ACC report: why ASADA needs teeth

The Australian Crime Commission released a February report alleging that ‘widespread’ doping is occurring in Australia and that organised crime is involved. This has led to the ASADA Amendment Bill 2013, which suggests greater investigative powers for the Australian Sports Anti-Doping Authority (ASADA). Catherine Ordway, a Sport & Anti-Doping Consultant who was formerly a Director at ASADA, explains why these and other powers are needed to help ASADA do its job.

The international performance enhancing drug trade is reportedly worth billions. The Australian Crime Commission (ACC) dropped a bomb on Australian sport in the form of its: ‘Organised Crime and Drugs in Sport’ report on 7 February 2013. The report claimed that ‘widespread’ doping is occurring in Australia:

‘The ACC has found, on the basis of a limited and focused examination of one component of the PEDs’ market, that the market has evolved significantly in recent years to include peptides and hormones. These substances, which are WADA-prohibited, are being used by professional athletes in a number of professional sporting codes. Organised crime has been found to have a tangible and expanding footprint in this market, and their activity is being facilitated by some coaches and support staff of elite athletes, who have orchestrated and/or condoned the use of prohibited substances and/or methods of administration.’

It is clear that doping cannot be detected by testing alone. The World Anti-Doping Agency (WADA) promotes Australia as having developed a revolutionary anti-doping model that solidifies cooperation between the anti-doping authority and other government agencies. WADA lauds the ‘Australian Model’ on its website and in its publications.

WADA is also of the view that a key component in the investigative and intelligence capabilities is the establishment and maintenance of relationships between investigative agencies across Government. This position is reflected in WADA’s ‘Guidelines for Coordinating Investigations’. So, how can Australian sport respond to the allegations from one of the most powerful law enforcement agencies in the country?

The Australian Sports Anti-Doping Authority (ASADA) is the Australian National Anti-Doping Organisation under the World Anti-Doping Code (the ‘Code’), and is a Commonwealth government statutory authority. ASADA’s vision is ‘to be the driving force for pure performance in sport’. ASADA’s purpose is to ‘protect Australia’s sporting integrity through the elimination of doping’. Outspoken scientist and anti-doping campaigner, Dr. Mike Ashenden, was quoted last month as expressing his disappointment in ASADA as: “a prodigy that has not yet delivered on its exciting potential...for some reason, things just haven’t clicked, and the results they’ve produced so far have been pretty modest”.

ASADA is established under the ASADA Act 2006 (amended 2011) and Regulations (including the National Anti-Doping Scheme). The challenges for anti-doping organisations (ADOs), including ASADA, are to disrupt and detect doping (anti-doping rule violations in the Code terminology) through information and intelligence obtained from the following:

- Athletes and Athlete Support Personnel as defined by the Code, thereby within the ADO jurisdiction.
- Government organisations, including Law Enforcement Agencies (LEAs).
- Non-governmental organisations and professional associations.
- Individuals not within the jurisdiction of the ADO.

ASADA currently has no power to compel any of the classes of person above to provide it with information which ASADA may be able to use to carry out its functions. Australian Olympic Committee (AOC) President, John Coates, has been calling for enhanced investigative powers to
be granted to ASADA (and its predecessor) from as early as 2000\textsuperscript{3}. There is currently a proposal before the Commonwealth parliament that the ASADA Act be amended to allow for, amongst other things, the ASADA CEO to compel witnesses to give evidence\textsuperscript{4}. In accordance with Australian parliamentary process\textsuperscript{5}, the ASADA Amendment Bill 2013 was introduced into the Senate (upper house) and, following the first reading of the Bill, was immediately referred to the Senate Rural and Regional Affairs and Transport References Committee for consideration. Interested parties were invited to make submissions to the Senate Committee in relation to the Bill, and a public hearing was held on 1 March 2013\textsuperscript{6}.

**History**

The Australian Sports Drug Agency (ASADA) was the original National Anti-Doping Organisation for Australia established by the ASADA Act 1990. In 2004, a new statutory authority was proposed to replace ASADA. The creation of ASADA was a key recommendation of the 2004 Anderson inquiry into the use of drugs by Australia’s track cycling team\textsuperscript{7}. Justice Anderson recommended, with respect to the investigation of doping offences in Australian sport, that: “There should be a body which is quite independent of the AIS\textsuperscript{8} and of the Australian Sports Commission and of the sporting bodies themselves with the power and duty to investigate suspected infractions such as substance abuse and to carry the prosecution of persons against whom evidence is obtained.”\textsuperscript{9}

ASADA replaced ASADA on 14 March 2006 and took over the functions performed by ASADA.

