-doping and financial corruption treaty framework)
2. subject to establishing this constitutional basis, the definition of 'sports integrity' in the Bill be reviewed to consider recent scholarship suggesting a broader approach incorporating a multitude of perspectives and elements beyond the inherent integrity of sport
3. subject to establishing this constitutional basis, the definition of 'threats to sports integrity' be expanded
4. that clarification be provided regarding the nature and extent of the CEO's power under the new section 75 regarding the request for information or documents.

¹ Explanatory Memorandum, 1.

² *Safeguarding the Integrity of Sport – the Government's Response to the Wood Review*.

³ Bills Digest No 61, 12.

2. Constitutional Considerations

There is no express Commonwealth constitutional power to legislate in the subject areas of sport, sports integrity or crime.⁴ Constitutional authority and legitimacy are fundamental characteristics that underpin the Bill's enactment.

The external affairs power under section 51 (xxix) of the Constitution is the mechanism upon which the Bill is based. For the external affairs power to be legitimately exercised, it is necessary for the legislators to identify the specific convention or treaty that supports the law as being a proportionate implementation of that treaty or convention.

2.1 Anti-Doping and Sports Corruption Conventions

Parliamentary authority to enact laws that implement the anti-doping framework are based on several conventions, including the Council of Europe Anti-Doping Convention (1989), the UNESCO International Convention against Doping in Sport and the World Anti-Doping Authority Code.⁵

For sports corruption and manipulation of sports competition, the *Convention on the Manipulation of Sports Competition* (Macolin Convention) is cited as the authority for such matters, noting however that Australia is yet to ratify the Convention. Consequently, the CEOs powers will be limited until ratification.⁶

2.2 Other Sports Integrity Threats

Section 4 of the Bill refers to other sports integrity threats as including:

- (c) The abuse of children and other persons in a sporting environment; and
- (d) the failure to protect members of sporting organisations and other persons in a sporting environment, from bullying, intimidation, discrimination or harassment

There is no specific 'sports integrity' treaty or convention that specifically provides the constitutional basis for these other integrity threats. While these subjects might broadly fall under existing treaties or conventions, the Bills Digest cites the *Macolin Convention* as giving authority for the broader sport integrity functions and the basis upon which the legislators assert constitutional authority for 'general federal regulation of sports integrity matters'.⁷

This assertion is problematic in that the *Macolin Convention* is limited in scope to refer only to the manipulation of sports competitions. The *Macolin Convention* does not refer to

⁴ See Heads of Power, Commonwealth Constitution, Section 51. See also Bills Digest, 11.

⁵ Bills Digest, 11.

⁶ Bills Digest, 11.

⁷ Bills Digest, 11.

member protection or other sports integrity matters as defined in the Bill.⁸ The main objectives of the *Macolin Convention* are

‘to prevent, detect and sanction national or transnational manipulation of national and international sports competitions; to promote national and international co-operation against manipulation of sports competitions between the public authorities concerned, as well as with organisations involved in sports and in sports betting’.⁹

Suggestion:

That in the absence of a specific ‘sports integrity convention’, the legislators review the extent to which reliance is placed upon the external affairs power as the constitutional basis that supports the broader regulation of these other sports integrity threats identified in proposed sections 4 (c) and (d).

3. Defining Sports Integrity

Subject to the constitutional authority being established in support of the broader regulation of the other sports integrity threats referred to above, a further question to consider is whether the current definition of ‘sports integrity’ in the Bill is consistent with modern conceptualisations.

3.1 Contemporary views on the meaning of sports integrity

A threshold (and substantive) issue for consideration is how the Bill defines and conceptualises sports integrity. The accuracy and comprehensiveness of this definition underpins the efficacy and effectiveness of the implementation, administration and enforcement of the Bill.

In 2011, the Australian Sports Commission (ASC) commissioned the University of Adelaide to undertake a literature review of integrity in sport.¹⁰ The study identified that ‘integrity is a complex term that takes on different meanings in different environments and contexts’¹¹ finding, amongst other things, that integrity is related to a,

⁸ *Macolin Convention* Art 1.1 states the purpose is ‘to combat the manipulation of sports competitions to protect the integrity of sport and sports ethics in accordance with the principle of the autonomy of sport.’

