SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

2006

1 March 2006

SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

2006

1 March 2006

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator A McEwen
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT OF 2006

The Committee presents its First Report of 2006 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Australian Citizenship Bill 2005

Australian Sports Anti-Doping Authority Bill 2005

Australian Citizenship Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2005*. The Minister for Immigration and Multicultural Affairs responded to the Committee's comments in a letter dated 13 January 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 14 of 2005

Introduced into the House of Representatives on 9 November 2005
Portfolio: Citizenship and Multicultural Affairs

Background

This bill replaces the *Australian Citizenship Act 1948*. It is intended both to update the legislative framework relating to citizenship and to implement a number of policy changes announced by the Government in July 2004. These include changes relating to:

- resumption of citizenship and applications for citizenship by conferral;
- consistency in provisions relating to citizenship by descent;
- English language requirements;
- ministerial discretions;
- personal identifiers;
- applications by persons assessed to be a risk to security; and
- the residential qualifying period.

The bill was introduced with the Australian Citizenship (Transitionals and Consequentials) Bill 2005.

Legislative Instruments Act – Declarations and exemptions
Subclause 48(6)

Subclause 48(1) permits the Minister to make an arrangement for the use of computer programs for the purpose of making decisions, exercising powers or complying with obligations. Under subclause 48(6) such an arrangement is stated not to be a legislative instrument. The effect of the subclause is to remove such instruments from parliamentary scrutiny.

Where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the Legislative Instruments Act. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision. (See the Committee's *Second Report of 2005* under the heading 'Legislative Instruments Act – Declarations'.)

It is likely that the reason for this latter provision is that the making of such an arrangement is an administrative and not a legislative function, and that subclause 48(6) is merely declaratory. However, the explanatory memorandum omits any reference to subclause 48(6). The Committee therefore **seeks the Minister's advice** as to whether the subclause is indeed no more than declaratory (and included for the avoidance of doubt) and, if so, whether it would have been appropriate to include that information in the explanatory memorandum.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> In respect of comments made by the Committee in relation to Subclause 48(6), it is not considered that this subclause breaches principle 1(a)(v) of the Committee's terms of reference. Subclause 48(6), I understand, is no more than declaratory and was incorporated within the Bill to avoid any doubt about subclause 48(1) and this

information should have been included in the explanatory memorandum to make this clear.

The Committee thanks the Minister for this response.

Delegation of legislative power
Subclauses 27(4) and 40(3)

Subclauses 27(4) and 40(3) would give to the Minister an unfettered discretion to authorise 'a person' to undertake a function on behalf of the Minister. Under subclause 27(4), that function is to be the person before whom an applicant for citizenship must make a pledge of commitment, and under subclause 40(3) it is to be the person who requests an applicant to provide one or more specified personal identifiers. The effect of these provisions is to permit the Minister to delegate some of his or her Ministerial functions to 'a person', without any limit being placed on the attributes or qualifications of that person, and thereby make the rights, liberties or obligations of applicants for citizenship dependent upon insufficiently defined administrative powers.

The Committee **seeks the Minister's advice** as to whether it would be possible to provide some specification in the legislation of the attributes or qualifications of the persons whom the Minister may authorise under these provisions.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Subclause 27(4) Persons who may receive pledge

People delegated under subclause 27(4) will not exercise decision-making power.

This subclause is the equivalent of subclause 15(2) sub-paragraph (a)(iv) of the existing Act. People delegated under Subclause 27(4) will be people before whom an approved citizenship applicant may make the pledge of commitment required by Section 26 as the final step in the acquisition of citizenship. The delegate will receive the pledge, effectively acting as a witness. The rights, liberties and obligations of prospective citizens are, therefore, not involved.

Currently, delegations under subclause 15(2) sub-paragraph (a)(iv) of the existing Act include people who hold or perform the duties of specified positions in the Department of Immigration and Multicultural Affairs, Australian diplomatic, consular and trade representatives, local government offices in each State and Territory, and specified Members of the House of Representatives.

