



**AUSTRALIAN ATHLETES' ALLIANCE**

**NSW LAW REFORM COMMISSION CONSULTATION PAPER NO. 12  
CHEATING AT GAMBLING (MARCH 2011)**

**Submission of Australian Athletes' Alliance Inc.**

**BACKGROUND**

The Australian Athletes' Alliance Inc (**AAA**) is the peak body of associations representing Australian athletes.

The current members of the AAA are the:

- Australian Cricketers' Association;
- AFL Players' Association;
- Australian Jockeys' Association;
- Australian Netballers' Association;
- Australian Swimmers' Association;
- Professional Footballers Association;
- Rugby League Players' Association; and
- Rugby Union Players' Association.

As the peak body, we provide a unified voice on issues affecting Australian athletes.

On 14 February 2011, following a request from the NSW Law Reform Commission (**the Commission**), the AAA made a preliminary submission in the above inquiry, providing our views in relation to a number of relevant general matters (as requested).

A copy of our preliminary submission is included as Schedule 1 to this submission, for convenience.

In March 2011, the Commission released the above-mentioned Consultation Paper, which included (at paragraph 6.36) draft legislative provisions for a series of offences in relation to cheating at gambling.

The primary purpose of this submission is to set out, for consideration of the Commission, the AAA's views on these draft provisions, although we have also provided comments on some of the other issues raised by the Consultation Paper.

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## IMPORTANCE OF A NATIONAL AND USER-FRIENDLY APPROACH

Before commenting on the specifics of the draft provisions, we wish to emphasise our view that it is important for any new legislation regulating individual conduct in relation to cheating at gambling to be implemented in a uniform, national fashion.

With the vast majority of professional sport in Australia being administered at a national level, athlete education programmes are likely to be national in nature and will be most effective if they can focus on a single, national set of uniform stand-alone laws.

In this regard, we are encouraged by the Commission's comments (at paragraphs 1.12, 1.13, 3.21 and 3.103 of the Consultation Paper), which recognise the importance of education and a national approach to this issue, as well as the agreement by the Sports Ministers of all Australian Governments to develop a National Framework based on the principle of a nationally-consistent approach to legislation relating to the criminality of match-fixing.<sup>1</sup>

Although not the primary focus of the Consultation Paper, we take this opportunity to note that we do not support the imposition by governments or legislation of mandatory codes for internal discipline in relation to corruption issues for sports participants (similar to the WADA code in relation to doping issues), since these are best collectively bargained between player associations and the governing bodies of the relevant individual sports, based on the specific circumstances of each sport.

## ANALYSIS OF DRAFT PROVISIONS

### Range of Proposed Offences

For the purpose of this analysis, we consider it helpful to note that the draft provisions set out at paragraph 6.36 of the Consultation Report provide for a range of offences.

For convenience, we have labelled each of the proposed offences as follows:

1. **"the Primary Inducement Offence"** (section 1(a)(iii));
2. **"the Inducement not to Report Offence"** (section 1(a)(iv));
3. **"the Participation Offence"** (section 1(b));
4. **"the Insider's Use of Inside Information Offence"** (section 2);
5. **"the Third Party's Use of Inside Information Offence"** (section 3).

We also note that the Consultation Paper sets out further draft provisions which would apply equally to each of the above proposed offences:

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<sup>1</sup> Press Release, Senator Mark Arbib, Minister for Sport, Australian Government, 25 March 2011 ([http://www.ausport.gov.au/news/releases/story\\_423592\\_government\\_welcomes\\_consultation\\_on\\_match\\_fixing](http://www.ausport.gov.au/news/releases/story_423592_government_welcomes_consultation_on_match_fixing), accessed on 20 April 2011).

1. *“For the purposes of these provisions no offence is committed unless the relevant act or omission was intentional or reckless.”* (section 4)
2. *“It is not necessary for proof of any of the offences contained in this section that the act or omission results in a win or gain, or in the securing of any advantage, or the causing of any disadvantage.”* (section 5)
3. *“The maximum penalty available for any such offence shall be imprisonment for 10 years.”* (section 6)

We provide our comments on each of these proposed offences below.

