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SENATE

COMMUNITY AFFAIRS LEGISLATION COMMITTEE

Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019

(Public)

FRIDAY, 14 FEBRUARY 2020

CANBERRA

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SENATE

COMMUNITY AFFAIRS LEGISLATION COMMITTEE

Friday, 14 February 2020

Members in attendance: Senators Askew, Hughes, McCarthy, Siewert.

Terms of Reference for the Inquiry:
To inquire into and report on:
Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019.
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Committee met at 09:30

CHAIR (Senator Askew): I declare open this hearing of the Senate Community Affairs Legislation Committee into the Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019. These are public proceedings and a Hansard transcript is being made. The hearing is being broadcast via the internet. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public, although the committee may determine or agree to a request to have evidence heard in private session. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may also be made at any other time. The committee understands that all witnesses appearing today have been provided with information regarding parliamentary privilege and the protection of witnesses. Additional copies of this information can be obtained from the secretariat.

I now welcome via teleconference Ms Malcher, a representative from the Coalition of Major Professional and Participation Sports. Thank you for participating in the committee’s hearing today. I’m Senator Wendy Askew and I have with me here in the room Senator Rachel Siewert, Senator Hollie Hughes and Senator Malarndirri McCarthy. Do you have any comments to make on the capacity in which you appear?

Ms Malcher: For the purpose of today’s session, I am a representative of the Coalition of Major Professional and Participation Sports, which is a coalition of seven sporting organisations. Unfortunately, we weren’t able to arrange for other members to attend.

CHAIR: I will now invite you, if you wish, to make a brief opening statement, and then I will ask committee members to ask you some questions in relation to your submission.

Ms Malcher: As I mentioned, the Coalition of Major Professional and Participation Sports comprises seven sporting organisations, each of whom have an integrity framework and systems in place to protect the integrity of our sports. As active participants, we have previously advocated in the Wood review process in relation to the Anti-Doping Rule Violation Panel as well as other parts of the Wood review. We are supportive of the bill, and I’m more than happy to take questions. There may be some items that I need to take back to the coalition on notice, but where that happens I’m happy to navigate that with you.

CHAIR: Thank you very much. Senator Siewert?

Senator SIEWERT: I have a few questions. Were you consulted in the drafting, specifically, of the bill?

Ms Malcher: I am not sure. I’ve only been in the Integrity Unit at Cricket Australia since 2018. It could well have been that it happened before that. Could I get Jo Setright, the deputy director of COMPPS, to confirm that position with you?

Senator SIEWERT: Yes.

CHAIR: If you could take that on notice, that would be great.

Ms Malcher: Perfect.

Senator SIEWERT: I am interested in your opinion of a couple of the provisions of the bill. I have heard, and read in your submission, that you are supportive of the bill, so I just want to drill down into it a little bit. My questions relate to removing the option of appeal to the AAT and the removal of the ADRV panel. Do you agree with these changes and do you think they will improve the process?

Ms Malcher: Certainly removing the ADRV panel takes out an additional layer of bureaucracy that lengthens the actual process. If that process is removed, it will assist with navigating the matter, investigating the matter and bringing these matters to a close.

Senator SIEWERT: I do want to come back to that, because you describe in your submission the fact that the process is convoluted, confusing et cetera. Can I ask you to address the AAT issue? Then I’ll come back to the matter of the panel
Ms Malcher: Certainly the AAT is something I'll have to take on board. I haven't been part of any discussions on the AAT. So, if you're happy for me, again, to take that one on notice, we can respond further.

Senator SIEWERT: That's fine. In relation to the panel, you just made the comment about taking out some of the bureaucratic process and resolving issues more quickly. You talk in the submission about the convoluted and confusing process. I took from what you said that it will make it a quicker process. Can you just explain that? How does that help athletes and how does that help in dealing with the issues around supporting your stance on antidoping?

Ms Malcher: Whilst the sports haven't had a lot of the ADRV processes in play, my understanding is that the process would initiate with a 'show cause' issued by ASADA. Following that, the matter is then provided to the ADRV for consideration. The respondent is given an opportunity to put relevant materials before them, and then it goes through that process. Without the ADRV, the steps that are actually covered by the bill would mean that the investigation happens and then it would simply go through to a determination. So it's an extra layer in. already, an investigation process that exists. For sports to be able to navigate those issues with ASADA without an intermediary step—it extends the process, not only for the player but for any athlete. It actually streamlines it for everyone.

Senator SIEWERT: I'm still having a bit of trouble understanding. I hear what you're saying in terms of it extending the process, but some would argue that perhaps that's worthwhile so that all the facts are on the table. Can you outline whether there have been major issues with that and what concerns athletes have? Are athletes really concerned that it does extend the process and they want to get the process done more quickly?

Ms Malcher: I understand that the Athletes Alliance is speaking to you next, and I actually think that that's probably a question for them. I haven't gone through this process with cricket, so we have limited experience in actually going through this process. I can certainly see whether any of the other COMPPS members have any further details about it. I think it's pretty well outlined in the sports integrity review submissions, but, if there is further detail that you require, I'm happy to take that on board.

Senator SIEWERT: Okay. I'm interested in it from your members' point of view. I probably misphrased what I said. Have your members had trouble with that particular process? So it would be appreciated if you could take that on notice just to provide a few examples of the problems that your members have had with that process.

Ms Malcher: Sure.

Senator McCARTHY: I want to go back a little bit from Senator Siewert's questions there and just look at the submission. With the ADRV panel—and you may want to take this on notice—it says here that the process was 'convoluted, confusing, bureaucratic and largely unnecessary'. Can you provide examples in relation to that?

Ms Malcher: I think it's best that I go back to the actual COMPPS members and seek that specific information from them. I can't speak for the other six. Certainly cricket hasn't gone through the ADRV process in recent years.

Senator McCARTHY: So you want to take that question on notice?

Ms Malcher: Yes.

Senator McCARTHY: Okay. Could you elaborate on your concerns in relation to the proposed lowering of the threshold for issuance of disclosure notices.

Ms Malcher: We don't have any concerns with lowering of that threshold to 'reasonably suspects'. Following that disclosure notice, there are still a number of steps to go through before a person would receive a 'show cause'. So we don't have any concerns about lowering of that threshold.

CHAIR: I'm just looking through a few different things to do with this, and I noticed—this is actually contained in the executive summary of the bill—that the Wood review noted:

... the current ADRV process is overly bureaucratic, inefficient and cumbersome. Australia's implementation of Code-compliant ADRV procedures is one of the most complicated of any countries in the world and, as a result, it is confusing for those subject to an ADRV allegation and to their representatives.

I'm just saying that because your submission seems to agree with the recommendation that came from the Wood review. I know you've taken some of that on notice, but do you wish to add anything further to that?

Ms Malcher: We certainly do support those findings from the Wood review, particularly around the ADRV process. We made submissions to the Wood review and the integrity of sports review. That covered the actual procedural steps and the requirements under the ADRV, which do often add to the other regimes that exist within the antidoping framework.

CHAIR: I have just one final question. In your submission, you reiterate your longstanding position on the need for adequate resourcing of ASADA. Can you elaborate on that a little bit more, please.
Ms Malcher: Yes. That means that, from our perspective, ASADA needs to be well resourced, not just in finances but also in actually being able to deliver an antidoping framework for sports so that we can continue to protect the integrity of all competition. So whatever measures are put in place by ASADA or SIA will require adequate servicing to actually deliver a framework that protects sport from doping.

CHAIR: Do you see this bill as having the potential to do that by adding that extra support with the framework?

Ms Malcher: Yes

CHAIR: Excellent.

Senator SIEWERT: I have a couple of other questions if that's okay. I just want to go back to the issues around privilege against self-incrimination. Some of the evidence that we've received says that some organisations require their members—players—to sign contracts that actually give up their right to avoid self-incrimination. I'm just wondering—and I realise that you may need to take this on notice—if any of your members have contracts that require people to basically give up their protection around self-incrimination?

Ms Malcher: Yes. Given that there are seven organisations I will need to go back to the other six. Cricket Australia's antidoping code does include that. That code has been approved by the Australian Cricketers' Association, which is our players' association. There are also provisions in contracts that cover investigations.

Senator SIEWERT: Could you just say that again.

Ms Malcher: On Cricket Australia's behalf, as a member club, we do have that written into our antidoping code, as well as contracts that have been agreed with the players' associations. In regard to the other organisations, I will need to make inquiries with each of them, because we all have different codes.

Senator SIEWERT: Thank you. That would be appreciated.

CHAIR: Are there further questions? No. Thank you very much for taking the time today to be available by phone. We really appreciate it. I notice that you have taken some questions on notice. The committee will be reporting to the Senate on Monday, 24 February and we request that answers to questions on notice are provided to the secretariat by next Wednesday, 19 February, if that's okay with you?

Ms Malcher: That's fine. No trouble at all.

CHAIR: Thank you very much once again and have a good day.

Ms Malcher: Thank you very much. Likewise.
SIGAL, Ms Laura, Deputy General Secretary, Australian Athletes’ Alliance

[09:47]

CHAIR: Welcome. Thank you for participating in the committee’s hearing today. If you would like to make a brief opening statement I will ask you to do that now and then we will ask you some questions.

Mr Holmes: Chair Askew and members of the committee, thank you for the opportunity to speak today about an issue of substantial importance to the Australian Athletes' Alliance. For context, the Australian Athletes' Alliance is the peak body for professional athletes in Australia and comprises the AFL Players Association, the Australian Cricketers' Association, the Australian Basketball Players' Association, the Australian Netball Players Association, Professional Footballers Australian, Rugby League Players Association and the Rugby Union Players' Association. In that group we represent more than 4,000 male and female athletes in elite sport—and I emphasise this point—who are most interested in ensuring the competitions they compete in are free from corruption and cheating. After all, a clean athlete—and I was one of them once—has the most to lose from drug cheats: a place in the team, a medal, a competition or championship trophy. We are definitely not here to make it easy on drug cheats.