The vast majority of citizenship ceremonies are conducted by local government. However, from time to time other people ask for, and are given, delegation so that they can receive the pledge at a specific ceremony. Examples include Senators, Queensland Premier Beattie and, more rarely, community figures with a special association with a particular group of prospective citizens.

It is considered that, specification in the legislation of the attributes or qualifications of the persons whom the Minister may authorise under subclause 27(4) would limit the existing capacity of the Minister to respond to reasonable requests for members of the community to perform a role in the final step in the acquisition of citizenship by those whose applications have been approved.

Subclause 40(3) Request for Personal Identifiers – Authorisation

Subclause 40(3) provides for the authorisation of persons to request citizenship applicants to provide one or more specified personal identifiers in relation to the application. This is the legislative expression of what is currently an administrative process. This process is necessary to verify the identity of a citizenship applicant.

Personal identifiers are required to verify the identity of an applicant at a number of stages, including at the commencement of an interview to establish whether or not the applicant meets certain requirements, for the purposes of decision making (sections 17, 24 and 30 refer), and when an approved applicant registers for a citizenship ceremony at which they will be making the pledge of commitment.

The person requesting the provision of one or more specified personal identifiers would not necessarily be a decision-maker. For example, some citizenship interviews are conducted on behalf of the Department of Immigration, Multicultural Affairs by Australia Post. As mentioned above, the vast majority of citizenship ceremonies are conducted by local government. The possibility of other organisations being asked in the future to assist with aspects of citizenship other than decision-making, for example the collection of applications and conduct of interviews, cannot be discounted.

Specification in the legislation of the attributes or qualifications of the persons whom the Minister may authorise under subclause 40(3) would limit the existing capacity

of the Minister to pursue effective and efficient arrangements for the receipt and processing of applications under the Act.

The Committee thanks the Minister for this response.

Delegation of legislative power
Subclauses 42(3) and 49(2)

Subclauses 42(3) and 49(2) would permit the Minister, in writing, to authorise 'a person' to carry out the administrative tasks of gaining access to identifying information about applicants for citizenship (under clause 42) or stating whether a specified computer program was functioning correctly (under clause 49). In neither case does the legislation give any indication of the attributes or qualifications of the persons who may be so authorised, and thus grants to the Minister an unfettered discretion in the choice of such persons.

The Committee **seeks the Minister's advice** as to whether it would be possible to provide some specification in the legislation of the attributes or qualifications of the persons whom the Minister may authorise under these provisions.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Subclauses 42(3) Accessing identifying information - Authorisation

Subclause 42(3) provides for the authorisation of people to access identifying information for specified purposes but does not provide for delegation of decision making powers. This is also the legislative expression of what are currently administrative arrangements for accessing material to verify the identity of a citizenship applicant and manage the personal material collected and stored for the purposes of the Act.

The specified purposes set out at subclause 42(4) show that the access is required to assist in identity verification, combating document and identity fraud, complementing anti-people smuggling measures, and administration in relation to the management of personal identifiers collected and stored for the purposes of the Act.

Specification in the legislation of the attributes or qualifications of the persons whom the Minister may authorise under subclause 40(3) would limit the existing capacity of the Minister to pursue effective and efficient arrangements for the receipt and processing of applications under the Act.

Subclause 49(2) Evidence of whether computer program is functioning correctly

Section 49 is the equivalent of section 46B of the existing Act. Specification in the legislation of the attributes or qualifications of the persons whom the Minister may authorize under subclause 40(3) would limit the existing capacity of the Minister to pursue effective and efficient arrangements in respect of occasions when evidence is to be provided of whether a computer program is functioning correctly.

The Committee thanks the Minister for this response.

Delegation of legislative power
Clause 53

Clause 53 provides that the Minister 'may, by writing, delegate to any person all or any of the Minister's functions or powers under this Act or the regulations.'

The Committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to anyone who fits the all-embracing description of 'a person'. In this case, it appears that the provision would grant to the Minister an unfettered discretion in the delegation of all of his or her powers under the Act.

Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. There appears to be no such limit proposed in the bill.

