

## Consideration of responses

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

*FRLI: F2013L01443*

*Portfolio: Health*

*Tabled: House of Representatives and Senate, 12 November 2013*

*PJCHR comments: First Report of 44<sup>th</sup> Parliament, tabled 10 December 2013*

*Response dated: 9 January 2014*

#### Information sought by the committee

3.1 Under the regulation, the Australian Sports Anti-Doping Authority (ASADA) Chief Executive Officer (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. The committee recommended amendments to provide that the CEO must consider any harm to the person or their family relationship before issuing a disclosure notice to ensure compatibility with the right to respect for family life.

3.2 The committee also sought further information to assess whether the requirement to produce documents or things, which could be relied upon to find the person guilty of an anti-doping violation, is consistent with the right to a fair hearing and the right to work.

3.3 The Minister's response is attached.

#### Committee's response

3.4 The committee thanks the Minister for his response.

#### *Right to respect for family life*

3.5 The committee notes the Minister's response to its suggestion that the regulation be amended 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.

3.6 The committee notes the fact that, as stated by the Minister in his response, 'it is not common practice for Commonwealth law to require an official who is exercising powers of compulsion to take into account the harm to the person or their family relationship before issuing a notice'.<sup>1</sup> The committee considers that, consistent with the position taken by our predecessor committee, the fact that a

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1 Minister's response, p 2.

provision or approach is consistent with general practice that may have been previously adopted will not be a sufficient reason to justify limitations on rights.<sup>2</sup>

3.7 The committee also wishes to clarify the Minister's view in relation to the rules applying under the Commonwealth, State and Territory Evidence Acts. The Minister states that:

I am advised that the Evidence Acts in each jurisdiction (the Commonwealth and each of the states and territories) do not give a witness the right to refuse to give evidence – even where it may incriminate their spouse, child, parent or someone with whom they have a de-facto relationship.

3.8 The committee notes that the Evidence Acts in the Commonwealth and in the majority of states and territories do, in the context of criminal proceedings, give a person who is a family member of a defendant the right to object to being required to give evidence against the defendant.<sup>3</sup> Generally, where such an objection is made, the court must not require the person to give evidence if the court finds there is a likelihood that harm may be caused to the person, or to the relationship between the person and the defendant, if the person gives the evidence and the nature and extent of that harm outweighs the desirability of having the evidence given.<sup>4</sup>

3.9 While the proceedings which may result from the information gathering powers in question (either the application of a civil penalty for failure to comply with a notice or a potential period of suspension for the athlete in question) are not criminal proceedings under domestic law, they do result in serious consequences for the persons involved.

3.10 The committee retains its concern that the lack of any requirement for the CEO to consider any harm to a person or to their family relationship before issuing a disclosure notice to a family member may inadequately protect an individual's right to respect for family life in article 17 of the International Covenant on Civil and Political Rights.

3.11 The committee notes the Minister's indication that the *Australian Sports Anti-Doping Authority Act 2006* 'does not currently authorise the making of regulations to insert additional factors that the CEO must take into account before

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2 Mr Harry Jenkins MP, Chair's statement to the House of Representatives, First Report of 2012, 22 August 2012.

3 See, for example: *Evidence Act 1995* (Cth), section 18; *Evidence Act 1995* (NSW), section 18; *Evidence Act 2008* (Vic), section 18; *Evidence Act 1929* (SA), section 21; *Evidence Act 2011* (ACT), section 18; *Evidence (National Uniform Legislation) Act*, section 18. In the majority of jurisdictions, the protection applies to the spouse, de factor partner, parent or child of a defendant.

4 See, for example, section 18(6) of the *Evidence Act 1995* (Cth).

issuing a disclosure notice'.<sup>5</sup> The committee notes that section 79 of the Act appears to set out a general regulation making power allowing the making of regulations prescribing matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

**3.12 The committee re-iterates its view that consideration be given to progressing amendments to enable consideration of any harm to family relationships before issuing a disclosure notice.**

*Right to a fair hearing and right to work*

3.13 The committee thanks the Minister for his response in relation to whether and how the ability to rely on documents or things produced by a person to find that person guilty of an anti-doping violation is compatible with the right to a fair hearing and the right to work.

**3.14 Despite the information provided, the committee retains its concerns regarding the consistency of the ability to rely on such material in anti-doping violation proceedings against a person with the right to a fair hearing and the right to work.**

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5 Minister's response, p 2.



**THE HON PETER DUTTON MP  
MINISTER FOR HEALTH  
MINISTER FOR SPORT**

Senator Dean Smith  
Chair  
Parliamentary Joint Committee on Human Rights  
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*Dean,*  
Dear Senator

Thank you for your letter of 10 December 2013 in relation the Australian Sports Anti-Doping Authority Amendment Regulation 2013 (No. 1) (the Regulation).