But we think it is important to view the proposed legislative changes in the context of antidoping burdens already on athletes when they are employed in sport. As a former professional basketball player and being fortunate enough to wave the towel when winning a Commonwealth Games gold medal in 1986, I am acutely aware of the burdens placed on athletes. Bear with me on this. Whether it be urinating in a cup, with your top above your head and pants below your ankles, with someone else watching, whether it is someone rocking up to your house at 6:00 in the morning to ask you for a drug test, or whether it's being accountable for your whereabouts every day of every week of an entire year, and if that changes making sure you make them if you happen to stay at a friend's house. Scarily, should a contaminated substance unintentionally enter your system, which is always a fear of mine, you could potentially be up for a charge, or at least defending yourself for thousands of dollars of costs to lower the degree of fault. Should that unintentional act be deemed negligent, I could have been deprived of my sporting career, not to mention the irreparable damage it did to my reputation and the removal of my ability to be a part of my sport, which I've been with for my whole life.

To be honest, all of these I accepted as part and parcel of the system we operate in, part and parcel of being an athlete protecting the best interests of sport and the integrity of the sport I played in. However, what we're seeing now in the legislation and particularly in the proposed bill is that it seeks to increase these already pretty substantial burdens as well, in our opinion, decrease the accountability that national sporting organisations and others have to the athletes, who I think we should have at the forefront of this, obviously with a bias towards that.

In simple terms, the bill proposes to do four things that we have an issue with: (1) to lower the standard for when personal information should be disclosed and privacy can be invaded, (2) to remove the basic human right of the privilege against self-incrimination, (3) to remove the right to hold those in governance of sport accountable for their actions if they're devoid of a duty of care and (4) make it more difficult for athletes to inspect the information that the enforcement has against them. All of this is in addition to lack of focus, we believe, that the legislation has on safeguarding and protecting the athletes and their human and legal rights. This should be the starting point—respect and protection of the human rights of all involved in sport and particularly the athletes.

With this in mind, I'll briefly go through the four areas in our submission, and then I can take some questions. In our belief, the current standard of 'reasonable belief' should not be diminished to 'reasonably sufficient' for a disclosure notice. Currently the CEO may issue a disclosure notice only if they reasonably believe that a person has information that may be relevant to the National Anti-Doping Scheme and the ADRV, which agrees that the CEO’s belief is reasonable. The bill not only eliminates the check of the CEO’s power with the ADRV but also lowers the standard that the CEO has to apply down from 'reasonable belief' to 'reasonable suspicion'. We accept that the information that the enforcement has against them. All of this is in addition to lack of focus, we believe, that the legislation has on safeguarding and protecting the athletes and their human and legal rights. This should be the starting point—respect and protection of the human rights of all involved in sport and particularly the athletes.

It should not be harder for athletes to review documents held against them. Simply, this should be done when it's convenient and accessible for the athlete. Especially with the many semi-professional athletes we have in our sports, with the growth of female players, to have it only at the direction of the CEO seems odd and inappropriate. Considering that the athletes' training schedules are fixed during their competition and their travel and, as I said,
potentially some have second jobs, it should be done at an appropriate time when it is accessible for the athlete to review that information.

Thirdly, we remain steadfastly against the removal of the right against self-incrimination. The privilege against self-incrimination has been described by the High Court as a human right that protects the personal freedom, privacy and dignity of people. It is historically well-established. Athletes should not be expected to waive this fundamental human right. Nor should we have the significant intrusions already in place on the privacy and dignity held within the current act.

As a part of the integrity framework it's worth noting on this legislation that Australia entered into the Macolin Convention, which has human rights as the first of its four guiding principles. Furthermore, the Kazan Action Plan, endorsed by the world's sports ministers, including Australia, also requires that fundamental human rights be protected and respected when protecting the integrity of sport. In addition, they aren't just international; there are also domestic concerns around this, with the recent report of the Parliamentary Joint Committee on Human Rights expressing concerns about this bill's compatibility with human rights. Fourth, NSOs should be responsible for their breaches. We oppose any change that would deny an athlete recourse if they suffer a loss as a result of a national sporting organisation's breach of its duty of care. Even for an athlete who is exonerated, the ramifications of anti-doping matter for their career, their mental health and their reputation are far-reaching. Accordingly, an NSO must be held responsible if they breach that duty of care and athletes should be able to hold them to account. We all believe that athletes must face consequences of their actions if they fall foul of this act. However, we also believe that administrators should be held to account.

Lastly, I will mention the final two things for us. We propose additions to the bill. From our perspective and those of the athletes, we require better education—education that isn't top-down, that is peer to peer and that works with the athletes on supporting them and educating them on what is a very complex system. Second is a legal aid service within an integrity-in-sport framework. We believe that the effective support, advice and representation of athletes is essential. Not all athletes have player associations. No matter the level of sophistication of their education, the vast majority of athletes who are provided with a notice by ASADA will have no experience with the process and the procedure that awaits them. Furthermore, most athletes will not have the resources or revenue at their disposal to obtain effective advice and representation in these times. Therefore we believe the provision of a new legal aid service within this framework is essential.

In closing, it is our firm belief that the bill should be deferred or amended, placing the safeguarding of athletes' rights front and centre, along with increased focus on support and education for athletes. I thank you for giving us time to speak today, and we'll take any questions.

CHAIR: Thanks, Mr Holmes. Would you like to start, Senator McCarthy?

Senator McCarthy: I certainly would. Thank you, Mr Holmes and Ms Sigal, for your presence here today. Wow! Thank you. That was an important opening statement. It makes me a bit nervous as well now, just listening to that. I think it's important, given that so many people play sports across the country, to hear those concerns on the record, so thank you, Mr Holmes.

Mr Holmes: Thank you.

Senator McCarthy: I'm going to go through some fairly generic questions first up, if that's okay. Firstly, was the AAA consulted in the drafting of this bill?

Mr Holmes: We provided a submission during, obviously, the Wood process and prior to that, during the process that was open to all the public, but, in terms of specific consultation, there wasn't an additional process in place.

Senator McCarthy: Would you have expected that?

Mr Holmes: An expectation is a high threshold. I think we would have hoped to be involved in that, particularly given the ramifications for the athletes.

Senator McCarthy: You do go into quite lengthy detail about your concerns about abrogation of the privilege against self-incrimination. Just for the benefit of the committee, are their particular examples that you want to put on the record for us that raise why you oppose that?

Mr Holmes: In terms of specific case examples?

Senator McCarthy: Yes.

Mr Holmes: Laura, do you have any you would like to mention?

Ms Sigal: No specific case examples. It's more the principle.
Senator McCARTHY: The principle of it?

Ms Sigal: Yes. Where we come from is really the context that athletes' human rights should be protected. I think the trend is towards that with everything that's gone on with the recent meeting with the ILO, with the Macolin convention and with the Kazan report. What we're really trying to do is ensure that athletes' rights continue to be protected rather than eroded.

Senator McCARTHY: Do you feel, though, that these amendments are good for your membership?

Mr Holmes: Not at all. The proposed amendments, in terms of the abrogation of the right against self-incrimination, are not good for the membership. I don't think they're good in general, for anybody involved in sport, be they athletes, support staff or anybody. What we're talking about is a specific group of people losing a basic human right which has been established through the High Court and numerous international conventions, policies et cetera. We're removing that for a specific class of people. When we look to remove that, it should be for an absolutely justified, strong reason. We don't see this as that reason. We actually see that the athletes should be front and centre of the protection, but also protecting those athletes. Removing a human right, to us, doesn't seem like the appropriate measure to take.

Senator McCARTHY: Would you prefer the status quo?

Mr Holmes: At the least.

Senator McCARTHY: If you had an opportunity to put forward your views in relation to what would be better, what would they be?

Mr Holmes: The bill in its entirety, to be honest, and the current legislation don't sit well with us in terms of the athletes. It's like the athletes are the problem and we're trying to take as much information from them and use them as much as possible, sometimes as the bait to try and catch cheats. What we're saying is: actually, let's come back a step and put the athletes and the athletes' rights at the centre of what we're trying to protect. The athletes are at the forefront of this. As I said, nobody wants clean sport more than the athletes. Work with them on that. Work with us on how we actually protect our sports, because, as I said, the vast majority of athletes want to have a clean competition. They want no part of this. At the same time, when we take away their human rights—when we take away things like their right to privacy—it's like: hang on a second! Where are we standing up and saying: 'Let's put the athletes in the middle of this. How do we protect them? What do they need and what is right for the sport in that sense?' We've gone a long way down the road of seeing athletes as the problem, and we're saying we think they're the solution.

Senator McCARTHY: Would you go so far as to say that these could be hostile amendments in terms of your membership?

Mr Holmes: I think there are significant concerns. That's why we have continued to raise this since—it's my understanding—2006, when Australian Athletes Alliance was first formed. We've raised the same continuous objections to the idea that we remove a basic human right, being the right against self-incrimination.

Senator McCARTHY: I might let the chair go to a few other senators and I'll come back, if that's okay, Chair.

CHAIR: No worries.

Senator SIEWERT: I've got a number of questions. Since we're on the self-incrimination point at the moment, I'll go there first. How many of your members would be required to sign contracts that give up the privilege in relation to self-incrimination? We have had evidence that the AOC, for example, requires athletes to sign such contracts. You just heard the evidence that Cricket Australia require their athletes to do it too. We seem to be having people being required to sign contracts that are actually already signing away their right against self-incrimination.

Mr Holmes: You're right. The point for us is that, in the example of the Cricket Australia contract, which is agreed between them and the Australian Cricketers Association, that is a contract within the collective bargaining agreement. So there is a process gone through where they understand how that all works. The context around how that's waived and under what process it's waived and what the process is when that goes through is different. Different sports have different obligations. I know in basketball the players in the national team don't waive their right against self-incrimination. It specifically states in there that they don't do that, because it's not seen as a necessary goal for that. In AFL my understanding is it's silent on that. I'll take it on notice to try and provide you with that for all of our seven associations, but it is varying.

Senator SIEWERT: If you could, I think it would be useful for us to get an understanding of what the situation is and how and why people have given up that privilege when they're negotiating contracts, whether it's
individually or whether their players association has done that, as you just said, as a collective agreement. That would be extremely useful.