The explanatory memorandum notes that the clause is the equivalent of section 37 of the existing Act. The memorandum goes on to assert that 'All delegations under the [existing] Act will operate in the same way under the [proposed] new Act. For example: under the [existing] Act the Minister did not delegate the power to revoke a person of their Australian citizenship and will not do so under this Act.'

The Committee notes that there appears to be no provision in the bill which requires that delegations will continue to operate as they have to date, and so this assurance provides no effective limit on the manner in which a Minister might decide to delegate his or her powers and functions in the future.

The Committee **seeks the Minister's advice** as to the basis on which this statement in the explanatory memorandum is made. The Committee also **seeks the Minister's advice** as to the need for this unfettered ministerial discretion and whether it would not be possible to provide some specification in the legislation of the attributes or qualifications of the persons who may be appointed as delegates or the scope of the powers and functions which might be delegated.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> Clause 53 is the equivalent of section 37 of the existing Act. The statement in the explanatory memorandum that delegations will operate in the same way under the proposed Act reflects the absence of any intention to make substantial changes to the way in which delegations are effected under the existing Act.
>
> The specification of the attributes or qualifications of persons who may be appointed as delegates, or the scope of the powers and functions which might be delegated, would unreasonably limit the existing capacity of the Minister to pursue effective and efficient administration of the Act.
>
> I hope my comments are helpful to the Committee, however, should Members have further queries I would be happy to respond to these.

The Committee thanks the Minister for this response. The Committee notes the Minister's assurance that there is no intention to make substantial changes under the proposed Act to the way in which delegations are effected under the existing Act. However, the Committee maintains its view that, in the absence of a provision in the bill which requires that delegations continue to operate as they have to date, the Minister's assurance provides no effective limit on the manner in which a Minister might decide to delegate his or her powers and functions in the future. The Committee considers that the question of whether a completely unfettered discretion, as provided for by Clause 53, is justified, remains unanswered. The Committee has a long-standing expectation that delegation powers will reflect the principle that the discretion to delegate ought to be limited to a particular class of persons, or limited to a particular range of powers and functions.

The Committee continues to draw Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Australian Sports Anti-Doping Authority Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2006*. The Minister for the Arts and Sport responded to the Committee's comments in a letter received on 27 February 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 1 of 2006

Introduced into the House of Representatives on 7 December 2005
Portfolio: Arts and Sport

Background

This bill establishes the Australian Sports Anti-Doping Authority (ASADA) to replace the Australian Sports Drug Agency. ASADA will also investigate potential additional sports doping violations, present cases against alleged offenders at hearings conducted by the international Court of Arbitration for Sport and other sports tribunals, determine mandatory anti-doping rules to be included in Australian Sports Commission (ASC) funding agreements, and advise the ASC of the performance of sports organisations in observing these requirements.

The bill establishes ASADA as a body corporate consisting of a Chair, Deputy Chair and between one and five other members.

Delegation of legislative authority
Clause 12

Clause 12 would permit the National Anti-Doping Scheme (which, under clause 9, is to be set up by regulation) to apply, adopt or incorporate any matter contained in specified international instruments relating to anti-doping 'as in force or existing from time to time', in derogation of the provisions of subsection 14(2) of the *Legislative Instruments Act 2003*. The effect of clause 12 is therefore to incorporate into Australian delegated legislation material which neither the Parliament nor any committee of the Parliament has seen.

Paragraph (iv) of the Committee's terms of reference requires the Committee to consider whether provisions 'inappropriately delegate legislative power.' While clause 12 is a clear delegation of legislative authority, the explanatory memorandum seeks to justify the provision by observing that the bodies set up by this legislation need to act quickly to respond to any changes that may be made to the World Anti-Doping Code or an International Standard that has been adopted by the World Anti-Doping Agency. The Committee may be prepared to accept this justification, but **seeks the Minister's advice** as to why the adoption of changes made to relevant international instruments should not be subject to Parliamentary oversight and disallowance, and further, whether the bodies could not equally quickly respond by explicitly making fresh amending regulations subject to the usual tabling and disallowance regime.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

International instruments such as the International Standards associated with the World Anti-Doping Code contain specific technical and operational aspects of an anti-doping program.

