

SPORTS DRUG TESTING BILL 2001

Committee

Resumed from an earlier stage of the sitting. The Chairman of Committees (Hon George Cash) in the Chair; Hon G.T. Giffard (Parliamentary Secretary to the Minister for Sport and Recreation) in charge of the Bill.

Clause 6: Agreement about performance of functions -

Progress was reported after the clause had been partly considered.

Hon G.T. GIFFARD: Before the break I was asked who will know about the agreement referred to in clause 6, who will read it and who will understand it. Hon Peter Foss also referred to the implications of the Hughes decision.

After the legislation is enacted, the Department of Sport and Recreation will have responsibility for developing the agreement in consultation with the Australian Sports Drug Agency. I understand that it has a standard agreement that it enters into with the States. Obviously the appropriate name changes will be made. That document will be signed off by the minister. State sporting associations will be able to obtain copies of the agreement from the department and they will be able to provide feedback about the agreement if they wish. All state sporting associations that will be affected or potentially affected by the legislation will be advised of its enactment and will have their obligations explained to them.

The Bill was drafted prior to the Hughes decision and it was reviewed when the judgment was handed down. The advice from the Crown Solicitor and parliamentary counsel was that, notwithstanding the Hughes decision, the Bill could be and should be progressed. I cannot provide a more detailed legal explanation of why the legislation is not caught by that decision, other than to say that it was reviewed.

Hon PETER FOSS: It is an interesting point. Perhaps it would be worthwhile putting on the record some observations about how the Hughes decision may impact on this legislation.

Strictly speaking, this clause probably is not necessary to confer on the minister the power to enter into contracts. In fact, it constrains the power of the minister to enter into contracts. Often, when legislation comes before this Parliament it confers capacity on the Executive, which it has in any event. By conferring it in a particular manner it deprives the Executive of plenary power. The clause reads -

ASDA must not exercise any functions conferred by this Act -

There is no doubt this Parliament can say what ASDA cannot do. It continues -

- unless there is in force an agreement between ASDA and the Minister about the performance of those functions.

That is well within constitutional capacity. It further states -

An agreement between the Minister and ASDA may require ASDA to perform those functions in the manner, or subject to the conditions, provided in the agreement.

A commonwealth authority can enter into all sorts of agreements. The mere fact the entity is a state entity is again no problem. My only concern is that subclause (2) almost seeks to turn the nature of that agreement into something that is essentially statutory. Of course an agreement between the minister and ASDA may require ASDA to perform those functions in the manner, or subject to the conditions, provided in the agreement. Why say that? That can be done without being told. The fact it is in the Bill is a hint indicating that it should be there. If it says something is required to be done in that manner, it almost becomes statutory rather than executive. I am concerned about that. There is a little hint that that may have an impact. The good thing is that nobody will take it to court. Although the Hughes type of problem must have been around for almost a century, nothing happened about it until it was captured by Corporations Law when very moneyed people thought it worthwhile to challenge it. It is not likely that will happen in this situation, although some sports people are extremely moneyed and someone who has made a lot of money out of sport and is eliminated due to an ASDA test in a state contest may think it worthwhile to take action. That takes me back to the point that this whole area should be looked after by the Commonwealth. The Commonwealth should be involved in an international treaty to support this arrangement. It is unsatisfactory for this arrangement to be subject to a scheme of this nature.

Hon DERRICK TOMLINSON: In spite of the sentiments expressed by Hon Peter Foss that it is preferable that some such functions be carried out by a commonwealth agency under commonwealth law in conformity with international agreements, subclause (2) indicates a discretionary authority is available to the state minister. It reads -

An agreement between the minister and ASDA may require ASDA to perform those functions in the manner, or subject to the conditions, provided in the agreement.

The parliamentary secretary indicated that ASDA has a hatful of these agreements that it pulls out and flogs around. The expectation in clause 6(2) is that the Western Australian minister may have some requirement to impose upon ASDA. I believe that is in the federal system, which we all uphold and which is highly desirable. I hope I am correct in that interpretation and that there is a discretionary authority. Although it must be agreed to by ASDA before it goes anywhere, there is the authority and the power of the state minister.

Am I also correct in my expectation that nothing can be agreed to that is outside or in conflict with this Act; for example, under clause 5 a WA competitor under the age of 18 must not be tested without the prior consent of the competitor's parent or guardian? In other words, a competitor under the age of 18 cannot be compelled to be drug tested. I assume that that will apply even within the agreement and it could not contradict that clause.

Hon G.T. GIFFARD: It is part of the national framework. That is the standard and it is reflected in the Bill and will be reflected in the agreement. It is one of the drug-testing guidelines.

Clause put and passed.

Clause 7 put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

HON G.T. GIFFARD (North Metropolitan - Parliamentary Secretary to the Minister for Sport and Recreation) [4.47 pm]: I move -

That the Bill be now read a third time.

HON DERRICK TOMLINSON (East Metropolitan) [4.47 pm]: I apologise to the House for speaking to the third reading; I know it is an unusual occurrence. However, my interest in sport is well known, as is reflected in my somewhat adipose physique!