**Mr Holmes:** Certainly.

**Senator SIEWERT:** You made some comments about the control over your life. Could you just articulate that a bit more strongly? How much information do you already have to give up and, in terms of those obligations, how will this bill then require more, if it does require more?

**Mr Holmes:** I will go on record and say I'm no longer an athlete. I struggle to run 10 metres now! What current athletes provide—and what I provided when I was an athlete—is specific information about basically their whereabouts all the time. When you're on those required lists, which I was with the national team, you're required to provide where you will be every day. 'If you decide to change that, make sure you notify us of that, because, if we rock up to your house, and you're not there'—to my understanding—'that's a breach.' Then you're into a process of: 'Why weren't you there? Where were you? You should update us.' That's a pretty significant burden on a regular—as I was when I started playing—a 17-year-old kid.

**Senator McCARTHY:** Do you mean that they will just turn up without you being aware? Is that what you mean?

**Mr Holmes:** Yes.

**Senator SIEWERT:** This is for random testing?

**Mr Holmes:** Random testing.

**Senator McCARTHY:** Whose requirement is that? Is that ASADA or is it from the Basketball Association, the ABA?

**Ms Sigal:** That's ASADA.

**Mr Holmes:** That's ASADA, I believe. If you're part of the national testing pool then you're available for that testing.

**Senator SIEWERT:** How did you do that? I struggle to even let my partner know where I am sometimes.

**Senator McCARTHY:** You sign up to that, do you?

**Mr Holmes:** That's basically the obligation that you've signed up for—that you will provide that information when you're part of the national testing pool, which I was with the national team. Then you basically get given: 'This is the calendar.' And then you provide: 'We're going to be training here at this time. I live here and I will be travelling there and then I'll come back to here.'

**Senator SIEWERT:** How do you do that? Is there an app?

**Mr Holmes:** There is now an app, I believe. There wasn't in my day. It was paper.

**Senator McCARTHY:** So you could have that random sampling done at your home, not always on the courts?

**Mr Holmes:** Yes.

**Senator SIEWERT:** By the sound of what you've said, there are different levels for athletes. You were part of the national team. That was the level that was required and is required for athletes that are still subject to this process. They don't necessarily have to report where they are all the time—is that correct? Sorry, sport isn't my portfolio. I'm not as around this as I am around some of the other portfolios, so apologies if these are stupid questions.

**Mr Holmes:** No, they're not. My understanding is that once you're into the pool—there are different thresholds for different sports, and I'm not across all of them so I can't—

**Senator SIEWERT:** That's what I'm trying to get there: there are different thresholds about who's in certain pools and the level of testing they're subject to.

**Mr Holmes:** The majority of our members would be in the threshold that would be tested randomly. That's my understand.

**Senator SIEWERT:** That gives me a better understanding of it. The second part of that question was: do the provisions of this bill then up that level of intensity about reporting? I took that from what you said. I'm not quite sure whether it does or doesn't.

**Mr Holmes:** It doesn't increase the whereabouts piece. What it does do is it adds to those burdens—'We've already got these in place for you'—which we think are fairly significant—'and then we're going to add to those and we can ask for a disclosure notice with a lower threshold with no oversight.'
Senator SIEWERT: That's where I wanted to go next—the issue around belief and suspicion. For the alliance, what's the difference that you see between belief and suspicion?

Mr Holmes: That's a pretty legal question. I'll refer to Laura for that.

Ms Sigal: Belief is pretty much what it says—that someone actually believes that it's going to lead to something. Whereas a suspicion is more of a hunch, like, 'I think it could but not really sure.' We think that, if someone's going to the burden of handing over their phone and their computer and all of this information, then it has to be more than a hunch; there has to be a belief that handing over that information will provide sufficient evidence of a violation, not that there's a hunch that it might. We're not against the removal of that layer in between, but that layer, to some extent, checks the CEO's power. Here we're removing the safeguard and lowering the standard, so that's part of the problem as well.

Senator HUGHES: Can I get clarification. What are you referring to with handing over your phone or computer? I thought we were talking about a test?

Ms Sigal: For a disclosure notice, one of the things that you can be required to disclose is to provide your computer and provide information. Those are the things that a disclosure notice can demand.

Senator HUGHES: What's that got to do with drugs in sport?

Senator SIEWERT: I presume it's because—

Senator HUGHES: I don't understand how what's on your computer can relate to drug testing in sport.

Ms Sigal: Drug testing isn't the only way that violations of the code are found. It could be that someone says, 'I know that so and so is selling steroids.' If there was enough there for someone to have a reasonable belief that looking at that person's computer, for instance, would provide evidence of the sale of steroids—

Senator HUGHES: I would assume that would be a police matter rather than a matter for a drug testing organisation. That's a very, very different matter.

Ms Sigal: But that's still in the ASADA Act.

CHAIR: How often does that happen or how often has that happened?

Ms Sigal: I don't know. I'll have to check.

Senator HUGHES: I think we're having a bit of a leap there.

Senator SIEWERT: I'll follow that up. Can you take on notice if that has occurred and what level of information to date has been requested from your members? For your members, what other things have occurred in terms of disclosure notice? What other examples—

Senator HUGHES: Actual examples, like what—

Senator SIEWERT: Hang on. Can you let me finish? What examples are there of property that has been taken as part of a disclosure notice as evidence of actions being taken or otherwise, whether it's documents, notes—things like that.

Ms Sigal: Sure. I know ASADA is going to be testifying as well. That something that might be asked of them as well.

Senator SIEWERT: Thank you. That would be appreciated. You touched on the issue around education. It's something that you think should be included more in the bill. What level of awareness do athletes have of what is required under the act and the issue around self-incrimination and that point about, going back to the contracts, where they sign away their right to privilege a

Mr Holmes: The education space—I'll go on the record as saying this—is extremely difficult. It has to be, because it's an extremely complex system we're talking about. I've played for 15 years in Australia and I have been out for five, and I've got a handle of it but I wouldn't say I'm an expert, and I've reviewed it more than most people. It's an extremely difficult situation.

With the education, currently the enforcement body is the educator. As an athlete, you view that as being similar to the police coming in to give you the education session. That's great, but I also might want to ask questions. I might want to be investigative about what is going on. I may want to have the ability to have an off-the-side conversation about stuff. I don't know that that top-down approach is the most effective way. For me, it's establishing the ability for us to be peer to peer with the athletes. That is obviously where the line sits: the athletes speak to the athletes about. 'Here are examples of where you can get yourself into dangerous situations.'
Senator SIEWERT: I hear what you're saying, but, with all due respect, is that not the responsibility of athletes' associations et cetera? I understand the need for it, because I get it's complex. How would putting that into the legislation help? How would you see that happening?

Mr Holmes: We represent seven major player associations, but we also have sympathy for the rest of the athletes who are operating under this system. I look at them and ask: 'Where do they turn? Who is providing the additional education, consultation and representation for those athletes?'

Senator SIEWERT: Okay, now I get it.

Mr Holmes: I think that's important to have in legislation. Let's put it up front that we're going to have effective education, work with athlete bodies and potentially establish the ability for us to have a bespoke funded area where athletes can be provided with support, with education and with, potentially, legal aid. When they are issued with a notice it'll say, 'Here is where you turn to have a phone call and this is what you're looking at.' The costs of going through this process are astronomical, even for members of our player associations, who are provided a significant amount of legal support in kind without any costs. What if you're outside of that system?

Senator McCARTHY: Just before I ask questions, I want to put on the public record, in the interest of disclosure, that my son plays in the Australian wheelchair basketball team. I just thought I'd better put that on the parliamentary record, in the interest of disclosure.

CHAIR: Thank you.

Senator McCARTHY: Mr Holmes, I didn't hear your responses to Senator Siewert, so I apologise if I ask questions in relation to that. Can I just go back to a couple of things here, such as the right to review evidence. You're opposing the changes that could impact on that. Can we just go to your concerns in relation to that.

Mr Holmes: Yes. What currently sits is that it's done at the appropriate time in a simple way. The change is suggesting that it's done at the discretion of the CEO, so the CEO decides when it's appropriate to provide access for the athlete to see the information and documents against them. For us, that goes to the whole issue of this: athletes are required to give information up but when they ask to see the information, which is held against them, they say, 'We'll do it at this time and day.' As I said, with travel schedules and with competition schedules for, potentially, a lot of semi-professional athletes or amateur athletes, that might be outside of their hours or on a weekend. They might not be in the country for two weeks, so they ask, 'Can I do it when I get back?'

It needs to be a bit more accommodating to the schedules of the athletes, particularly when it's the information that they're holding against them, or of them.

Ms Sigal: Currently the language is 'at the times that the person would ordinarily be able to do so', meaning at such times as the athlete would be ordinarily be able to do so. The proposed change is to change it to 'at such time and place as the CEO thinks appropriate', so it's really shifting it from the convenience of the person accused, and the ability of the person accused, to the convenience of the CEO of ASADA, and we think that's inappropriate.

Senator McCARTHY: I'd like to follow up on Senator Siewert's questioning about education. In your submission, you are concerned about the top-down approach. That's what you've raised, and you believe the peer-to-peer approach is much better. Why is that?

Mr Holmes: I think because it has cut-through and because, when you're talking to an athlete as a fellow athlete—who has no agenda besides representing you, supporting you, being there for you and having your back—I think there's a trust in the delivery of the message. There's also an ability for you to inquire about how this affects you and how this works and to have a continuing conversation on that basis. I think ASADA are trying and have changed their education systems, which is good. I know they've been better, but I still think there's the capacity for us, particularly for those athletes outside of our framework. Can we help them? Can we be available to those athletes? But that requires funding, it requires oversight and it requires us to be involved in that process as part of the solution, not just the problem. These athletes bodies are actually providing a valuable service to their members, and they provide valuable information. Potentially we should work with them and get into other sports—fund areas of our sports—to be able to provide that education from a level that is peer to peer, not saying: 'We're the enforcement body. Here's the information; here's the compliance mechanism.' How does that come to be? How do I get myself in that situation? Can I hear from a past player about that? We think that could be valuable.