Australia's anti-doping legislation is structured so that the *Australian Sports Anti-Doping Authority Act 2006* principally provides the authority for the making of Regulations that give effect to our commitments under the UNESCO International Convention Against Doping in Sport and to implement arrangements that are consistent with the principles of the World Anti-Doping Code (the Code).

The Regulation gives effect to the amendments contained in the *Australian Sports Anti-Doping Authority Amendment Act 2013*, which received passage through the 43rd Parliament and commenced operation on 1 August 2013. These amendments have enhanced the capacity of the Australian Sports Anti-Doping Authority (ASADA) to investigate possible anti-doping rule violations in sport. The ASADA Chief Executive Officer (CEO) has been using these extended powers to issue disclosure notices requiring people to assist in its current investigations by attending an interview, providing information and producing documents or things.

Since the Regulation was lodged on the Federal Register of Legislative Instruments in July 2013, the World Anti-Doping Agency (WADA) has amended the Code to recognise the increasing importance of investigations and intelligence gathering in the fight against doping. WADA recognises that many of the most high-profile successes in the fight against doping have been based largely on evidence obtained through the investigations process.

In reference to the specific comments in the Committee' report, I note the following:

*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.*



The Act and ASADA Regulations have a number of protections around the issuing of a disclosure notice that ensure these powers are used appropriately. For a family member to be issued with a disclosure notice, the ASADA CEO would need to have sufficient information to demonstrate that they have a reasonable belief the family member could assist with an investigation. Moreover, this reasonable belief has to be tested with three members of the independent, expert Anti-Doping Rule Violation Panel (the Panel).

With respect to the Committee's recommendation, I understand that it is not common practice for Commonwealth law to require an official who is exercising powers of compulsion to take into account the harm to the person or their family relationship before issuing a notice. I am advised that the Evidence Acts in each jurisdiction (the Commonwealth and each of the states and territories) do not give a witness the right to refuse to give evidence – even where it may incriminate their spouse, child, parent or someone with whom they have a de-facto relationship.

It is also unlikely the CEO would be in a position to confidently assess what harm might come to a family relationship from issuing a disclosure notice.

Australia's anti-doping arrangements are not however, intended to impinge adversely upon family relationships. The matters that the CEO is required to take into account before issuing a disclosure notice are set out in the Act. The Act does not currently authorise the making of regulations to insert additional factors that the CEO must take into account before issuing a disclosure notice. Given this, I am prepared to consider the Committee's concerns when the Government is next considering amendments to the Act.

*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.*

#### Right to a Fair Hearing

The Committee's concern appears to relate to the fairness of the proceedings when the person had been compelled to provide documents or things that could be used against him or her and this is the sole basis for a finding of guilt leading to a significant period of suspension.

The issuing of a disclosure notice to provide documents is only one method of sourcing information that ASADA employs in its investigations. ASADA investigations are undertaken in accordance with the requirements of the Australian Government Investigations Standards. ASADA investigators collect all the information they need to show that the person has a potential case to answer. This information is passed to the Panel who makes a determination on whether it is possible the person has committed an anti-doping rule violation (ADRV).



At this point, the information is forwarded to the responsible national sporting organisation which arranges a hearing (unless the athlete accepts that they had committed an ADRV). The matter is heard either by a Tribunal established by the sport or the Court of Arbitration for Sport. There are also mechanisms within the sport's anti-doping policy to ensure decisions made at these hearings are appealable. The Act also provides for a person to appeal the Panel's decision in relation to a possible violation to the Administrative Appeals Tribunal.

#### Right to Work

Under Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), "state parties recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right".

Athletes and support personnel, through their sport membership, generally sign up to contractual provisions that require them not to use, possess, administer or traffic (as the case may be) substances prohibited in sport. Possible sanctions are contained in those provisions. Breaches of anti-doping rules effectively amount to breaches of:

- codes of conduct applicable to the sport (which are often incorporated into the employment arrangements of professional athletes and support personnel);
- obligations to work with care and diligence; follow all lawful and reasonable orders of the employer; duty of fidelity, etc.

Most athletes and support persons are not able to earn a living solely through their sport. While they spend a substantive amount of time preparing and competing, they are often employed in other professions. A suspension for a doping violation would not directly prevent them from working in these or other professions.

Moreover, a professional sports person who is doping is denying a clean athlete the opportunity to work in that sport. The prospect of being ineligible to be involved in the sport also acts as a significant deterrent against doping.

I would add that Article 7 of the ICESCR requires employers to provide healthy and safe work environments. It would be inconsistent with Article 7 to allow people to be employed by a sporting organisation if they are involved in doping, particularly if they are in a position where they are able to influence the training, development and management of younger members of that organisation.

I trust this information addresses the concerns of the Committee in relation to the Regulation. Please advise if I can be of further assistance.

Yours sincerely



09/01/14.

PETER DUTTON