

## CONSULTATION DOCUMENT – INTRODUCTION OF A POLICY OF DISCRETION

---

### Introduction

1. DFSNZ is responsible for protecting the integrity and reputation of sport and health of our athletes by:
  - (a) educating, supporting and advocating for clean athletes;
  - (b) deterring and detecting doping, holding dopers to account; and
  - (c) engaging with our wider sporting communities.
2. Our work includes athlete education such as outreach with communities and values-based workshops with schools; engaging with NSOs and other stakeholders; providing an avenue for making confidential reports about doping concerns and, for high performance athletes or those on the pathway, a testing programme.
3. We also bring proceedings for suspected anti-doping rule violations (**ADRV**) in accordance with the Sports Anti-Doping Rules (**SADR**) and the World Anti-Doping Code (**Code**). To date, DFSNZ has adopted the orthodox view in terms of the Code that where we become aware of evidence of a potential ADRV, we are obliged to investigate the issue.
4. Furthermore, if we believe there is sufficient evidence to establish that an ADRV has occurred, then we must bring ADRV proceedings before the Sports Tribunal of New Zealand (for all sports except rugby) or the New Zealand Rugby Union Judicial Committee.
5. Once proceedings are brought, if the ADRV is established to the comfortable satisfaction of the relevant adjudicative body, then that body must apply the mandatory sanctioning set out in the Code (and SADR). WADA has confirmed this.
6. After an investigation into the NZ Clenbuterol website, DFSNZ identified evidence that indicated approximately 40 athletes had committed an ADRV and took proceedings accordingly.
7. During the course of those proceedings being heard, concerns were raised by some sporting organisations and the relevant adjudicative bodies that DFSNZ should (and in fact did) have discretion not to take proceedings against lower level athletes. The feedback questioned whether it was an appropriate use of DFSNZ's limited resources to pursue lower level athletes, and furthermore observed that the sanctioning regime prescribed in the Code (and brought into NZ within SADR) applied the same level of sanctions to high-performance athletes as lower level athletes. This was seen as potentially inequitable.
8. It should be noted that the Sports Anti-Doping Act 2006 requires DFSNZ to make the SADR, and the SADR must reflect certain articles of the Code without substantive changes. This includes the Anti-Doping Rule Violations, sanctions and definitions.

### Considerations

9. DFSNZ has considered the concerns that have been raised:

#### *Sanctions*

10. In relation to sanctions, DFSNZ is concerned that the sanction regime mandated by the Code could, because of perceived harshness, potentially undermine the fight against doping in sport as prescribed in the Code and the SADR.

11. The sanctioning of athletes who have committed an ADRV falls within the jurisdiction of the Sports Tribunal and the New Zealand Rugby Union Judicial Committee respectively. These adjudicative bodies are responsible for applying the SADR (and therefore the Code) when deciding on sanctions to athletes. DFSNZ does not have any decision-making capacity in this regard.
12. Nonetheless, recognising a potential inequity in the Code, DFSNZ has made submissions to WADA as part of the review process for the 2021 Code, seeking the recognition of a “recreational athlete” category, and thereafter greater flexibility to be introduced into the sanctioning regime for such athletes in the 2021 Code. This is likely to be included with in the 2021 Code. Of note, this change will not affect whether or not proceedings should be taken, but in certain circumstances could allow a more lenient sanction to be given.

#### *Discretion*

13. We have focussed now on whether it might be possible to create some discretion into our procedures prior to taking formal action.
14. DFSNZ supports the adoption of a policy that would empower DFSNZ with a discretion to decide whether or not it should commence ADRV proceedings. Under such a policy, DFSNZ would apply a two-fold test, and consider both:
  - (a) whether it believes there is sufficient **evidence** to establish, to the comfortable satisfaction of the relevant adjudicative body, that an ADRV has been committed; and
  - (b) whether taking ADRV proceedings would further the **interests** of the prevention of, and fight against, doping in sport.
15. We believe such a policy would address concerns about the use of resources required to bring cases against lower level athletes which might be used elsewhere, and which could have a detrimental effect on the fight against doping in sport. A broadly similar policy has been adopted by UK Anti-Doping.
16. We note that, due to the obligations under the Code, WADA will retain the ability to challenge any decision by DFSNZ to not bring proceedings. After such a challenge WADA would be able to require DFSNZ to take proceedings where WADA is of the view they should be taken. Such a requirement would have to be enforced soon after the initial decision not to proceed was made.
17. Whether to exercise the discretion to not bring a proceeding on the basis of the general interests of the fight against doping in sport will be a matter for DFSNZ’s sole discretion. The decision would be based on a number of factors, and such discretion would likely be only available to lower level athletes.
18. Where appropriate, DFSNZ would seek input from the relevant sport to ascertain the facts pertaining to a particular athlete, prior to considering whether or not to take proceedings.
19. The starting point for consideration would be that proceedings ought to be taken where there appears to be sufficient evidence of an anti-doping rule violation. In deciding whether or not the general interests of the fight against doping mean that a proceeding should not be taken, DFSNZ envisages taking into account matters such as the athlete’s age, level of anti-doping education, the type and quantity of prohibited substances/methods involved, the seriousness of the alleged ADRV and potential other avenues to address the conduct (such as an agreement to undertake anti-doping education) when deciding whether or not to take proceedings.

#### **Feedback sought**

20. We are now seeking feedback from the sporting community on whether we should adopt such a policy on discretion. In particular, we wish to hear feedback on:

- (a) Whether you are of the view that DFSNZ should adopt the policy.
- (b) What factors ought DFSNZ take into account when considering whether it should not bring ADRV proceedings.

21. Feedback closes on **29 October 2019**. Please send all feedback to [feedback@drugfreesport.org.nz](mailto:feedback@drugfreesport.org.nz).