Ms Sigal: Currently, for some state leagues—for instance, there is a player who was a tradie, so he worked. He went and trained at night. He told me that his drug education was given at the end of a training session in the middle of the week after he had worked all day—I forget what trade it was—and had to get up early to work the next day. That's probably not the best time to train someone in such a way that they're really going to absorb the information.
Senator McCARTHY: When would be an appropriate time for drug education and training?

Mr Holmes: It's very dependent—that's the thing. As an athletes association, we understand and work with the athletes on when would be best in their schedule. We already attend club visits, where we do that work. We could work with other associations and other codes on when's the appropriate time in a camp when we can have space and have discussions and allow them to actually come back.

Senator McCARTHY: So you want to flip it so that, instead of ASADA having that call, it's you guys saying, 'This is what works best for the athletes.' Is that what you mean?

Mr Holmes: I think it's working with ASADA on how an education model is rolled out. It actually includes peer-to-peer education. I'm not saying, 'Take away the compliance and the hard information about what can happen,' but let's work on: 'How does that situation come to be? How do you actually put yourself in a vulnerable position?' Let's try and talk about athletes that may have been there before and talk with them about how we could do that.

Senator McCARTHY: Lastly, you also mention in your submission—in relation to support, representation and legal advice—that you believe the provision of a legal aid service within the new integrity in sport framework is essential. Do you want to give us some further details in relation to why you think that?

Mr Holmes: I think it's absolutely critical, when we're talking about the level of sophistication of the legislation and the requirements that athletes have to comply with, that we then provide them with the support and access when they are issued with a disclosure notice or are having questions about what happens now, because this process, even if you take away some of the cumbersome areas of it, is still a serious process. No matter the education you do, you're never going to be across it all. You're always going to have questions. Athletes aren't lawyers, and lawyers aren't always specific on the antidoping bill. So to provide access to actually get specific advice to support yourself through a process like this—especially when we're talking about a body that is now extremely powerful and broad ranging—we should have also a provision in there for the athletes: 'When this happens, here's where you can turn. Here's an independent body that you can speak to, that can provide you with advice and support you through the process, and you won't be up for tens of thousands of dollars of cost for that.'

Senator McCARTHY: Are there any examples that you can show us or refer us to that you've seen, either around Australia or around the world, that we should look at, in terms of that independent legal body?

Mr Holmes: Not that I know of.

Senator McCARTHY: Could you take that on notice.

Mr Holmes: Yes.

CHAIR: We've got 60 seconds for Senator Hughes to ask a question or two.

Senator HUGHES: You mentioned that you played professional basketball for 15 years. How often were you tested?

Mr Holmes: Wow, that is a good question. I couldn't give you a specific number. I was in the national team squad for around 15 years. It would have been over 10 times, for sure.

Senator HUGHES: Less than once a year.

Mr Holmes: Potentially. I was also not always in the team. My understanding is that, the further you went in the process of being in the national team, the more tests you went through. I can take it in notice and check my records, but there was a substantial amount of testing.

CHAIR: Thank you very much for coming along today and providing evidence. We have given you a bit of homework to come back with—the questions on notice. We are reporting on Monday 24 February, so we would appreciate it if responses to questions on notice could be provided to the secretariat by Wednesday 19 February.

Senator SIEWERT: Chair, I've got a couple more questions I might put on notice.

CHAIR: Okay, you'll provide those through the secretariat?

Senator SIEWERT: Yes.

CHAIR: Okay, Mr Holmes and Ms Sigal, those will come through to you as well. Thank you very much for your time.
EVANS, Ms Leanne, Senior Policy and Relations Adviser, Exercise & Sports Science Australia

[10:21]

CHAIR: Welcome. I invite you to make a brief opening statement before we ask a few questions.

Ms Evans: Thank you, Chair. We appreciate the opportunity to address the committee in person regarding the Australian Sports Anti-Doping Authority Amendment (Enhancing Australia’s Anti-Doping Capability) Bill 2019. Firstly, I would like to acknowledge the Ngunawal people, who are the traditional owners of the land on which we are meeting, and pay my respect to elders past, present and emerging.

I have worked for ESSA for several years in policy and advocacy, and across the export sector for many years in leading roles with various sporting organisations and government agencies. I am not a lawyer and have not worked in sports integrity. I provide comments on behalf of ESSA within that framework. As you may be aware, in December 2017, Sport Australia announced national accreditation schemes for sports scientists and strengthening and conditioning coaches, ensuring rigorous governance measures to protect athletes and the integrity of Australian sport. It's important to note that this policy came into being well after the ASADA Act was legislated. Exercise & Sports Science Australia was recognised by the Australian Institute of Sport and Sport Australia as the peak accrediting body for athlete support personnel working in Australian sports science.

ESSA's accreditation system includes a set of sport science professional standards; ongoing professional practice requirements, including continuing professional development; a code of professional conduct and ethical practice; the need for continuing professional development; as well as a complete system for breaches of the code. Our members who work in sports science include 300 accredited sport scientists specialising in applying scientific principles and techniques to assist coaches and athletes to improve the performance at either an individual level or within the team environment. We also have another 50 members who work as accredited high-performance managers, who have advanced knowledge and skills in leading and managing teams of sport scientists and sports medicine professionals.

Our members work in high-performance sport within the National Institute Network, which is the network of the state institutes and academies of sport; for various national sporting organisations, including in athletics, cricket, cycling and swimming, just to name a few; within professional sporting leagues, including the AFL, the NRL, the A League; and in schools and universities. Services provided by our members are an integral part of the Australian sporting landscape and help Australian athletes reach their potential and maintain their international competitiveness.

Australian sport scientists are in demand the world over and are responsible for leading innovation in areas such as workload monitoring, developing evidence based high-performance programs, and establishing both best practice and minimum standards within the discipline. We recently supported our sports science members to develop a sports science industry development plan. One of the four key priority areas in that was regulatory services to maintain the highest levels of integrity and standards in sports science and human performance.

Some of the challenges faced by our members include job security and career pathways; renegade practitioners without appropriate qualifications and accreditation working outside the formal higher-performance system as notional sports scientists; and also the demise of the physiology, biomechanics and skill acquisition departments at the AIS. We would suggest that an increased governance role by NSOs could help address the issue of non-accredited sports scientists. Our members are deeply committed to ensuring a level playing field for Australian athletes and are keen to ensure that their professional accreditation and ESSA's role in managing this system is recognised and embedded within the national sports integrity system.

I'm happy to elaborate on our key recommendations to extend statutory protection against civil actions to cover peak accrediting and registering bodies for athletes' support personnel; leaving the burden of proof threshold for the issuance of disclosure notices as is; and supporting the right to not self-incriminate as a basic human right. ESSA does not support removing the privilege against self-incrimination. We believe that doping offences are no more serious than serious criminal matters, which are regularly investigated without undermining the privilege against self-incrimination. We believe that our members should be entitled to the same human and legal rights as others in the community and the international sporting arena.

We also note the Parliamentary Joint Committee on Human Rights, in its human rights scrutiny report, asked for more information on the proportionality of measures with the right to privacy. We also note that the privilege against self-incrimination is not a requirement of the WADA code. Thank you, and I'm happy to take questions.

CHAIR: Thank you very much for that introduction.

Senator SIEWERT: Just to be clear, your members are covered by these changes, aren't they?
Ms Evans: Yes. In our other submission to the other enquiry we have asked that ESSA's role as a sport accrediting agency be included within the Act.

Senator SIEWERT: Can I go to the issue of belief to suspicion. Are you aware of any circumstances where in your opinion that would be required—in other words, ASADA hasn't been able to pursue something because that threshold is too high in terms of reasonable belief?

Ms Evans: We're not aware of any cases that have precluded ASADA from taking action, but we also appreciate that much of that information is confidential. None of our members to date have been involved in an ASADA process.

Senator SIEWERT: How worried are your members? What's the level of concern in terms of the changes from belief to suspicion?

Ms Evans: They don't believe they should be treated any differently to anybody else in the community. The requirement to change would be in excess of what the WADA code expects. We don't have any evidence to suggest that the threshold should be increased. There was no information provided in the explanatory memorandum in respect of how ASADA's actions have been impeded by the current arrangements.

Senator SIEWERT: We were talking earlier with the Athletes Alliance about the issue of athletes being required to sign contracts that waive their current rights around self-incrimination. Are any of your members are also required to do that?

Ms Evans: I would take that on notice, but I would suggest that any of our members who would end up being a member of the Australian Olympic team, for example, would have to sign the same agreement as any of the athletes.

Senator SIEWERT: If you could take that on notice, that would be appreciated. I heard what you just said about the members of the Olympic team, but can you also look beyond that for other members who are employed or involved elsewhere.

Ms Evans: Yes.

Senator McCARTHY: Is it just the Olympics? What about the Commonwealth Games and other games?

Ms Evans: I'm assuming—but I will take that on notice—that any of our members who are involved in representing Australia, either with the Australian Paralympic team or via Commonwealth Games Australia or the Australian Olympic Committee, would be in the same position.

Senator SIEWERT: Are your members generally aware of the WADA Code and the fact that it doesn't require them to waive that right?

Ms Evans: Probably not, if I'm truly honest. I think that they want to support a system that catches cheats, obviously, because they want a level playing field. But at the same time they, as individuals, don't want to be disadvantaged in respect of the rest of the community and people within elite sport in other countries.

Senator SIEWERT: What role does your organisation play in ensuring people know about what their rights and responsibilities are?

Ms Evans: Through the system that we've set up, the requirement to meet legislation—not only in terms of the ASADA bill but all other legislation in existence—is embedded in our professional standards. We have a requirement of them, as university trained professionals, that they abide by legislation, whether it comes to workplace health and safety or any other aspect of the law, and the requirements of the ASADA Act are no different to that.

Senator SIEWERT: In terms of their understanding, are the issues around self-incrimination included in that work as well?