### **“The Primary Inducement Offence”**

The relevant provision setting out the proposed “Primary Inducement Offence” is as follows:

- (1) *An offence is committed where:*
  - (a) *a person, directly or indirectly, with intent:*
    - (i) *to obtain a **benefit** for himself or herself or for any other person;*  
or
    - (ii) *to cause a loss or disadvantage to any other person, **dishonestly** induces or attempts to induce a **participant**, or makes an offer to such a **participant**:*
      - (iii) *to engage in any act or omission which constitutes a threat to or which undermines the integrity of any **sporting or other event**, including:*
        - (A) *deliberately under-performing or withdrawing from such event; or*
        - (B) *in any way fixing or influencing the outcome of such event, or of any contingency that may occur during it, being an event, outcome or contingency upon which the person or any other person stands to lose or gain any money or monies worth, whether as a **participant**, or by betting on such outcome or contingency; .....*

In our respectful submission, any legislative provisions which are to be enacted based on this proposal should be substantially more limited in scope.

In the Consultation Paper (at paragraph 6.22(i)), the Commission noted as one of the issues to be considered in relation to the offence, *“whether the cheating which gives rise to the offence should be linked to gambling, or should be available in relation to any interference with, or manipulation of, a sporting event or contingency, irrespective of the motive?”*.

In our submission, any offences should be limited to matters which are connected to gambling.

Cheating at gambling is, after all, the very matter at which this inquiry is directed.

There may be tactical reasons in the context of a sporting competition as to why a particular individual or team may wish to deliberately underperform or bring about a particular contingency, which have nothing to do with gambling. This might be against the spirit or rules of a sport and therefore be regarded as “dishonest”. It may be appropriately regulated and punished according to the rules of the sport. However, in our submission, no justification has been made out by any party as to why such a general offence belongs as part of the criminal law, particularly with such a serious maximum penalty applying as is currently proposed.

We are also concerned about the generality of language used in the proposed section 1(a)(iii) to identify the relevant act or omission to which a participant must be induced or attempted to be induced (or in relation to which an offer must be made). That is, “... *any act or omission which constitutes a threat to or which undermines the integrity of any sporting or other event*” (emphasis added).

In our submission, any final legislative provision should be directed exhaustively towards the specific evils at which the offence is directed, rather than (as with the current proposal) adopting the uncertain concept of “*constituting a threat to or undermining the integrity of*” an event, followed by an inclusive list of more specific evils.

We strongly believe that, given the seriousness of the prospect of criminal prosecution, those who may be the subject of prosecution for the offence should be entitled to know with precision which types of conduct are proscribed and that this would not be achieved with the proposed wording.

Consistent with the above, we suggest amending section (1)(a)(iii) as follows:

- (1) *An offence is committed where:*
  - (a) *a person, directly or indirectly, with intent:*
    - (i) *to obtain a **benefit** for himself or herself or for any other person;*  
*or*
    - (ii) *to cause a loss or disadvantage to any other person,*  
*in connection with betting by the person or any other person on an event, outcome or contingency, dishonestly induces or attempts to induce a participant, or makes an offer to such a participant:*
    - (iii) *to engage in any act or omission which constitutes, or is intended to bring about a threat to or which undermines the integrity of any sporting or other event, including:*
      - (A) *the deliberately under-performanceing in, or withdrawaling from, any such event; or*

(B) ~~in any way~~ the fixing or improper influencing of the outcome of any such event, or ~~of any contingency, that may occur during~~ it, ~~being an event, outcome or contingency upon which the person or any other person stands to lose or gain any money or monies worth, whether as a participant, or by betting on such outcome or contingency; .....~~

### “The Inducement Not to Report Offence”

The relevant provision setting out the proposed “Inducement Not to Report Offence” is as follows:

- (1) *An offence is committed where:*
- (a) *a person, directly or indirectly, with intent:*
- (i) *to obtain a **benefit** for himself or herself or for any other person;*  
or
- (ii) *to cause a loss or disadvantage to any other person, **dishonestly** induces or attempts to induce a **participant**, or makes an offer to such a **participant**:*
- .....
- (iv) *not to bring to the attention of a member of the Police Force, or other appropriate authority such as a sports controlling body, any such offer or inducement or attempted inducement in relation to a scheme or arrangement of the kind contemplated by sub-paragraph (1)(a)(iii)*

We are in favour of this proposal, subject to the amendment of proposed section 1(a)(iii), as described above, and proposed section (4), as described below.