⁹ *Macolin Convention* Art 1.2 (a) and (b)

¹⁰ Mandy Treagus, Rob Cover and Christine Beasley, ‘Integrity in Sport Literature Review’ 2011, Australian Sports Commission, Canberra, 15.

¹¹ Mandy Treagus, Rob Cover and Christine Beasley, ‘Integrity in Sport Literature Review’ 2011, Australian Sports Commission, Canberra, 5.

‘range of sport related virtues and that sport can reflect the values of the wider society, such as ‘concepts of fair play, respect for the game, sportsmanship, positive personal values of responsibility, compassion for the other and honesty in adhering to rules’.¹²

Recently, Gardiner et al. explained that the use of the term integrity had ‘become common currency in the sports world’ arguing that the ‘ubiquitous use of the term has resulted in it exhibiting both imprecision and superficiality’.¹³ Their research examined the policing of integrity, the approaches taken by the sports integrity industry (a collection of state and nonstate actors involved in enforcement and compliance) and identified three characteristics, namely: –

1. the existence of different narratives about integrity amongst the different groups
2. a lack of integration between the different views of integrity in sport, and
3. the dangers of imposing a corporate model of behavioural-based integrity.¹⁴

Gardiner et al. argued for a broader approach to conceptualising integrity in sport to encompass the following four constitutive elements, namely: -

1. the inherent integrity of sport,
2. personal integrity in sport,
3. organisational integrity of sport, and
4. procedural integrity in the sport event.¹⁵

3.2 The Wood Review

The Wood Review broadly (and intentionally) conceptualised sports integrity to ‘capture the full range of corrupt activity within sport ranging from serious and organised crime related interventions to minor code and ethics breaches’.¹⁶ A broader conceptualisation of sports integrity is a sensible and pragmatic approach, particularly in light of the pace at which new and emerging threats are presenting.

3.3 The Bill - Section 4 ‘sports integrity’

The Bill introduces a definition of sports integrity as ‘the manifestation of the ethics and values that promote community confidence in sport’.¹⁷ This definition is consistent with the

¹² Mandy Treagus, Rob Cover and Christine Beasley, ‘Integrity in Sport Literature Review’ 2011, Australian Sports Commission, Canberra, 15.

¹³ Simon Gardner, Jim Parry and Simon Robinson, ‘integrity and the corruption debate in sport: where is the integrity?’ (2017) 17 (1) *European Sport Management Quarterly* 7.

¹⁴ Ibid,

¹⁵ Gardiner et al., 17-19.

¹⁶ Wood Review, 6.

¹⁷ Schedule 1, Section 4.

view that sport reflects the values of the society in which it exists.¹⁸ indeed, if community confidence translates to public trust in the sports system, then this definition reflects the inherent integrity of sport as being,

‘focused in an identity maintained by a cooperative community that recognises and respects the goods and excellence that are internal to the activity, and the core values that define it, including justice (as fairness), respect (inclusivity and care), excellence and competition’.¹⁹

3.4 Enhancing Public Trust as a Rationale for State Regulation

The definition of sports integrity under the Bill as ‘promoting community confidence’ is tied to the notion of public trust in the sports system. Enhancing public trust is a legitimate and established rationale underpinning state regulation.²⁰ Indeed, while state actors typically adopt a laissez faire approach to regulating sport, the state plays a vital role in enhancing the public’s trust in the sports system by indicating a willingness to calibrate the system when matters arise that threaten the integrity of sport.

3.5 A Broader Definition

Principles of statutory interpretation support the contention that the underlying definitions are vitally important to the efficacy and effectiveness of the legislative instrument and its subsequent interpretation. Consequently, a valid question to consider is whether the current definition is adequate to reflect contemporary views on defining and conceptualising sports integrity across the Australian sports ecosystem. In other words, does the definition of sports integrity as being the ‘manifestation of the ethics and values that promote community confidence in sport’, adequately embody and reflect the four elements of recognised by Gardiner et al., and the depth and breadth of sports integrity.