Ms Evans: Not specifically but broadly, because there's a requirement of all our members—it's in their code of conduct, basically—that they have to abide by relevant legislation. There's possibly some more work to be done in terms of highlighting those responsibilities, but I think those who work in high-performance sport are certainly aware of their responsibilities. One of the people who responded to feedback to help me prepare my opening statement works for Cricket Australia, so we've sought information from our members working in very responsible positions.

Senator SIEWERT: Sorry to harp on about the contract issue, but has the issue about people being required to sign away their rights under contract been raised with your organisation?

Ms Evans: By our members?

Senator SIEWERT: Yes.
Ms Evans: I would hazard a guess to say that many of our members would be unaware that that right is being waived, and I take on board Mr Holmes's previous comment that, depending on the education mechanisms and support that are available within each national sporting organisation, that level of knowledge will vary quite considerably.

Senator SIEWERT: So—just so I'm clear—when they're signing contracts, they're not aware that they are signing away their right to—

Ms Evans: I would say many of them would be not aware. Again, I would say that's partly as a consequence of the education and support that surrounds the signing of that agreement.

CHAIR: The contract would have it in it though. You're talking about the ones that we were discussing earlier in the day?

Senator SIEWERT: I'm talking about when they're signing their contracts—

Senator HUGHES: Is that the contract with the sporting organisation? I'm just trying to understand what we're talking about. So with Cricket Australia or whatever team they're playing for?

Senator SIEWERT: Yes. When they're signing their contract with whoever they're working for at the time, they are signing a contract that waives their current right not to self-incriminate.

CHAIR: Which isn't under the act, but it's actually in the agreement that was negotiated; that's what we were advised earlier.

Senator SIEWERT: It was only that one organisation that had signed that.

CHAIR: Yes, that's what I mean.

Senator SIEWERT: So there are a number of scenarios.

Ms Evans: Can I just clarify: I am assuming—but I will take it on notice—that there are two kinds of contracts that we're talking about. One is a general employment contract. Our members are employed, normally, as full-time employees of national sporting organisations or state institutes and academies, so there's an employment contract. Over and above that there will be an agreement identical to the athlete agreement that is signed when our members are selected to travel with national teams.

CHAIR: If you could take that on notice and provide clarification on that, that would be great.

Ms Evans: Yes.

Senator McCARTHY: I have a follow-on question from Senator Siewert. Ms Evans, you mentioned education and awareness. What did you mean by that?

Ms Evans: Exactly what we've been speaking about—the broader context in which they operate, so that they understand the requirements of the act. As well as that I think—

Senator McCARTHY: Do they get that education and awareness about the requirements of the act?

Ms Evans: I'll need to take that on notice. I'm not involved in our professional development, but we certainly encourage our members to access the professional development that is provided by ASADA, for example.

Senator McCARTHY: Do you have a record of who has sought that education and awareness from ASADA?

Ms Evans: No, I don't. But I can certainly go back to our advisory body and endeavour to get some information for you on that.

Senator McCARTHY: You've got 7,000 university trained exercise professionals, 300 of whom work as accredited sports scientists, so it's quite possible that not many of those would actively seek to get that if it's not an enforced requirement?

Ms Evans: Nothing's enforced, in terms of our code. When I say 'enforced'—in terms of our continuing professional development, our members are required to accrue so many points, but that's elective. They can choose to do that professional development across a whole range of areas within their area of interest or whatever.

Senator McCARTHY: Where I'm coming from, Ms Evans—it's not a trick question; it's just that when we're dealing with acts, when we're dealing with the concerns that are raised around this whole subject, the issue of awareness and education is quite a critical one that we, as a committee, look at as well, in the bigger picture of just how aware people who work in this space are of what their responsibilities are.

Ms Evans: I certainly think the majority of our members working in the very elite, high-performance space would certainly be aware of the requirements of ASADA and WADA, in terms of antidoping. In terms of these other issues, in terms of the right not to self-incriminate and the evidence threshold, I would say their awareness of that is far lower. But I will take it on notice, and we'll investigate whether those clauses are included in their
employment contracts as opposed to the normal athlete agreement which an athlete would sign after being selected, or endeavouring to be selected, for an Australian team.

Senator McCARTHY: Could you also provide for the committee, with your questions on notice, whether there's anything in that area—which we could consider as a committee—that you'd like to see different in relation to that education and awareness far more broadly.

Ms Evans: In our submission to the Wood review, we offered to work with ASADA to expand the knowledge with respect to professional development.

Senator McCARTHY: All of that obviously comes down to resourcing and financial costs, but I think it's important for our committee to be aware of what that could look like. Thank you.

Senator SIEWERT: We've had a bit of a discussion around the self-incrimination process. Is there something else you would recommend in order to deal with some of the issues, or would you just leave it as it currently stands?

Ms Evans: That's a very good question, and, as I said in my opening statement, I'm not a lawyer. We would echo the comments in the report from the Human Rights Committee that there may be other, less rights-restrictive methods. But at this point we're not aware of what they may be. They were hoping that the government might be able to work with us and other stakeholders in developing a system that is less onerous.

Senator SIEWERT: There's an argument that the bill needs to change because there are third parties, like the AOC, who are signing contracts, where athletes and players are signing contracts that waive their rights, so it's bringing them in line with what third parties are doing. Can I ask for your opinion on that argument?

Ms Evans: Our understanding of what the government's position is at this point—and I'll let the government people in the room speak on their own behalf shortly—is that the amendments the government is trying to bring forward will in fact legislate current practice, as opposed to looking at ways to maintain and protect the rights that exist in theory but which people have waived.

Senator SIEWERT: I understand that. They're arguing—and we've heard that not everybody is required to; we heard that from Mr Holmes earlier—that it's not every—

Ms Evans: Player's association.

Senator SIEWERT: Player's association or every sport. Cricket Australia requires it but we heard that basketball doesn't. In fact, not every sport is doing that. Just because someone is doing it, why would you make a law? What's your view on making a law that then meets what other people are doing but which takes away somebody's human right, as your argument and that of others goes, to the privilege of self-incrimination?

Ms Evans: We would argue for the status quo to prevail. We don't believe that we've seen enough evidence or examples or circumstances under which ASADA can't go about its business. In that case, we don't support any change.

Senator SIEWERT: Your recommendation is that the definition of 'sporting administration body' in the bill be expanded to ensure that the role of accrediting and registering bodies for sport support persons is recognised in the act. Could you expand on the rationale behind that?

Ms Evans: I think it's a question of timing, and the landscape has changed. When the act was initially written there was no accreditation system for sport scientists or strength and conditioning coaches, for example. To me, it's just an issue of the legislation being updated to include ESSA as an organisation which has a responsibility to fulfil government policy, basically. We're over here, administering the accrediting functions at the request of the AIS and Sport Australia, but we are not recognised within the act in a specific way.

Senator SIEWERT: Okay. And what would be the positives, then? If you're doing it, what are the key things—

Ms Evans: It strengthens, it recognises and it embeds our role in the system. In our response to the Wood review we also ask for some additional mechanisms to ensure that we're part of the communication process. For example, if one of our members were served with a notice then there would be a formal system by which we're notified, because we would then suspend our member—pending investigation. It's like this system has evolved well after the act. We're just saying that we would like the act to be amended and updated to reflect the current practice.

Senator SIEWERT: That makes sense to me, thank you.
CHAIR: There being no further questions, thank you very much for your time today. We have given you a few questions on notice to report back with. I think you may have heard earlier that we report to the Senate on 24 February, so we'd appreciate your responses by next Wednesday, which is 19 February.

Ms Evans: Thank you again.
CHAIR: Welcome. Thank you for appearing before the committee today. I remind witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Would you like to make an opening statement?

Mr Godkin: Thank you, we would.

CHAIR: Thank you. I'll let you go ahead.

Mr Godkin: The Department of Health and ASADA welcome the opportunity to appear before this committee to provide additional information regarding the Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019. This bill arises from the government's commitment to implement agreed recommendations of the Wood review of Australia's sports integrity arrangements. This independent review forensically analysed Australia's sports integrity frameworks and the existing and emerging threats, consulting extensively across the sports sector and with other relevant stakeholders. It looked at the gaps in our response and made comprehensive, carefully considered recommendations to address those gaps.

This bill is designed to enhance Australia's ability to confront modern doping threats. It seeks to equip ASADA with the tools necessary to combat an increasingly sophisticated doping threat in the interests of clean competition and the rights, health and welfare of participants in Australian sport. Importantly, this bill is about equipping ASADA to meet the international call to confront the threat of the entourage—those third-party enablers beyond the reach of sports who facilitate doping, corrupting, in particular, aspiring sporting stars with enticing promises of boosted success.

The antidoping framework in Australia is a civil, not a criminal, regime. ASADA has the power to sample, test and investigate. It does not have the power to sanction. That rests with sporting organisations. Critically, doping violation sanctions involve periods of ineligibility to participate in sport, disqualification of relevant results and possible forfeiture of prize moneys. They do not engage criminal penalties associated with criminal offences, such as imprisonment.

The provisions in this bill will be supported by new regulations designed to give full effect to the government's response to the recommendations of the Wood review. For example, it is intended that they will enable ASADA to apply a more risk based approach to lower-level athletes. Currently, a fifth-grader cricketer playing in regional Australia faces the same sanctions and penalties as an elite test cricketer. That fifth grader doesn't get the same education or support as the test cricketer but faces identical outcomes if they inadvertently, for example, ingest a prohibited substance. The provisions contained in this bill must be considered in light of the recalibration of the antidoping system the total suite of changes will enact.

Sample testing alone is no longer an effective way to detect doping and cannot disrupt the activities of the enablers. There are constantly new doping substances, techniques and detection evasion strategies being developed, requiring new detection methods. ASADA, in common with all antidoping agencies, needs to keep pace with these developments and have the intelligence and investigation capability to detect and disrupt doping activities without relying on positive samples alone.