For example, the *International Standard for Testing* harmonises the planning for effective testing, with the intent to maintain the integrity and identity of samples. Similarly, the *International Standards for Laboratories* and related technical documents aim to ensure the harmonisation of valid testing, results and reporting from accredited laboratories.

Methods for the illicit use of drugs in sport are evolving at a pace which threatens to outstrip parallel developments used in the pursuit of drug cheats. It is crucial that the new Australian Sports Anti-Doping Authority (ASADA) be given the mechanisms to respond in the shortest possible time. Given the frequency of major international competitions it would not be practical to respond to changes to international instruments by amending regulations via legislative instruments subject to the usual tabling and disallowance regime.

That is, if such international instruments were set out in full in National Anti-Doping (NAD) scheme, ASADA in accordance with clause 11 of the Bill, would be required to undertake public consultation before it made an instrument under clause 10 that amended the NAD scheme. Essentially, ASADA would be required to publish a

draft of the instrument, invite people to make submissions on the draft and consider any submissions that were received within the time limit specified by ASADA when it published the draft. The specified time limit must be at least 28 days after the day of publication, by which time several international competitions could well have been staged.

For the continued effectiveness of Australia's anti-doping framework and to ensure that Australian athletes are not disadvantaged by inconsistencies in anti-doping practices, it is vital that Australia has the ability to respond quickly in recognising any amendments made to International Standards.

Australia may face international criticism if these expectations are not met, especially as we would not be meeting our international commitments under the Code. Further information on this matter is at Attachment A.

The Committee thanks the Minister for this response and notes that the Minister has drawn attention to an apparent conflict between the requirements for public consultation under proposed Clause 11 and the Committee's longstanding expectation that changes to legislative instruments be subject to Parliamentary oversight and disallowance. The Committee accepts that, in this case, Australia's anti-doping framework may be best served through the Australian Sports Anti-Doping Authority having the ability to adopt technical amendments to international standards as soon as they come into effect.

Legislative Instruments Act - Declarations
Subclauses 48(6) and (7)

Subclauses 48(6) and (7) provide that neither an instrument under subclause 48(1) nor a direction under subclause 48(3) is a legislative instrument. It appears from the context that these provisions are no more than declaratory, as the instrument and direction referred to appear to be administrative and not legislative in character.

Where a provision specifies that an instrument is not a legal instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt). In this case, the explanatory memorandum merely describes the content of subclauses 48(6) and (7), and does not advise the reader whether they are no more than declaratory. The failure of the explanatory memorandum to live up to its name on this occasion is surprising, given that subclauses 75(5), (6) and (7) are in very much the same form as subclauses 48(6) and (7), but the explanatory memorandum, on page 37, suggests that subclauses 75(5), (6) and (7) are 'intended to clarify to the reader that such a record [as is provided for under subclauses 75(1) and (2)] is not a legislative instrument. [The subclauses are] not an exemption to the *Legislative Instruments Act 2003*.' The Committee **seeks the Minister's advice** as to whether subclauses 48(6) and (7) are indeed merely declaratory of the law.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> In response to the Committees query regarding subclause 48(6) and (7), these are declaratory of the law and were intended to clarify to the reader that neither an instrument made under subclause 48(1) or a direction given under subclause 48(3) is a legislative instrument. Subclauses 48(6) and 48(7) are not exemptions to the *Legislative Instruments Act 2003.*

The Committee thanks the Minister for this response and particularly for his assurance that subclauses 48(6) and (7) are merely declaratory of the law. However, the Committee reiterates its expectation that provisions of this nature be adequately explained in the explanatory memorandum to the bill. The Committee set out its approach to declarations of this kind in its *Second Report of 2005*.