### “The Participation Offence”

The proposed “Participation Offence” is set out in proposed section 1(b) as follows:

- (1) *An offence is committed where:*
- .....
- (b) *a **participant** dishonestly offers or agrees to carry into effect, or carries into effect, any scheme or arrangement of the kind contemplated by sub-paragraph 1(a)(iii).*

We are comfortable with this proposal, provided that proposed section 1(a)(iii) is amended as described above, proposed section (4) is amended as described below, and any provisions to this effect are introduced as part of uniform, national legislation.

### The “Use of Inside Information” Offences

The proposed “Use of Inside Information” Offences are as follows:

- (2) *It shall also be an offence where an **insider** possesses information in relation to a **sporting or other event** or contingency that he or she knows or ought reasonably to know is **insider information**, and with that knowledge,*
  - (a) ***dishonestly** places a bet directly or indirectly on the outcome of that event or contingency, or*
  - (b) *directly or indirectly **dishonestly** communicates the information or causes that information to be communicated to a third party who the **insider** knows or ought reasonably to know would or would be likely to place a bet on that event or contingency; or*
  - (c) *procures a third party to place a bet directly or indirectly on the outcome of that event or contingency*
  
- (3) *It shall also be an offence where a third party, to whom information is disclosed by an **insider**:*
  - (a) *knows or ought reasonably to know that the information is **insider information**; and*
  - (b) *with that knowledge, **dishonestly** places directly or indirectly a bet or accepts a bet on the outcome of the event or contingency to which the **insider information** relates.*

In our submission, the above offences should apply only where the relevant accused person acts **dishonestly** and knows or suspects that:

- (a) the relevant information is **inside information**; or
- (b) the relevant third party would or would be likely to place a bet on that event or contingency.

Accordingly, we propose that the above draft provisions be amended by substituting the word “suspects” for the words “ought reasonably to know” in sections (2), 2(b) and 3(a) and inserting the word “**dishonestly**” before “procures” in section 2(c).

## Required Mental Element

In our opinion, the proposed offences should only be satisfied when undertaken intentionally and “recklessness” should not be a sufficient standard.

Accordingly, we propose that draft section (4) be amended as follows:

- (4) *For the purpose of these provisions no offence is committed unless the relevant act or omission was intentional ~~or reckless~~.*

## “FAILURE TO REPORT” OFFENCE

At paragraph 6.29 of the Consultation Paper, the Commission stated:

*“An allied consideration is whether non-disclosure of information concerning cheating should be included as an offence, where a person knows or believes that it is planned or has occurred. It is our provisional view that s 316 of the Crimes Act 1900 (NSW) concerning the concealment of a serious indictable offence should be capable of capturing such conduct, that is, assuming the proposed offence would be punishable by imprisonment for at least 5 years.”*

We agree with the Commission’s provisional view regarding the application of s 316 of the *Crimes Act 1900* (NSW).

As a matter of principle, however, we do not believe that a failure to report wrongful or suspicious conduct should of itself constitute an offence. In this respect, we agree with many of the reasons expressed by the Commission when it recommended (by majority) the repeal of s 316 of the *Crimes Act 1900* (NSW) (in its then current form).<sup>2</sup>

## CONCLUSION

We thank the Commission for the opportunity to provide these comments.

We would be pleased to provide any further assistance which the Commission requires.

For any further information or assistance, please contact:

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<sup>2</sup> NSW Law Reform Commission, Report 93 (1999), *Review of Section 316 of the Crimes Act 1900 (NSW)*.

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SCHEDULE 1                      PRELIMINARY SUBMISSION OF AUSTRALIAN ATHLETES ALLIANCE TO  
NSW LAW REFORM COMMISSION DATED 14 FEBRUARY 2011

**Submission of the Australian Athletes Alliance  
to the NSW Law Reform Commission  
Inquiry into the application of the criminal law to cheating in gambling**

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The Australian Athletes' Alliance ("AAA") is the peak body of associations representing Australian athletes. Its members currently include the

- Australian Cricketers' Association,
- AFL Players' Association,
- Australian Jockeys' Association,
- Australian Netballers' Association,
- Australian Swimmers' Association,
- Professional Footballers Association,
- Rugby League Players' Association, and
- Rugby Union Players' Association.

As the peak body, we provide a unified voice on issues affecting Australian athletes.