While mindful of the human rights considerations, the proposed provisions to abrogate the right not to self-incriminate are appropriate and proportionate. The Parliamentary Joint Committee on Human Rights observed, in footnote 3 on its comments on the bill in report 1 of 2020:

… the measure does not raise human rights concerns in relation to the right not to incriminate oneself due to the availability of relevant safeguards.
The right not to self-incriminate can in fact be abrogated in certain circumstances where it is proportionate and appropriate to achieve a legitimate outcome and where there are appropriate protections. This bill contains those protections against use and derivative use of any admission of criminality arising from questioning from ASADA. Athletes and athletes’ support staff in Australia already agree to forego the right not to self-incriminate through the contractual rules of their sport, which require them to answer questions from ASADA regardless of whether the answers might incriminate them. The Australian Olympic Committee provided this committee with a copy of their rules outlining this requirement. Most, if not all, sports have similar provisions.

The provisions in the bill will also allow ASADA an independent capacity to better address doping activities wherever they may occur in a sport, including in sports administrations—not just athletes themselves—where we know, unfortunately, conflicts of interest can sometimes exist.

Third party enablers are rarely subject to the rules of a sport. ASADA can issue them with disclosure notices where appropriate, but they frequently claim the right not to self-incriminate to avoid answering questions. The answers to those questions are important to establish the facts of doping activities, allowing the innocent to be protected and the guilty identified and sanctioned. Lowering the threshold for issuing disclosure notices is a provision that will have little practical effect on athletes but is a vital part of the armament ASADA needs to address the threat of doping facilitators.

AAA represented in its submission the threshold of reasonable suspicion as being a hunch. Acting on a hunch is not reasonable. As set out in the explanatory memorandum to the bill, reasonable suspicion is a threshold used for issuing search warrants in many jurisdictions in Australia. Search warrants authorise, amongst other things, the forced entry into premises and seizure of items. Reasonable belief is appropriate when ASADA is able to rely on adverse analytical findings—it has a positive A and B sample, and evidence that an antidoping rule violation has taken place, exists—but, as noted, reliance on adverse analytical findings alone is increasingly ineffective in confronting doping.

Where ASADA is relying on intelligence gathered from multiple sources, the situation may not always be clear. Disclosure notices are a critical tool to gather necessary evidence. With the reasonable belief threshold a suspicion may never be dispelled and, where suspicion may have fallen on an innocent sports participant, they may proceed forever under the cloud with associated negative consequences. The removal of review by members of the Anti-Doping Rule Violation Panel from the process for issuing disclosure notices is not a diminution of natural justice. Significant oversight is retained through internal ASADA procedures as well as through judicial review, through the Federal Court and complaints ombudsman. The government has also established a dedicated, independent and accessible sports dispute resolution body, which includes an antidoping dispute resolution capability in the form of the National Sports Tribunal.

There are other examples of regulatory schemes and Commonwealth legislation, some far more onerous than antidoping legislation, where reasonable suspicion is deemed an appropriate threshold for action—all of these without the oversight of members of a body like the Anti-Doping Rule Violation Panel. These include the Migration Act 1958 for the search of persons, the Health Insurance Act 1973 for the disclosure of information and the Bankruptcy Act 1966 for a warrant for seizure of property. The Integrity Commissioner of the Australian Commission for Law Enforcement Integrity can issue investigation warrants authorising search and seizure based on having reasonable grounds for suspecting. Given the goal of disrupting doping in Australia to protect the health and welfare of athletes, to provide a level playing field and to protect the integrity of sports and sporting competitions, allowing ASADA to take action based on a reasonable suspicion is appropriate and proportionate does not represent a threat to athletes.

The provision to extend the immunity from civil liability to sporting officials taking action under antidoping policies does not take away from the athlete's rights to take action in the case of negligence. Extending these protections is important, because ASADA is not the body that takes actions on antidoping rule violations. However, the sport is required to follow the directions of ASADA imposing mandatory provisional suspensions on athletes and support staff. These protections will simplify the process for sports which are following the ASADA CEO's directions.

Finally, in relation to concerns raised about the proposal to change the time an athlete may inspect a document, the current provisions give no leeway or flexibility. The athlete may choose, for example, a time when the document in question is not physically in the possession of ASADA. The new proposed provision simply allows the CEO to make a time when the document is physically available for such viewing. I thank you for your time, Chair, and we would welcome any questions from the committee.

CHAIR: Thanks, Mr Godkin. Would it be possible for you to table that introductory statement for the information of the members of the committee?
Mr Godkin: Certainly, but I might just give you a clean copy.

CHAIR: Even if you wanted to email an electronic copy through to the secretariat, that would be appreciated.

Senator SIEWERT: You made the comment about the Wood review, and that this is implementing the agreed recommendations. Could you expand on that a bit? I notice that you said 'agreed' rather than 'the recommendations'.

Mr Godkin: Yes. The Wood review, which was an independent review, was provided to the government. The government considered those recommendations and issued a formal response to those recommendations in February last year, known as the Safeguarding the integrity of sport: the government response to the Wood Review. In that response, the government went through all 52 recommendations and made comments in relation to those recommendations. We are putting into effect those recommendations that the government has actually supported.

Senator SIEWERT: Thank you. How many of those did the government agree to, sorry? I missed that.

Mr Godkin: There were 52 recommendations.

Senator SIEWERT: Yes, but how many were agreed to?

Mr Godkin: There is a range of responses in there. The government agreed to the majority of them, but a number of those—I could get you the particular numbers, but the government agreed in principle or in agreement with the vast majority of the recommendations.

Senator SIEWERT: How many of those does this bill specifically implement?

Mr Turner: We'd have to take that on notice to give you the specific number, but I believe it's about nine.

Senator SIEWERT: How many of the remaining agreed ones have been implemented to date, outside of this bill? Am I making sense?

Mr Turner: Yes, that makes sense. I think the technical answer to that question is zero, because we're still working on implementation. A range of them deal with the National Sports Tribunal. That has legislation passed and will open its doors on 19 March. There is a range that deal with Sport Integrity Australia. That legislation is currently before the Senate. But we're hoping to be able to open our doors on 1 July. And then there's a range of other things around Commonwealth match-fixing legislation, which are all in train.

Mr Godkin: And perhaps I could just answer your earlier question. The government agreed to 22 of the recommendations and agreed in principle with 12. A further 15 are agreed in principle for further consideration, two were agreed in part and one was noted.

Senator SIEWERT: I have a question about the comments that have been made about the issue about reasonable belief and suspicion. You've heard what witnesses have said today—that they think the bar is too low. I heard the comment that you made, Mr Godkin, in your opening statement about warrants and things like that. But those warrants are in the criminal justice system. I presume that those are the warrants that you were talking about. There's a certain threshold there that you have to meet to get that warrant. So in terms of suspicion, in your assertions, are the two processes the same? Is that what I should take from the comment you made?

Mr Godkin: I will refer to ASADA for that response.

Mr Mullaly: I will try to give an explanation as to the difference between 'reasonable belief' and 'reasonable suspicion'. That comes from a High Court case and is very technical, and I will try to break it down as simply as I can. Looking at reasonable belief, belief is something like a state of mind—assenting to rather than rejecting a state of affairs. 'Suspicion' is lower than 'reasonable belief'. It is like an apprehension that something may exist but must be more than idle wondering or conjecture—or a hunch, as the AAA have suggested. That's the difference between 'belief' and 'suspicion'. 'Suspicion' is lower. If you're doing a comparison, which we're normally conscious not to do between these civil schemes and criminal schemes with warrants—

Senator SIEWERT: But there was one just made.

Mr Mullaly: Correct. 'Reasonable suspicion' and 'reasonably suspecting' are the same standard that would apply across—what it means in the criminal context is the same as what it would mean here in terms of reasonably suspecting that something has occurred.

Senator SIEWERT: So under the criminal justice system—I heard that you said you don't normally compare—what did you say, sorry?

Mr Mullaly: Reasonable suspicion.

Senator SIEWERT: Reasonable suspicion under that process.
Mr Mulally: Yes, for the issuing of warrants in most jurisdictions in Australia.

Senator SIEWERT: But in order to do that you have to go and get permission from somewhere to do that, in the justice system.

Mr Mulally: In the criminal justice system, but in his opening Mr Godkin outlined examples of other agencies that have a similar power, based on the same standard of reasonable suspicion where there is no oversight, like the Anti-Doping Rule Violation Panel. So there are other precedents in legislation where this occurs without that oversight. Obviously, the criminal system in that sense in terms of what you have to do to get a warrant, but the standard is the same.

Senator SIEWERT: For those other agencies.

Mr Mulally: Yes.

Senator SIEWERT: Thank you. You referred to some consultation you did around the bill. That's my recollection of your opening statement.

Mr Godkin: There was wide consultation in the Wood review in the formulation of the recommendations, but there was also wide consultation in the formulation of the government response. The legislative initiatives are built on those consultations. The bill itself of course does not normally go around widely for consultation, but certainly the contributions—

Senator SIEWERT: Elements of bills go out for consultation.

Mr Godkin: leading up to the formulation of the legislation drafts, certainly, were all taken into account.

Senator SIEWERT: Is it a fair comment to make that the actual provisions of the bill weren't consulted on, but you took that from what people said in response to what people said in response to the Wood review?

Mr Turner: Correct. The actual provisions were not specifically consulted on, but arising out of the consultation on the government response it was an expectation that these things would be legislated. Also, in formulating the provisions in the bill we did consult in a narrower sense with stakeholders to help to frame the legislation as we moved forward.

Senator SIEWERT: Could you outline who you consulted in that process.

Mr Godkin: Yes.

Mr Turner: Jonathan, you're going to have to help me with this. This went through one of the advisory groups, did it not?

Mr Bray: There were a range of consultations undertaken over a really significant period of time. One of the first things that we did in developing a response and then developing an implementation plan for the response was to set up some working groups and advisory groups of stakeholders—government and non-government, also state and territory and Commonwealth governments—to assist us in providing direct and specific feedback in relation to a number of things. In relation to the bill itself, there wasn't a consultation draft of the bill produced, but—

Senator SIEWERT: I understand that, but often there is of what the intent of the bill is.