ASADA’s functions were focused on advocacy and the testing and education of athletes and athlete support personnel. Significantly, ASADA was also given the power to investigate doping allegations and present Anti-Doping Rule Violations (ADRV) cases at hearings either before the Court of Arbitration for Sport (CAS) or other sports tribunals under the Code. This new Authority assisted the Howard Government to fulfill its election\textsuperscript{10} and treaty\textsuperscript{11} obligations. This development was also in keeping with the growth in non-policing public sector agencies performing investigative functions\textsuperscript{12}.

**ASADA’s limitations**

ASADA does not possess powers of compulsion, or of search and seizure. ASADA must therefore rely on information derived from sport anti-doping rules and cross-government agreements. ASADA’s current limitations became more obvious through the release of the ACC ‘Organised Crime and Drugs in Sport’ report in February 2013\textsuperscript{13}. The ACC has coercive powers to investigate criminal matters at the national level, particularly focused on organised crime. The ACC has referred the matters outlined in its report to the State and Federal police forces, and to ASADA (in relation to anti-doping).

Unfortunately, ASADA cannot compel the Athletes or Athlete Support Personnel featured in the ACC report to provide any further information, so unless they voluntarily come forward, there is no guarantee that any of the matters identified can be progressed.

**Information sharing with external organisations**

In order to investigate those matters within its jurisdiction, referred to it by the ACC or otherwise, ASADA must rely on the agreements in place with the major National Sports Organisations (NSOs) requiring the NSOs to: immediately advise ASADA of any alleged anti-doping rule violations and [to] provide assistance to ASADA in any investigation that ASADA might reasonably request\textsuperscript{14}. If an NSO fails to comply with this agreement, ASADA only has limited legal (e.g. breach of contract) and political avenues to pursue (e.g. embarrassment in the media, with the Minister for Sport or the Australian Sports Commission). The NSO in turn has jurisdiction over the Athletes and Athlete Support Personnel via their membership contracts (club, state and then national) or employment arrangements.
Barriers to information sharing with government agencies (including LEAs)

An expansion to ASADA's powers as anticipated by the 2013 Bill will assist to overcome one of its current challenges: reliance on LEAs. In order to have matters thoroughly investigated, ASADA must attract the attention of organisations which have scarce resources and higher priorities for community safety (e.g. murders, child pornography, and the trafficking of non-performance enhancing drugs, including ice and heroin). Even if the LEAs are keen to provide information to ASADA, there are additional barriers to sharing information, both internally and externally.

One of the additional challenges to inter-agency cooperation is Australia’s privacy legislation. This has not been addressed in the current draft Bill. For example, in 2008, ASADA attempted to data-match records with Medicare to determine whether doctors were prescribing performance enhancing drugs to athletes for non-therapeutic purposes, particularly where those substances may be subsidised by the Pharmaceutical Benefits Scheme (PBS). Other Australian Government agencies data-match on a regular basis, and far in excess of the number of records referred by ASADA, and yet ASADA's efforts in that instance were blocked. Before a response was received from Medicare, concerns relating to the privacy of medical records were raised in the media. Following an investigation initiated by the then Sports Minister, Kate Ellis, questions were asked of ASADA by the Commonwealth Parliament Senate Estimates Committee. This led to the Privacy Commissioner conducting an investigation and handing down recommendations for ASADA to implement in its future information handling practices. It would be of assistance to ASADA if this Bill was amended to allow for data-matching exercises to be conducted to investigate anti-doping rule violations (ADRVS) including, for example to examine whether public funds are being diverted from the PBS inappropriately.

Summary

I am supportive of ASADA being provided with powers to compel witnesses to provide information relating to potential anti-doping rule violations. Many of the human rights, privacy and philosophical concerns raised with me by some of my legal and sporting colleagues have been fully addressed in the parliamentary report into human rights. In my submission to the Senate Committee, I have also suggested that it may also be of benefit for ASADA to be granted powers of ‘search and seizure’, and for the recently introduced information-sharing facilitation mechanism - the National Collaboration Framework - be used more effectively in relation to ASADA, including extending the Privacy Commissioner's data-matching in accordance with information handling guidelines. I have also suggested that we have another look at whether ADRVS should be made criminal offences under the Crimes Act, and thereby whether other benefits may flow from that, including applying the relevant provisions of the Proceeds of Crime Act to ASADA. The latter suggestion is a bigger discussion for another day.

Catherine Ordway
Sport & Anti-Doping Consultant
Lecturer and PhD Candidate, National Institute of Sport Studies, University of Canberra
catherine.ordway@intemocile.on.net

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21. An example of this type of agreement is found in Appendix D of the ‘Cycling Australia Review’ conducted by the Hon James Wood AC QC, released on 14 January 2013, at www.regional.gov.au/sport/resources/reports/review-of-cycling-australia.aspx
24. Methamphetamine, or “crystal meth”, 25. Medicare is Australia’s universal health insurance scheme,

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