

The New Zealand Model at Work

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Introduction

The purpose of this presentation is not to attempt to justify the existence of a drug testing programme. Such programmes have a high level of support from sporting communities both internationally and in New Zealand. It was, perhaps, surprising how few submissions to the Select Committee challenged the fundamental concept of an anti-doping programme. The purpose is to represent the experience of the Agency under an Act of Parliament which uniquely, in New Zealand, provides for the operation of a drug testing programme.

Background

While the New Zealand Sports Drug Agency Act 1994 technically came into effect on January 5, 1995, a sports drug testing programme has existed in New Zealand for a number of years.

Following the 1988 Seoul Olympic Games and the Ben Johnson affair, the New Zealand Olympic and Commonwealth Games Association decided to introduce a programme in the lead up to the 1990 Auckland Commonwealth Games. The programme continued and expanded following those games, with the financial support of the Hillary Commission, with a view to the 1992 Barcelona Olympics and in fact grew beyond just Olympic sports.

In 1991 a Task Force which had been set up by the Hillary Commission recommended that an agency, independent of sport, should be established, by Act of Parliament, to prevent the misuse of drugs in sport. In 1993 an Interim Agency was set up in Auckland and operated according to the draft of the Bill as it was modified and eventually passed through Parliament in July 1994.

Legislation versus status quo

The point to emphasize therefore, is that prior to the Act coming into force, a successful programme had been operating for some time with a high level of acceptance by the sporting community. There are also examples of agencies in other parts of the world, for example Canada and Norway, operating effective and respected programmes without the benefit of legislation.

Given the above, we need to realistically assess whether or not the Act enhances the effectiveness of an existing programme or, as is undoubtedly a possibility, whether it actually hinders the programme by weighing it down with bureaucracy and curbing its ability to respond to external changes.

It was generally considered that legislation would be of benefit by bringing greater certainty as to the legality of the procedures being applied and, in so doing, reduce

considerably the possibility of successful challenges to doping infractions on the basis of legal interpretations (rather than fact). In addition, and just as significantly, the legislation would spell out clearly the rights of competitors and the protections they could expect.

The legislation was based closely on the model which had been operating in Australia for a number of years—the “Australian Sports Drug Agency Act 1990”. The New Zealand Act, however, differs in at least one important respect in that it requires only “substantial compliance” with the provisions of the regulations. Without such a provision the Australians had, in one instance, been required to spend in excess of A\$300,000 to defend an entry made on its register. In that case an athlete admitted using anabolic steroids but claimed that when the Canadians tested him on behalf of the Australian Sports Drug Agency, strict compliance with the Act was required and the Canadian paperwork used was not permissible. The NZSDA Act makes some provision and allowance for such circumstances.

The experience

Following are a few examples of how issues that have historically proved problematic and/or came under particular scrutiny from outside, during the development of the legislation, have been dealt with.

1 *The right to test*

The “right” to test competitors has previously been assigned to the Agency by national sporting organizations drawing on anti-doping provisions within their own constitution and rules. While advice was available from a variety of quarters to assist sports ensure that their positions were legally sound, it would be fair to say that many constitutions dealt less than perfectly with this issue, and probably provided fertile ground for challenge.

The NZSDA Act has done two things in this regard; it has established clearly that the Agency has a right to drug test sporting competitors irrespective of the rules of sports. There remains, however, a crucial reliance on those sports to follow up a determination of the Agency by hearing cases and applying sanctions as appropriate. The second key factor is that the Act has pointed very specifically to requirements which the drug testing process places on sports, and prompted many of them to review and update their constitutions and rules accordingly. A large number of sports have seen this as a good opportunity to go further and refurbish their constitutions in total which has been of major benefit.

2 *“Service of notice”*

The ability of the Agency to verify that proper notice of the requirement to attend a test, had been served in a manner that could stand up legally, always provided some potential for question. The difficulties which reliance on telephone notification provided were quite publicly aired at one point. The Act is now quite explicit as to what is required in order to serve notice or deem notice to have been served. While this has required the Agency to rethink and adjust some of its procedures, the result is that there is undoubtedly more certainty in the process of serving all notices and the possibility of avoiding service is consequently reduced.

3 *Definition of a "competitor"*

The Agency saw this as being a crucial issue because if the definition was too narrow, credibility could easily be lost if groups on the fringe of, but outside, the definition were seen to be doping but the Agency was unable to intervene. The Privacy Commissioner, in particular, sought a closely defined and relatively narrow approach.

The Agency was very satisfied with what emerged as it includes, to all intents and purposes, all people participating in sport. Clear steps have been taken, however, to ensure that this leeway is not abused and the spectre of dawn raids on the homes of elderly women bowlers may exist in the imagination of a few, but not in reality. For reasons of both practicality and limited resources, testing occurs almost exclusively in the domain of "elite" sport and considerable effort is expended to ensure those being tested have information well in advance which enables them to understand the requirements.

4 *Positive tests*

An issue which has been dealt with less satisfactorily, in my view, is that of what is a "positive test". The Act assumes that a single test can always give a definitive result in terms of providing evidence that a competitor has taken a banned substance. This is true in the vast majority of cases, but not so in a small but significant category—notably when measuring levels of naturally occurring hormones and their metabolites. In such cases it is more relevant to consider fluctuations of levels over a series of tests rather than decide on the basis of a single elevated level.

As the lab is unable to report levels below what is arbitrarily deemed positive, the Agency loses the potential to receive invaluable clues as to which athletes may be doping by taking additional quantities of, in particular, testosterone.

5 *Competitors' rights and protections.*

While the Agency has always endeavoured to ensure that competitors are treated fairly and reasonably, the Act now spells out precisely the requirements to ensure this situation remains. In addition, the provision for appeal to the District Court gives an important and previously unavailable opportunity for competitors to get an independent consideration of their case.

Nevertheless, an academic rather than practical approach to some issues, has required the inclusion of some administratively burdensome "safeguards" which are unused and unwanted by the competitors themselves and seem unnecessary. Indeed while the Act has required relatively few fundamental changes to the way the Agency operates, it has certainly increased significantly the volume of paper which surrounds the process.

The future

These are, of course, just a few of the many elements of the legislation which command both legal and practical scrutiny. A key test for the legislation will also be its ability to respond appropriately to what is a rapidly changing field. The current experimentation with blood testing overseas will almost certainly require a response in New Zealand at some point. The growth of overtly "professional" sports will also provide a challenge, not least in relation to the departure from traditional sporting jurisdictions.

Summary

It is undoubtedly too early to make any *final* assessment of the NZSDA Act either in relation to the detail of its format and drafting or its effectiveness as a total package tool to prevent doping in sport. There is no doubt that the Agency takes considerable comfort from the relative certainty it provides to a number of potentially contentious areas of its operation. It is expected that the opportunities for successful “frivolous” challenges are remote but only time will reveal that. To date things have been relatively straightforward. There is no doubt that the Agency has been frustrated by some aspects of the Act which require cumbersome administrative procedures, or significantly constrain its ability to meet its goals.

In the anti-doping campaign, as with most things, there is no absolutely right or wrong method only a requirement that one good one is selected and followed through properly. The legislative path is undoubtedly a good method and while experience to date suggests that it can be made to work well, to the benefit of New Zealand sport and society, in the parlance of this group, the jury is still out.