
The committee has sought further information in relation to the following instruments

Australian Sports Anti-Doping Authority Amendment Regulation 2013 (No. 1)

FRLI: F2013L01443

Portfolio: Health

Tabled: House of Representatives and Senate, 12 November 2013

Summary of committee concerns

2.1 The committee recommends amendments to the regulation to ensure its compatibility with the right to respect for family life. The committee requests further information to assess whether the requirement to produce documents is consistent with the right to a fair hearing and the right to work.

Overview

2.2 This regulation amends the *Australian Sports Anti-Doping Authority Regulations 2006* to give effect to amendments contained in the *Australian Sports Anti-Doping Authority Amendment Act 2013*. These amendments seek largely to strengthen the investigations capacity of the Australian Sports Anti-Doping Authority and to refine the operation of the anti-doping rule violation process.

2.3 Among other things, the regulation:

- amends the National Anti-Doping Scheme (NAD scheme) to specify the framework within which the ASADA CEO will be able to require someone to assist with an investigation. The CEO will be able to issue a disclosure notice requiring a person to attend an interview to answer questions; give information; and/or produce documents or things;
- creates an infringement notice scheme, which permits the CEO to issue an infringement notice to a person who is alleged to have failed to comply with a disclosure notice, for an amount which is no more than one-fifth of the civil penalty that a court could impose. The person alleged to have breached the civil penalty provision can choose to pay the amount in the infringement notice or to have the matter determined by a court pursuant to the ASADA Act;
- clarifies some of the roles and responsibilities of the Anti-Doping Rule Violation Panel; and
- permits the CEO to disclose information relevant to the administration of the NAD scheme to the government's National Integrity of Sport Unit.

Compatibility with human rights

Statement of compatibility

2.4 The instrument is accompanied by a detailed statement of compatibility which identifies that it engages a number of human rights, including the right to take part in cultural life;¹ the right to privacy;² the right to a fair trial;³ the right to be free from self-incrimination;⁴ and the right to the presumption of innocence⁵.

2.5 The statement states that the measures promote the right to culture as they assist to protect the integrity of sport in Australia, and their place in competition internationally. It provides a detailed discussion of the provisions that limit rights and concludes that the instrument is compatible with human rights.

Committee view on compatibility

2.6 The committee considers that the statement of compatibility adequately addresses the human rights limitations contained in the instrument and provides sufficient justifications for most of them.

Right to respect for family life

2.7 The committee, however, shares the concerns expressed by its predecessor committee that measures which subject a person to a penalty for failing to comply with a disclosure notice, without allowing for any exceptions, may inadequately protect the individual's right to respect for family life, which is recognised in article 17 of the International Covenant on Civil and Political Rights (ICCPR).⁶ Our predecessor committee suggested that consideration be given to allowing family members to raise an objection to complying with a disclosure notice if to do so may cause harm to the person or their family relationship, rather than being immediately subject to penalty.⁷

2.8 The statement of compatibility argues that the measures are proportionate as the regulation includes various safeguards, including:

- the option for the CEO to request assistance without issuing a disclosure notice;

1 Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

2 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

3 Article 14(1) of the ICCPR.

4 Article 14(3) of the ICCPR.

5 Article 14(2) of the ICCPR.

6 See, Parliamentary Joint Committee on Human Rights, *Second Report of 2013*; and *Third Report of 2013*, pp 113-114.

7 See, Parliamentary Joint Committee on Human Rights, *Second Report of 2013*; and *Third Report of 2013*, pp 113-114.

- key rights and obligations must be set out in the disclosure notice;
- a minimum of 14 days' notice of an interview, unless the Anti-Doping Rule Violation Panel agrees that extraordinary circumstances exist which may require an earlier interview;
- the opportunity for the recipient of a notice requiring an interview to ask the CEO to consider changing the date, time or place on the grounds that it would cause undue hardship;
- the possibility of conducting the interview in person or electronically;
- the right of all interviewees to have a legal practitioner present;
- interviewees may have another person present who is not a legal practitioner, although if it is reasonably believed that the presence of that other person may compromise, hinder or obstruct an investigation – for example because the other person is a suspect or a witness themselves - then that person may not attend and the interviewee will be asked to nominate an alternative person; and
- interviewees under 18 years of age may have a lawyer present and another person, to cater for the likelihood that a parent or guardian should be present, regardless of whether the person is legally represented.