Robert Ray
Chair

Sen the Hon Amanda Vanstone

Minister for Immigration and Multicultural Affairs

Parliament House, Canberra ACT 2600

Telephone: (02) 6277 7860

Facsimile: (02) 6273 4144

Senator Brett Mason
Deputy Chair
Standing Committee for the Scrutiny of Bills
Department of the Senate
Parliament House
CANBERRA ACT 2000

Dear Senator Mason Brett

I am responding to the Standing Committee for the Scrutiny of Bills comments on the *Australian Citizenship Bill 2005,* contained within the Scrutiny of Bills Alert Digest No 4 of 2005 (30 November 2005). I apologise for the delay in getting back to the Committee. This is an important Bill and I have taken your concerns on board and hope that the following clarification will assist allay the Committee's concerns.

In respect of comments made by the Committee in relation to Subclause 48(6), it is not considered that this subclause breaches principle 1(a)(v) of the Committee's terms of reference. Subclause 48(6), I understand, is no more than declaratory and was incorporated within the Bill to avoid any doubt about subclause 48(1) and this information should have been included in the explanatory memorandum to make this clear.

The Committee has also commented on the delegation of legislative power under subclauses 27(4) and 40(3), 42(3) and 49(2), and clause 53. I am advised that these provisions also do not breach principle 1(a)(iv) of the Committee's terms of reference. Please find my considerations, against each of the subclauses, in more detail below.

Subclause 27(4) Persons who may receive pledge

People delegated under subclause 27(4) will not exercise decision-making power.

This subclause is the equivalent of subclause 15(2) sub-paragraph (a)(iv) of the existing Act. People delegated under Subclause 27(4) will be people before whom an approved citizenship applicant may make the pledge of commitment required by Section 26 as the final step in the acquisition of citizenship. The delegate will receive the pledge, effectively acting as a witness. The rights, liberties and obligations of prospective citizens are, therefore, not involved.

Currently, delegations under subclause 15(2) sub-paragraph (a)(iv) of the existing Act include people who hold or perform the duties of specified positions in the Department of Immigration and Multicultural Affairs, Australian diplomatic, consular and trade representatives, local government offices in each State and Territory, and specified Members of the House of Representatives.

Currently, delegations under subclause 15(2) sub-paragraph (a)(iv) of the existing Act include people who hold or perform the duties of specified positions in the Department of Immigration and Multicultural Affairs, Australian diplomatic, consular and trade representatives, local government offices in each State and Territory, and specified Members of the House of Representatives.

The vast majority of citizenship ceremonies are conducted by local government. However, from time to time other people ask for, and are given, delegation so that they can receive the pledge at a specific ceremony. Examples include Senators, Queensland Premier Beattie and, more rarely, community figures with a special association with a particular group of prospective citizens.

It is considered that, specification in the legislation of the attributes or qualifications of the persons whom the Minister may authorise under subclause 27(4) would limit the existing capacity of the Minister to respond to reasonable requests for members of the community to perform a role in the final step in the acquisition of citizenship by those whose applications have been approved.

Subclause 40(3) Request for Personal Identifiers - Authorisation

Subclause 40(3) provides for the authorisation of persons to request citizenship applicants to provide one or more specified personal identifiers in relation to the application. This is the legislative expression of what is currently an administrative process. This process is necessary to verify the identity of a citizenship applicant.

Personal identifiers are required to verify the identity of an applicant at a number of stages, including at the commencement of an interview to establish whether or not the applicant meets certain requirements, for the purposes of decision making (sections 17, 24 and 30 refer), and when an approved applicant registers for a citizenship ceremony at which they will be making the pledge of commitment.

The person requesting the provision of one or more specified personal identifiers would not necessarily be a decision-maker. For example, some citizenship interviews are conducted on behalf of the Department of Immigration, Multicultural Affairs by Australia Post. As mentioned above, the vast majority of citizenship ceremonies are conducted by local government. The possibility of other organisations being asked in the future to assist with aspects of citizenship other than decision-making, for example the collection of applications and conduct of interviews, cannot be discounted.

Specification in the legislation of the attributes or qualifications of the persons whom the Minister may authorise under subclause 40(3) would limit the existing capacity of the Minister to pursue effective and efficient arrangements for the receipt and processing of applications under the Act.