By letter dated 25 January 2011, Hon James Wood AO, QC, Chairperson of the NSW Law Reform Commission, requested that we submit on six issues:

1. *any rules of conduct, or professional or contractual obligations, applicable to those who participate in the activities within your area of interest, that may apply to conduct of the kind mentioned (referred herein as "Private Sporting Rules");*
2. *the adequacy of current laws to deal with the conduct in the criminal context (referred herein as "Current Laws");*
3. *the extent to which you perceive that such conduct does occur, or is at risk of occurring in your area of interest (referred herein as "Risk of Conduct");*
4. *any reform of the current laws concerning cheating at gaming in the context of betting on sports events, (for example through the fixing of results or the manipulation of incidents in the course of a sporting event) that you would consider desirable (referred herein as "Proposed Reforms");*
5. *any difficulties that you have perceived in investigating responding to, or prosecuting conduct of the kind mentioned (referred herein as "Difficulties Responding to Gambling Issues");* and
6. *any other matter you consider of relevance to this reference (referred herein as "Other Matters").*

Private Sporting Rules

Governing bodies in sport have codes of conduct and rules that relate to gambling by their participants, including the punishment of participants for conduct related to cheating in gambling. We submit that so long as these rules and regulations 1) provide affected persons with natural justice and 2) are bargained collectively by the governing body and the participants covered, they should be the primary means through which gambling is addressed with respect to sports persons.

We note that the most important issue arising from Private Sporting Rules is that third parties are not bound. Accordingly, a third party who initiates participates in, or profits from cheating in gambling cannot be sanctioned by the governing bodies, so must be held to account through state and commonwealth laws.

#### Current Laws

The current laws are inadequate in that they are not uniform across Australia, with different rights and obligations among states.

We submit that laws on cheating in gambling should be enforced federally, through applicable commonwealth legislation, where possible, and otherwise through uniform state criminal laws. We would suggest that the harmonised laws be guided by the legislation currently applicable in Victoria.

Given the cultural differences among countries with respect to gambling and the difficulties in the implementation of uniform international criminal laws applicable to persons other than sporting participants, we would unreservedly and strongly oppose any suggestion that this issue should be addressed on a global basis. Importantly, an international agency (such as WADA) with jurisdiction with respect to gambling would only have jurisdiction over sports participants, thus would not be able to address the conduct of third parties.

#### Risk of Conduct

As is evident from several international sporting scandals reported in the media, sportspeople are at risk of being associated with cheating in gambling. There are significant international syndicates involved in illegal gambling. Such syndicates have destroyed leagues (as in the downfall of the Chinese football league) as well as players (recently, Pakistani Cricketers on the national team). Syndicates and individuals have been known to use a variety of methods to influence sportspersons such as bribery, blackmail, threats of violence (including to sportspersons' families), trickery (such as through sexual seduction). While we expect sportspersons to take full responsibility for their conduct, the law must recognise that some of the conduct would not have occurred but for the influence of third parties.

#### Proposed Reforms

We do not have specific proposals; however, we propose that legislation should meet the following conditions:

- it should be national in scope, including through uniform criminal laws (rather than state specific or international);
- it should focus on ensuring that third parties (those not covered by rules and regulations of governing bodies) be subject to investigation, prosecution, and punishment;
- government prosecution and punishment of sportspersons and others covered by rules and regulations of governing bodies stay prosecution and punishment under the rules and regulations of the governing bodies to ensure the protection of individual rights and natural justice;

- punishment must be proportional and must be tailored to the specific circumstances of each individual matter;
- legislation should require that licensed betting agencies be required to provide information about anomalies in wagering;
- legislation should prohibit providing inside information for use in gambling, intentional under-performance (either individual or by a coach or official, etc.), and spot betting, not only match-fixing; and
- governing bodies' rules and regulations regarding gambling should only be applicable if they are bargained with the relevant player association and if individual rights, including natural justice are protected.

#### Difficulties Responding to Gambling Issues

The greatest difficulty appears to come from access to information. Licensed betting organisations currently provide information about betting by professional sportspersons. Some licensed betting organisations also report anomalies and cease wagering where there is cause to believe that an integrity issue may have arisen.

Legislation should provide a way in which to gather information about third parties and require all betting organisations to report anomalies without violating individual privacy rights.

Finally, measures should be implemented to protect sportspersons from being subject to intimidation and threats of physical harm and to address instances in which such threats arise in a manner that does not prejudice the sportspersons continued participation in his/her sport.

#### Other Matters

We submit that the NSW Law Reform Commission should join with the law reform commissions of other states and the commonwealth law reform commission to develop a uniform approach to cheating in gambling that ensures that third parties are held accountable and that the individual rights of sportspersons are protected.