Hon N.D. Griffiths: You watch a lot of it on television.

Hon DERRICK TOMLINSON: I watch none and have no interest in any of it. I listened to the debate, particularly in committee, with some interest and concluded that perhaps this Bill should not proceed. My first concern arises from clause 5, which exempts competitors under the age of 18 from being subject to a drug-testing regime. My second concern is the process of adopting commonwealth laws by agreement. Although I respect that taking samples of tissue from a juvenile should be within the province and at the discretion of a parent or guardian and under the protection of a parent or guardian, the effect of clause 5 is to enable any Western Australian competitor who is under 18 years to take performance-enhancing substances, whether they be chemical, hormonal or any other form, and to compete at an elite level, succeed at an elite level and avoid detection. I listened to the parliamentary secretary explain that there is of course education, advice and counselling for all of those things. Yes, indeed, they are in place and, yes, indeed, they have been for some time. Yes, indeed, all elite athletes know the consequences of drug taking or the consumption or injection of performance-enhancing substances. They know through a process of education and counselling the consequences of being caught, but they still do it. Why do they do it? It is because they want to win. Whether they want to win for some financial gain or whatever buzz sportspersons get out of winning, I do not know, but they still do it. Furthermore, not only do they cheat in that way - it is fair to say it is cheating, is it not - they are aided and abetted by chemists, biochemists and snake-oil physicians who are constantly refining and developing products that are undetectable given the present technology. There is an industry associated with the avoidance of drug-testing regimes. People will cheat. People want to win. I am told that which drives an elite athlete is the desire to win, and for some the desire to win at all costs. If we relate that to our knowledge of international and national competition of the past 12 months -

Point of Order

Hon KIM CHANCE: The third reading debate, as I understand it, is not an occasion to raise matters relating to the policy of the Bill; nor is it an occasion to raise new material relating to the policy of the Bill or in support of arguments that go to that policy. It is an occasion, as I understand it, to address matters of why or why not a Bill may be read a third time.

Hon Graham Giffard; Hon Peter Foss; Hon Derrick Tomlinson; Hon Kim Chance; President; Hon Ray Halligan

The PRESIDENT: There is no point of order. The member did start off by relating specifically why the Bill may not be read a third time, but I will pay close attention to the point the Leader of the House raises of not canvassing once again the second reading debate or other non-relevant matters.

Debate Resumed

Hon DERRICK TOMLINSON: Thank you, Mr President. I will try to avoid contravening the convention regarding the third reading. If I was introducing new material, it was in response to matters that had been discussed at the committee stage. I was using that argument to demonstrate why this Bill should not proceed because the Bill does not meet the requirements of its own policy by clause 5.

An increasing number of athletes are under the age of 18 years. Therefore, an increasing number of elite athletes are succeeding at national and international levels of competition who under this Bill, and I assume under the commonwealth Act, will be exempt or will avoid the consequences of drug-testing regimes. It exposes a conflict of the desire to protect the interests of juveniles and the desire to protect the authority or discretion of parents and guardians of juveniles versus the desire to protect sports from cheats. Whether they are juveniles or not, if they rely upon performance-enhancing drugs and substances, they are cheats. If the Bill does not meet its expectations, it has no purpose.

The second reason is related to clause 6. Again, this was discussed during the committee stage of the Bill. In spite of expressions during the committee stage that it might be desirable to have a commonwealth regime that applies to the States and is consistent with international treaty obligations, the simple fact is that the application of commonwealth law is by agreement. We do one of two things: we give the power to the Commonwealth and allow the Commonwealth to legislate and regulate or we do it ourselves. I do not believe that the authority of this Parliament should be usurped by a process of ministerial agreement. That is what this Bill does. The parliamentary secretary said something to the effect that the purpose of the Bill is to enable an agreement between the minister and the Australian Sports Drug Agency that the minister is not otherwise authorised to enter into. If the Bill is about giving the minister the power to enter into an agreement that he is not otherwise authorised to enter into, the Bill is intended to transfer a power of the State to the Commonwealth by what appears to be a convenient method.

I would suggest that in spite of the admirable and perhaps desirable purposes of the Bill, there are better ways to regulate the use by elite athletes - particularly juvenile athletes - of performance-enhancing substances than this legislation. I therefore believe the legislation should not proceed.

HON RAY HALLIGAN (North Metropolitan) [4.59 pm]: I share the concern of Hon Derrick Tomlinson. The title of the Bill is "to provide for drug testing of persons representing Western Australia in sport". In the light of clause 5, certain athletes can be involved in sport and not be tested. I wonder whether the policy should not be for the testing of certain persons, which is referred to in the second part of the title which applies to other persons participating rather than representing. The difficulty is that Ian Thorpe is only 18 years of age, has been swimming for many years and has many world records.

Hon N.D. Griffiths: What are you saying?

Hon RAY HALLIGAN: Only that many of our elite athletes are under 18 years of age. If this Bill is to do what it purports to do - that is, to drug test persons representing Western Australia - it appears to fall short because of clause 5.

Debate adjourned, pursuant to standing orders.