By focusing only on the inherent integrity of sport itself, a potential risk is that there will inevitably be a collision of interests arising from different sports settings and the range of public and private interests within this arena. By limiting the definition and not incorporating the four constitutive elements as discussed above, the proposed definition could fall within what Gardiner et al. describe as being ‘too narrow and simplistic view of behavioural integrity that does not make an effective connection to governance’.²¹

Suggestion:

That the definition of sports integrity in the current Bill be reviewed to consider the four constitutive elements developed by Gardiner et al., extending beyond the inherent integrity of sport

¹⁸ Mandy Treagus, Rob Cover and Christine Beasley, ‘Integrity in Sport Literature Review’ 2011, Australian Sports Commission, Canberra, 13.

¹⁹ Gardiner et al., 18.

²⁰ Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017), 56.

²¹ Gardiner et al., 20.

4. Defining Threats

The following discussion is subject to establishing the constitutional authority of the Bill.

4.1 The Threats Landscape

A fair assessment of the sports integrity landscape supports the view that threats to sports integrity extend beyond the traditional anti-doping and financial corruption areas, now reaching into other new and novel arenas. Indeed, a key finding of the Woods Review was that threat to sports integrity in Australia are not limited to doping and competition manipulation, noting

Equally important is the ability of governments in the sport sector to adequately respond to other integrity issues in the sporting sphere including: harassment, bullying and discrimination; child protection; health and safety issues; accreditation of athlete support personnel; regulation and supply of performance and image enhancing drugs, including in sporting and dietary supplements; gender issues and corruption of new and emerging sports without identifiable controlling bodies (for instance, Esports)²².

4.2 The Bill – Section 4 ‘threats to sports integrity’

Section 4 of the Bill defines threats to sports integrity as including:

- (a) the manipulation of sporting competition; and
- (b) the use of drugs and doping methods and sport; and
- (c) the abuse of children and other persons in a sporting environment; and
- (d) The failure to protect members of sporting organisations and other persons in a sporting environment from bullying intimidation discrimination or harassment.

This list does not include health and safety issues, exclusionary practices, accreditation issues or those concerns regarding fragmented sports governance. Given the evolving nature of sport and the influence of technological and scientific, a broader and more flexible interpretation of the meaning of integrity would be beneficial.

4.3 A Non-Exhaustive List

The Explanatory Memorandum states that section 4 is a nonexhaustive list of sports integrity threats.²³ It states that the list is ‘not intended to limit what may be considered a threat to sports integrity, rather, the list provides content to the functions exercised by the CEO of SIA’.²⁴

²² Wood Review, 37.

²³ Explanatory Memorandum, 8.

²⁴ Explanatory Memorandum, 8.

Suggestion:

If the intention of the legislators is that this list of sports integrity threats is nonexhaustive, a suggestion is to include a statement in the act that provides clarification that the list is only for the purposes of the functions exercised by the CEO and not a reflection of a prescriptive or narrow view of sports integrity threats.

5. New CEO Powers - Section 75

A new section has been introduced in the Bill and provides the CEO with power to request information and documents from 'any person or body about matters relating to sports integrity'. This is a broad power given to the CEO.

It would be beneficial to understand what circumstances might enliven the exercise of such power. For example, is it a general sports integrity matter or is it when there is an actual or potential threat to sports integrity? Are there consequences for non-compliance?

In order to clarify the ambit of this power and the nature and extent to which the CEO is entitled to exercise such authority, it would be beneficial to have some explanation in the Bill as to when these powers will be exercised.

The Explanatory Memorandum does not provide any background as to why this new power has been introduced.

Suggestion:

Provide clarification as to the nature and extent of this power to request information or documents. Consider amending the section to include 'actual or potential threat to sports integrity'. If the legislators require a broader interpretation of this section, it would be beneficial if examples were provided or further amendment to the section to illustrate the circumstances which could lead to such request.

Thank you for the opportunity to provide this submission.

Dated this 16th day of January 2020.

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