Mr Bray: Certainly. There was a significant period of consultation that led up to the Wood review being drafted and released. What's in the Wood review when it comes to the content of the Enhancing Capabilities Bill, which is what we're here today to talk about, is an almost direct legislative translation of the recommendations of the Wood Review. There was significant consultation, and we can take it on notice to provide you with the outline of the consultation.

Senator SIEWERT: If you could.

Mr Bray: There was consultation in moving from the Wood review's recommendations to the government response, so whether or not the government accepted or accepted in principle the recommendations, and then moving from the response into the implementation, which is the bill. So certainly it would be difficult to see how there could be any surprises when the bill was released when it's such a direct representation of the specific antidoping recommendations of the review.

Senator SIEWERT: My next question relates to this: obviously there's a group of key stakeholders, being the athletes and the support community, that are very concerned about this issue about self-incrimination and, also, as you've heard, the difference between reasonable belief and suspicion. So did they reflect that back to you in that consultation? I understand what you've just said—it's a reflection of that—but they clearly don't support removal of that privilege.

Mr Bray: I think it would be difficult to say that they, as a collective, don't support the—
Senator SIEWERT: Four thousand members of the Australian Athletes Alliance. That's a significant number. I hear what you're saying, because we also heard from the coalition, but that's a fairly significant chunk. Sorry, I can't remember how many members ESSA has, but I'd say it would have a fair—

Senator McCarthy: Seven thousand.

Senator SIEWERT: Seven thousand. That's a fair chunk.

Mr Bray: Sure. Throughout the consultation, we did consult with AAA, and AAA also provided written submissions at various points along the way. I think it would be for AAA to make them available to the committee if that were what they chose to do. We also made it very publicly known that we were open for consultation. The Department of Health has an online consultation forum, and we went through each of the Wood review's themes. The Wood review can kind of be separated into themes. I think there are probably five or six key themes in the Wood review. So we grouped each one of those themes on the consultation website and, I guess, prompted commentary and feedback from the wider Australian community as well. It is difficult for us to engage specifically with such a large number of athletes through the Olympic athletes commission and also AAA, but certainly we made it as widely known as we possibly could that it was available for the Australian community to consult in relation to the development of the response and also implementation. We'd probably have to take on notice how many responses we actually got back through that, but I don't recall any specific responses coming back from athletes that raised concerns in relation to those issues.

Senator SIEWERT: If you could take that on notice, that would be appreciated. I have some more questions, but—

Chair: That's okay. Senator McCarthy, do you have some questions?

Senator McCarthy: I do. Thank you very much, Chair. I'm not sure who this question goes to, so I'll put it out there and you can let me know. I want to touch on the education and awareness side of some of the information that we've received this morning and in submissions. Would you be able to provide to the committee just what kind of education and awareness programs you provide to athletes in relation to the act?

Mr Mullaly: Absolutely. It's not just the act; it's also important to understand the context—and this has come up earlier—in terms of testing requirements and athlete whereabouts requirements and things like that that we've talked about. Just to correct something earlier, the requirements to provide whereabouts currently exist in relation to 205 athletes in Australia, so we're not doing that across a massive range of athletes in the country. That requirement comes from the international rules, which are the World Anti-Doping Code. Being able to go to people's places to collect samples and do target testing is a priority under the world rules. So a lot of the information that we have to educate on applies to athletes globally and comes through our compliance with the WADA code in that respect. On education, we were lucky enough to get extra resourcing approximately 18 months ago. We've actually doubled—or more than doubled, I should say—the resourcing that ASADA has spent in education.

Senator McCarthy: So how much was that?

Mr Mullaly: I'd have to take on notice the actual figures, but currently we're well over $1 million in what we spend as an agency in the education space. I can get you the specific figure on notice.

Senator McCarthy: Thank you.

Mr Mullaly: Absolutely. It's not just the act; it's also important to understand the context—and this has come up earlier—in terms of testing requirements and athlete whereabouts requirements and things like that that we've talked about. Just to correct something earlier, the requirements to provide whereabouts currently exist in relation to 205 athletes in Australia, so we're not doing that across a massive range of athletes in the country. That requirement comes from the international rules, which are the World Anti-Doping Code. Being able to go to people's places to collect samples and do target testing is a priority under the world rules. So a lot of the information that we have to educate on applies to athletes globally and comes through our compliance with the WADA code in that respect. On education, we were lucky enough to get extra resourcing approximately 18 months ago. We've actually doubled—or more than doubled, I should say—the resourcing that ASADA has spent in education.

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Senator McCarthy: Thank you.

Mr Mullaly: We're on a bit of a unity ticket, I've got to say, with the AAA in doing peer-to-peer education. We've overhauled how ASADA does face-to-face education. So we've gone and hired clean sport presenters or facilitators to deliver those face-to-face sessions. We've got 16 casual employees who do that. They're all either current or former elite athletes. So we are sending in athletes who have peed in a cup and are aware of the system to educate other athletes in our face-to-face sessions. We think that's critical. People in the department or other people in ASADA may have a really good knowledge of antidoping rules, but we don't have the same impact on athletes as sending another athlete who has actually gone through the process and done it. That's a significant change we have made over the last 12 to 18 months.

We also have developed products such as the Clean Sport app, trying to engage with innovation and technology to better reach athletes across all levels where they can not only check their medications but also check batch tested supplements to try to reduce the risk of them inadvertently falling foul of the antidoping rules.

Senator McCarthy: Are they picking that up?

Mr Mullaly: Absolutely.

Senator McCarthy: How many?
Mr Mullaly: Thousands and thousands. Again, I can take on notice the number of downloads that we have had. That's been significant. The take-up of that app has also been linked to some of ASADA's corporate plan performance measures, which we've met. A little known fact about our school education work is that antidoping is now forming part of the national curriculum. We conduct several professional development courses a year for teachers to be able to come in and for us to actually help them and give them resources to try to educate schoolkids, who are the athletes of tomorrow. We're certainly not focusing on a top-down approach in every aspect of our education.

Senator McCARTHY: Are they secondary?

Mr Mullaly: Yes, that's correct. I have talked about the athlete presenters. We have also rolled out a range of other educational resources in the last 12 months, such as parent courses and things like that, to try to get this antidoping information down to a variety of different stakeholders. Of course, we don't just focus on the athletes, but the athletes are the main focus of our education.

Senator McCARTHY: Just on the 205 athletes that you spoke about at the beginning there, walk us through what that education and awareness process is with one of those athletes.

Mr Mullaly: Registered testing pool athletes receive education. They're the elite of the elite, so they receive our normal education. I neglected to add we also have free online education courses that anybody can do. Anybody can log on to our website and do those. There's a multiple range of courses there for getting information. All of that's available to them. They don't just get put in ASADA's registered testing pool with no notice of all of these things. They have a letter provided to them which gives them passwords and details for the athlete management system where they have to enter their information. That is held and run by WADA. So we have to give them login details. We have to make them aware of their rights in the registered testing pool, including what is required and what the potential consequences are. They get that correspondence before they start providing one-hour whereabouts every day. That list of 205 athletes is ever-changing. If we have someone that's towards the end of their career and they're not competing in elite things, they may come off the list and we will add other athletes on. So it's dynamic and it's constantly changing.

Senator McCARTHY: So that 205 is a random sampling? Is that correct?

Mr Mullaly: They are the athletes who are required to provide their whereabouts. When we talk about the burden of athletes having to give their whereabouts every single day, we're talking about 205 today who have to do that.

Senator McCARTHY: How does the random sampling work? How many athletes are in that pool?

Mr Mullaly: That's a very different issue. This is why investigations are important and the powers in this legislation are important, because over time most testing was random selection or random sampling. The world rules are requiring antidoping organisations such as ASADA to focus on targeted testing. To be able to target test you have to have access to intelligence. We don't want to be going and just randomly turning athletes into pin cushions and testing them lots and lots of times.

Senator McCARTHY: Which is why you want the amendment of the CEO having not the belief but—

Mr Mullaly: One of the reasons—in terms of intelligence. It is still a useful tool, in terms of deterrence, to go and do testing. We have had success in situations where we've been able to get intelligence, going and doing target testing, and getting a result and taking a case forward against someone who has cheated. And those cases haven't been inadvertent supplement cases and things like that; we are dealing with situations where athletes have deliberately set out to take, often, serious substances. That is also an important point to raise when we look at the proportionality issues that have been discussed—with human rights and things like that. More and more what we are seeing in terms of intelligence is facilitators providing athletes with substances that don't necessarily fall into the criminal law environment for law enforcement agencies to be able to deal with.

Senator McCARTHY: Is that the reference to the third-party enablers?

Mr Mullaly: Correct—the facilitators, the third-party enablers. Providing our athletes or support personnel with substances that aren't approved for human use, that are dangerous to health, that experts even today don't know what the short-term, medium-term or long-term health impacts are going to be—they are the people that we want to be able to have some powers to bring to the table and ask them questions and get answers as to what it is they've distributed, and how they've one it, so that we've got that intelligence to be able to shut facilitators down and try and protect the athlete, as opposed to using these powers against the athletes.

Senator McCARTHY: You say you've got $1 million in terms of education. Also, in relation to the investigations, I understand the government, in its response to the Wood review—I think it was recommendation
Mr Mullaly: Correct. A portion of that $3.8 million has been used to double our investment in education.

Senator McCARTHY: So that's where that's come from?

Mr Mullaly: It's that money. We've put a good solid portion of that into doubling our education efforts and education resources.

Senator McCARTHY: How much of that resourcing would go into the investigation side?

Mr Mullaly: I don't have that figure off the top of my head. I'd have to take that on notice. I can give you a breakdown of where we have invested that $3.8 million. It's certainly enabled us to provide more services and better education for not just athletes but also athlete support personnel and other people—parents—that have to deal with the system.

Senator McCARTHY: Yu started to talk about doing more testing. What would you invest that extra resourcing in in terms of investigation?