Subclauses 42(3) Accessing identifying information - Authorisation

Subclause 42(3) provides for the authorisation of people to access identifying information for specified purposes but does not provide for delegation of decision making powers. This is also the legislative expression of what are currently administrative arrangements for accessing material to verify the identity of a citizenship applicant and manage the personal material collected and stored for the purposes of the Act.

The specified purposes set out at subclause 42(4) show that the access is required to assist in identity verification, combating document and identity fraud, complementing anti-people smuggling measures, and administration in relation to the management of personal identifiers collected and stored for the purposes of the Act.

Specification in the legislation of the attributes or qualifications of the persons whom the Minister may authorise under subclause 40(3) would limit the existing capacity of the Minister to pursue effective and efficient arrangements for the receipt and processing of applications under the Act.

Subclause 49(2) Evidence of whether computer program is functioning correctly

Section 49 is the equivalent of section 46B of the existing Act. Specification in the legislation of the attributes or qualifications of the persons whom the Minister may authorise under subclause 40(3) would limit the existing capacity of the Minister to pursue effective and efficient arrangements in respect of occasions when evidence is to be provided of whether a computer program is functioning correctly.

Clause 53 - Delegation

As noted by the Committee, Clause 53 is the equivalent of section 37 of the existing Act. The statement in the explanatory memorandum that delegations will operate in the same way under the proposed Act reflects the absence of any intention to make substantial changes to the way in which delegations are effected under the existing Act.

The specification of the attributes or qualifications of persons who may be appointed as delegates, or the scope of the powers and functions which might be delegated, would unreasonably limit the existing capacity of the Minister to pursue effective and efficient administration of the Act.

I hope my comments are helpful to the Committee, however, should Members have further queries I would be happy to respond to these.

Yours sincerely

AMANDA VANSTONE

SENATOR THE HON ROD KEMP

Minister for the Arts and Sport

Senator R Ray
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Email: scrutiny.sen@aph.gov.au

Dear Senator Ray

Re: Australian Sports Anti-Doping Bill 2005

Thank you for the opportunity to provide a response to the comments made by the Committee on the *Australian Sports Anti-Doping Bill 2005* (ASADA Bill).

I note the two issues that were raised by Committee, specifically:

1. why under clause 12 of the Bill, the adoption of changes made to relevant international instruments should not be subject to Parliamentary oversight and disallowance, and further, whether the bodies could not equally respond by explicitly making fresh amending regulations subject to the usual tabling and disallowance regime; and
2. whether subclauses 48(6) and (7) (relating to Advisory Committees) are declaratory of the law.

In response to the first matter, international instruments such as the International Standards associated with the World Anti-Doping Code contain specific technical and operational aspects of an anti-doping program.

For example, the *International Standard for Testing* harmonises the planning for effective testing, with the intent to maintain the integrity and identity of samples. Similarly, the *International Standards for Laboratories* and related technical documents aim to ensure the harmonisation of valid testing, results and reporting from accredited laboratories.

Methods for the illicit use of drugs in sport are evolving at a pace which threatens to outstrip parallel developments used in the pursuit of drug cheats. It is crucial that the new Australian Sports Anti-Doping Authority (ASADA) be given the mechanisms to respond in the shortest possible time. Given the frequency of major international competitions it would not be practical to respond to changes to international instruments by amending regulations via legislative instruments subject to the usual tabling and disallowance regime.

That is, if such international instruments were set out in full in National Anti-Doping (NAD) scheme, ASADA in accordance with clause 11 of the Bill, would be required to undertake public consultation before it made an instrument under clause 10 that amended the NAD scheme. Essentially, ASADA would be required to publish a draft of the

Parliament House . Canberra ACT 2600 . Tel 02 6277 7350 . Fax 02 6273 4134

instrument, invite people to make submissions on the draft and consider any submissions that were received within the time limit specified by ASADA when it published the draft. The specified time limit must be at least 28 days after the day of publication, by which time several international competitions could well have been staged.