2.9 While the committee welcomes these enhancements, it is concerned that they still do not adequately address the concerns identified in our predecessor committee's reports.

2.10 The committee intends to write to the Minister for Sport to recommend that consideration be given to amending the regulation to provide that the CEO must consider any harm to the person or their family relationship before issuing a disclosure notice to a family member.

Right to a fair hearing

2.11 In its report on the Australian Sports Anti-Doping Authority Amendment Bill 2013, our predecessor committee expressed concern about the proposed power to compel a person to produce information or documents, which might then be used in proceedings against a person under the *Australian Sports Anti-Doping Authority Act 2006* (the Act).⁸ The bill provided protection against the use of that information or those documents in criminal proceedings,⁹ or in any proceedings that would expose

8 Parliamentary Joint Committee on Human Rights, *Second Report of 2013*, paras 1.16-1.22 (referring to proposed new section 13D).

9 Other than proceedings for an offence against section 137.1 (false or misleading information) or section 137.2 (false or misleading documents) of the *Criminal Code* that relates to the Act.

the individual to a penalty, other than proceedings in connection with the Act or the regulations. However, the bill would still have permitted the use of that material in:

proceedings (however described) before a sporting administration body or the Court of Arbitration for Sport or other sporting tribunal that relate to sports doping and safety matters are proceedings in connection with this Act or the regulations.¹⁰

2.12 The committee notes and welcomes the fact that the bill was amended during its passage through Parliament, so that section 13D(1) as enacted provides:

An individual is excused from complying with a requirement to answer a question or to give information if the answer to the question or the information might tend to incriminate the individual or expose the individual to a penalty.

2.13 The committee understands that this provision would now prevent information provided from being used in proceedings carried out under the auspices of an athlete's national sporting organisation which might result in the suspension of the athlete's eligibility to engage in his or her sport for significant periods when found guilty of an anti-doping violation.

2.14 However, the committee notes that this protection relates only to the answering of questions or the provision of information. A person may be still be compelled to produce a document or thing pursuant to a notice.¹¹ This material or any information or thing obtained as a result of its production may not be used in criminal proceedings,¹² or in any proceedings that would expose the individual to a penalty, other than proceedings in connection with the Act or the regulations. This would include an inquiry by a sporting organisation that might result in a suspension of the athlete. This position is reflected in regulation 3.26B(9)(e), which reiterates the position that such compelled material may be used in proceedings brought under the auspices of a national authority.

2.15 These provisions mean that a person can be compelled to provide documents or things that can be relied on to find the person guilty of an anti-doping violation, leading to a period of ineligibility to participate in the sport that may comprise a number of years. This raises issues not only as to the right to a fair hearing,¹³ but also the right to work.¹⁴

10 Proposed new section 13D(3); Parliamentary Joint Committee on Human Rights, *Third Report of 2013*, p 117 (response by the former Minister to the committee's comments).

11 Section 13D(1A)–(3).

12 Other than proceedings for an offence against section 137.1 (false or misleading information) or section 137.2 (false or misleading documents) of the Criminal Code that relates to the Act.

13 Article 14(1) of the ICCPR.

14 Article 6 of the ICESCR.

2.16 The former Minister noted that these proceedings are conducted in accordance with the requirements of a right to fair hearing.¹⁵ However, in her reply she did not address the issue of whether the fairness of the proceedings was affected by the fact that the person had been compelled to provide documents or things that could be used against him or her which might provide the sole basis for a finding of guilt leading to a significant period of suspension. Nor was any information provided as to whether the provisions constituted a reasonable limitation of the right to work.

2.17 The committee intends to write to the Minister for Sport to seek further information as to whether requiring a person to provide documents or things that can be used against that person in proceedings that may lead to the suspension of the person's eligibility to engage in paid employment is consistent with the right to a fair hearing under article 14(1) of the ICCPR or the right to work under article 6 of the ICESCR.

15 Parliamentary Joint Committee on Human Rights, *Third Report of 2013*, p 117.