Mr Mullaly: Just to go back a step: the history of anti-doping testing was basically the first and only tool that anti-doping organisations had. We have seen a progression over the last 13 to 15 years where the World Anti-Doping Code, which changes roughly every six years, has increasingly put an emphasis and a focus on investigations over testing. Some figures that WADA released globally—and they are not the exact figure—are that 1.5 to 1.6 per cent of all tests return a result. And yet we know when we look at the global anti-doping scandals—Marion Jones or Lance Armstrong were tested hundreds of times. They were using prohibited substances, and the testing methodologies couldn't detect them. In terms of our own intelligence and looking at matters over the years where the third-party enablers or facilitators—the way it works is that, for WADA to accredit a new test, they have to publish the results and the research in a peer-reviewed science article. So third-party enablers and facilitators are looking at international science articles and using the information in them to backtrack and work out what dosage requirements they might have to give for non-approved human substances to be able to administer them to athletes.

Senator SIEWERT: To get them up to that level?

Mr Mullaly: Yes. Because they get under that level and can't be detected through traditional means. That's why the global shift has started to pivot away from random or targeted testing and towards investigations as the best way to detect sophisticated doping. That's essentially where we're at in terms of needing those tools to be able to try and (1) get the intelligence and ascertain what those people have done; and (2) then take action if we can, working in partnership with law enforcement and with other regulatory bodies, to shut them down, ideally, before they cause havoc in the Australian sporting environment.

Senator McCARTHY: Can I just take you to lowering the threshold for disclosure notices and that line of thinking in terms of investigations. If this amendment goes through, do you already have an awareness of just how many cases might be out there that you would automatically be able to look at if that line of suspicious belief were in there? Sorry, it's not suspicious belief, but it's in terms of suspicion.

Mr Mullaly: I don't have a figure in terms of looking forward into the future, because in some instances you don't know what you don't know. But we can—

Senator McCARTHY: Yes, I get that, but the reason it has come forward, even through the Wood investigation, is that there's obviously already an understanding that there are things falling through the system. So there must be a thinking, a view or a culture whereby you feel so strongly that this particular recommendation has to go through. I just want to be convinced. That's all.

Mr Mullaly: Yes. The thinking comes from an analysis of past practices and what we understand from the past as opposed to that future. I guess that is how I'd characterise it.

Senator SIEWERT: Can you expand on that?

Mr Mullaly: Yes. If you look at just about every major doping scandal globally, you're dealing with situations where the third-party facilitators sit outside the sporting environment. In athletics—if we take athletics as an example—you had the BALCO scandal, which involved Marion Jones and a range of elite athletes from a variety of countries. Victor Conte, who was the facilitator who'd come up with the undetectable cream and the steroids that they were giving the athletes, sat outside, so antidoping organisations didn't have the power to bring that gentleman in and ask questions to find out what he'd done. The sport didn't. International sporting federations didn't. If you move to another sport, cycling—
Senator SIEWERT: Can I just ask something there, though. I appreciate what you've said, but was there suspicion at the time?

Senator McCARTHY: Or was there a belief.

Mr Mullaly: Yes, there was.

Senator SIEWERT: That's the issue, then. Was there a suspicion at the time?

Mr Mullaly: There was suspicion at the time. BALCO is a complicated case with a variety of different measures, but the antidoping agency—and I'm talking of the top off my head here; I don't have it in front of me—was given—anonymously, I believe—a syringe that had been used to inject someone. So they went and did scientific analysis on the syringe and detected the prohibited substance but were trying to get a grasp of where it was coming from, who was doing it and what athletes were using it. It took several years, from that point to the conclusion, to be able to actually get there, and it was only done because the FDA had some powers and had the resources to be able to look at it, which is not always a given. When you're balancing what our law enforcement agencies look at in counterterrorism and a range of other important things, one athlete importing steroids or a support person who's handing out some steroids is not necessarily going to get the attention and attract the resources of law enforcement to be able to deal with it. You also have cycling, with Operacion Puerto and a range of other different circumstances, where these facilitators are operating outside.

A specific example of where lowering the threshold would help ASADA—a recent analogy of what you could look at—is a situation where ASADA might get information in relation to a person who goes to a store or to a clinic. Someone tells us that they've purchased a substance. We can't get to the reasonable belief standard to issue a disclosure notice for believing that someone has information in relation to the administration of the NAD scheme. We don't go and investigate someone who's bought Panadol. We have no power to do that. We have to link it to a prohibited substance. So we have to have information or evidence in relation to something being a prohibited substance.

Senator McCARTHY: Does that stop you now?

Mr Mullaly: Absolutely. If we don't have—

Senator McCARTHY: Sorry, Mr Mullaly. This is really important. You can take this question on notice: how many examples can you provide to the committee where you've been unable to pursue it because you haven't been able to have that extra length to go to actually investigate? Could you provide that to us?

Mr Mullaly: I will take that on notice. But, in that situation, because you don't have the information about the substance, that reasonable belief standard is not something that you necessarily are going to reach. But there is enough—and when I talked about the definitions earlier—to have an apprehension that something may exist. We might know that that particular clinic is one of the worst anti-ageing clinics in Australia for handing out prohibited substances to people, not just athletes but the general public. So, there is a reasonable suspicion there that by going to that clinic—if someone has a photo of athlete X coming out of the clinic—it may be the case that they have bought a prohibited substance or they're involved in prohibited substances. If we issued a disclosure notice to that clinic to get information about the substance or the purchase, which would enable us to continue an investigation, that's not an extra burden on the athlete. The athlete wouldn't even necessarily know that we have done that. We'd issue the notice to the clinic to get that specific piece of information, which would help us to answer definitively one way or another whether the athlete did in fact buy Panadol and there's no case to answer and we can move on and close it down, or whether we're dealing with something more serious. Plus there is the issue of what that facilitator or clinic is doing, in terms of issuing substances—what are the substances, what do we have to look at and what work can we do with other agencies to try to stop that happening.

Senator McCARTHY: You're using that example based on suspicion rather than belief.

Mr Mullaly: Correct.

Senator McCARTHY: So, if you believed that something was going on, you're saying you couldn't do anything about it?

Mr Mullaly: If the evidence that we had through a tip-off actually included information about the substance or a sales receipt, you might get to the reasonable belief standard. But, of course, that's not a perfect world. If I can draw an analogy, there's not always documents or things that the current legislation allows us to get, and there's no privilege. So, we can use that power as it is now. But the importance of being able to bring people in to ask them questions is that—maybe if I put it this way: a robber who comes into your house doesn't keep an itemised record of everything they steal. When the police start investigating that they can't go to a document to get an itemised list. People who are distributing prohibited substances or substances not approved for human use...
aren't necessarily keeping lists as to, 'I gave person X this particular substance.' So, you have to have the ability to bring them in and ask questions to ascertain who they have given things to and how that's been done and what it is that they have provided.

**Senator SIEWERT:** I want to go to the issue of powers. We had a bit of a conversation, which you heard earlier, about seizing things. When you're in that process of substantiation, what is generally included and what powers do you have to take things like computers, laptops and those sorts of things, just so that we're clear about the depth of the impact on—

**Mr Mullaly:** For the last few years, ASADA has had the power to issue disclosure notices for someone to produce documents or things, if we start with those. The privilege has been taken away in relation to people providing documents or things. That's the current legislation. From the perspective of getting computers, mobile phones, a bank record or order forms off a computer, one of the reasons you would get a computer is because just ordering something on the internet is a potential violation under the world rules that apply to all athletes. Quite often getting that order form is all you need, in terms of being able to substantiate the case. That stays essentially the same in the legislation. The difference is in relation to when people come to interviews. They can no longer claim privilege in terms of answering questions. That is what is proposed in the legislation. Bearing in mind the safeguards that are in place, that information can only be used in antidoping hearings under the legislation or for two discrete Criminal Code violations that relate to providing false information or false documents. In any other criminal matters or any other civil matters the protections are there where that information can't be used directly or indirectly against a person, if they provide an answer to the question. Their answer can only be used in terms of what we do with enforcement in an antidoping scenario. That's the significant change. The other disclosure notice relates to the giving of information, which can be broad, but it's not documents or things. It might be passwords, or something like that, to enable us to access a computer or a phone, for example.

**Senator SIEWERT:** The computer where you're trying to find the order form, for example.

**Mr Mullaly:** Yes. There's a bit of a curious situation at the moment where we've got the ability to get documents or phones and you can't claim the privilege, but with information you can claim privilege in terms of what the password is, potentially. That doesn't really sit neatly. It's just a small practical impediment in terms of the way the legislation is currently drafted.

**Senator SIEWERT:** Can I just go to the question that I asked them. It was that the definition of 'sporting administration body' in the bill be expanded to ensure the role of accrediting and registering bodies for sport support persons be recognised in the bill. Is there a reason why that isn't included? It sounded reasonable to me. What's the counterargument to that? Is there a reason that specifically hasn't happened?

**Mr Mullaly:** The sporting administration bodies under the bill link in to signatories of the World Anti-Doping Code, where there are compliance obligations—that is, international sporting federations and their member associations. If you take the ICC in cricket, Cricket Australia fall under the ICC so they all have obligations in terms of sanctioning athletes and athlete support personal or officials from sport if there are violations of the World Anti-Doping Code.

The ESSA, with all due respect, don't have a role to play in terms of applying World Anti-Doping Code sanctions, which is what the definition of 'sporting administration body' goes to. It's the importance of a sporting administration body having those rules to enable the sanctioning to take place. There are separate accreditation bodies. It's true that a sport scientists might get caught up in the World Anti-Doping Code provisions and receive a World Anti-Doping Code sanction. It's true that ESSA may have a separate disciplinary process in terms of disciplining their sport scientists separately to that WAD code. They may recognise the WAD Code sanction, but it happens as a separate disciplinary matter that sits outside antidoping and the World Anti-Doping Code requirements.

**CHAIR:** Thank you very much for coming in and providing your evidence today. It has been very informative. We note that we've given you some homework—questions on notice. As we mentioned earlier today, we will be reporting to the Senate on 24 February, so we'd appreciate your responses by 19 February, if possible. On behalf of the committee I'd like to thank all those who made submissions to the inquiry and made representatives available today. I'd also like to thank broadcasting, Hansard and our secretariat staff for their support.

**Committee adjourned at 11:33**