For the continued effectiveness of Australia's anti-doping framework and to ensure that Australian athletes are not disadvantaged by inconsistencies in anti-doping practices, it is vital that Australia has the ability to respond quickly in recognising any amendments made to International Standards.

Australia may face international criticism if these expectations are not met, especially as we would not be meeting our international commitments under the Code. Further information on this matter is at Attachment A.

Finally, in response to the Committee's query regarding subclause 48(6) and (7), these are declaratory of the law and were intended to clarify to the reader that neither an instrument made under subclause 48(1) or a direction given under subclause 48(3) is a legislative instrument. Subclauses 48(6) and 48(7) are not exemptions to the *Legislative Instruments Act 2003*.

Yours sincerely

ROD KEMP

Attachment

1. Delegation of legislative authority (Clause 12 of the ASADA Bill)

Background

Under the ASADA Bill, a relevant international anti-doping instrument means:

d) the World Anti-Doping Code; or
e) an International Standard; or
f) an international agreement to which Australia is a party, if the agreement is prescribed by regulations for the purposes of this definition.

In March 2003, the World Anti-Doping Agency (WADA), established to coordinate anti-doping efforts worldwide, released the World Anti-Doping Code (the Code). The Code provides a framework for anti-doping policies, rules and regulations for sport organisations and public authorities. The fundamental aim of the Code is to achieve a level international playing field where all athletes are subject to the same doping rules and sanctions.

The Code works in conjunction with the List of Prohibited Substances and three other *International Standards* aimed at harmonising the technical and operational aspects of a country's anti-doping program: testing, laboratories and therapeutic use exemptions. Adherence to the *International Standards* is mandatory for compliance with the Code.

Currently, Australia is a signatory to the Code through the *Copenhagen Declaration on Anti-Doping in Sport*, the non-binding international instrument which recognises and supports the Code.

Rationale for international instruments not being subject to Parliamentary scrutiny

It is important that ASADA be able to adopt any technical amendments made to the International Standards as soon as they come into effect in order to maintain the integrity and effectiveness of Australia's doping control program and stay abreast of international best practice.

For example, the International Standard for Testing harmonises the planning for effective testing, with the intent to maintain the integrity and identity of samples. Should any changes be made to blood collection procedures to implement new detection methodologies such as the human growth hormone test, ASADA must be in a position where it can immediately implement such collection procedures.

Similarly, the International Standards for Laboratories and their related technical documents aim to ensure the harmonisation of valid testing, results and reporting from accredited laboratories. Should a new detection methodology for an illicit substance or method be introduced, laboratories need to be in a position to carry out these new tests without disadvantaging athletes or Australia's anti-doping program.

It should be noted that whilst the Code and its associated International Standards may be revised from time to time by the WADA Executive Committee, the Australian Government is formally consulted on any proposed changes and has a voice in the decisions of the WADA through its representation on both the WADA Foundation Board and Executive Committee.

Additionally, on 15 December 2005, Australia ratified the *UNESCO Convention Against Doping in Sport*. If this Convention enters into force for Australia, State Parties commit themselves to the principles of the Code (not the letter of the Code itself). The International Standards relating to the Prohibited List and Therapeutic Use Exemptions form annexes to the treaty and as such are an integral part of the Convention. Under the proposed Convention, parties have 45 days to object to a proposed amendment to these annexes. In the Joint Standing Committee on Treaties report to Parliament, which contained advice on the proposed UNESCO convention, the Committee acknowledged that it may not be able to inquire into changes before they enter into force. Sections 2.12 to 2.23 of the report state:

> *2.21 Due to the timing of any future amendments, it is unlikely that the Committee will have an opportunity to inquire into them before they come into force.*
>
> *2.22 The National Interest Analysis emphasises that the amendment procedures in Article 34 only relate to the changes to the two Annexes, primarily the Prohibited List, and that it is in Australia's interest that the Annexes to the Convention remain in congruence with the most recent list issued by WADA.*
>
> *2.23 In these circumstances, the Committee recognises the importance of consistency between the Prohibited List and the Convention and the WADA list and accepts that it may be unable to inquire into changes before they enter into force.*