

**This is a “man’s” world – Is there adequate legal protection from sex, gender and wage discrimination in sport?**

**by**

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## Chapter 1

### 1.1 Introduction

The founder of the modern Olympic Games, Pierre de Coubertin, said that women were not eligible to compete in or attend the games without the risk of punishment.<sup>1</sup> In fact, he was of the view that their inclusion would be impractical, unaesthetic, uninteresting and incorrect.<sup>2</sup> On the face of it, much has changed, and women participate in most sporting codes in the world today.

Despite this, the playing field is not always level. If one has regard to and examines the differences between men and women competing in the same sporting codes, the inconsistencies are apparent. Homosexual, transgender and intersex athletes are also faced with these obstacles when participating in sport.

Even in the 21<sup>st</sup> century, gender discrimination still exists in varying degrees, after years of controversy surrounding Augusta National Golf Club's exclusionary policy in respect of women members, the first two female members were admitted as such during August 2012.<sup>3</sup> During the 2011 Wimbledon tennis tournament, top ranking female seeds were allocated to courts other than centre court and court one.<sup>4</sup> A recent report from the Mumbai Women's Football League (WFL) confirmed that no games were played in the league for a three year period, because the stadiums available were not equipped with change room facilities for women.<sup>5</sup>

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<sup>1</sup> Selami, Ozsoy (2010). *Investigation of Beijing Olympic Games Photos in the Turkish Sports Media in terms of Gender Discrimination*, Ovidus University Annals, Series Physical Education and Sport Volume 10, Issue 2 Pages 369.

<sup>2</sup> *Women at the Olympic Games*, [www.topendsports.com/events/summer/women.html](http://www.topendsports.com/events/summer/women.html)

<sup>3</sup> Ludka, Alexandra (2012), *Augusta National Admits First Women Members, Condoleezza Rice and Darla Moore*, [www.abcnews.go.com/Sports/augusta-national-admits-women-condoleezza-rice-darla-moore](http://www.abcnews.go.com/Sports/augusta-national-admits-women-condoleezza-rice-darla-moore).

<sup>4</sup> Gibson, Owen (2011) *Wimbledon 2011: Leading women allege sex discrimination in scheduling*, [www.guardian.co.uk/sport/2011/jun/24/wimbledon-2011-scheduling-dispute](http://www.guardian.co.uk/sport/2011/jun/24/wimbledon-2011-scheduling-dispute)

<sup>5</sup> SportzPower (2012) *Mumbai Women's Football League kicks off after 3-yr gap*, [www.sportzpower.com/?q=print/18537](http://www.sportzpower.com/?q=print/18537)

My dissertation will examine the forms of discrimination which women, homosexual, transgender and intersex sports people are subjected to, in both amateur and professional world sport and the mechanisms which purport to provide legal protection from such discrimination.

After consideration of the aforementioned, I will consider whether the legal protection from sex, gender and wage discrimination available to these vulnerable athletes in sport is both adequate and effective.

At the outset, I will consider the Treaties and Declarations which have been implemented to protect individuals from gender discrimination and to ensure that the practice of equality is fostered in sport. These include:

- The Universal Declaration of Human Rights<sup>6</sup> and its application to international sports;
- The Yogyakarta Principles<sup>7</sup> which recognises that all individuals regardless of their sex or gender are protected by international human rights laws;
- The Brighton Declaration<sup>8</sup>;
- The Beijing Platform for action<sup>9</sup> which sets out proposals to ensure that equality for woman participating in sport is upheld;
- The Convention on the Elimination of all forms of Discrimination against Women<sup>10</sup> (“CEDAW”) which was adopted by the United Nations General Assembly on 18 December 1979 and became an international treaty in 1981; and

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<sup>6</sup> Universal Declaration of Human Rights, GA Res 217 (III) A, UN Doc. A/RES217 (III) (December 10, 1948); [www.un.org/en/documents/udhr](http://www.un.org/en/documents/udhr)

<sup>7</sup> The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to sexual orientation and gender identity, [www.yogykartaprinciples.org/principles\\_en.pdf](http://www.yogykartaprinciples.org/principles_en.pdf)

<sup>8</sup> The Brighton Declaration on Women and Sport (May 5-8, 1994), [www.iwgti.org/Bin/22126/Brighton\\_Declaration\\_e.pdf](http://www.iwgti.org/Bin/22126/Brighton_Declaration_e.pdf), referred to in Siekmann, J and Soek, J “*The Council of Europe and Sport – Basic Documents*” T.M.C Asser Press (2007) - Recommendation 1701 (2005) Discrimination against women and girls in sport. 27 April 2005, Third Sitting, Document 10483, report of the Committee on Equal Opportunities for Women and Men, Page 390

<sup>9</sup> Fourth World Conference on Women, September 4-15, 1995, Beijing Declaration and Platform for Action

<sup>10</sup> Convention on the Elimination of all forms of discrimination against women (New York 18, 1979) 1249 U.N.T.S 13,19 I.L.M 33 (1980), [www.un.org/womenwatch/daw/cedaw](http://www.un.org/womenwatch/daw/cedaw)

- The Los Angeles Declaration<sup>11</sup> which recognises gender equality in sport and seeks *inter alia* to dedicate more resources to women's sport in the spheres of leadership and management as well as ensuring that the International Olympic Committee ("IOC") and its constituents promote equitable representation in sport.

The Olympic Charter further sets out the principles, rules and bylaws which govern the Olympic Games and which have been adopted by the IOC.<sup>12</sup> One of the IOC's founding principles is that discrimination based on various grounds, including gender, which is specifically relevant to this study, is incompatible with the Olympic Movement. The Charter also goes further to state that the practice of sport is a human right.<sup>13</sup> The IOC seeks to promote Olympism by supporting the promotion of woman in all sports and ensuring that equality between men and woman in sport is implemented.<sup>14</sup> Despite these provisions, the Olympic Games are no stranger to incidents of discrimination and controversy; the 2012 Olympic Games in London were no exception. I will consider instances of individuals who have been adversely affected by these incidents in more detail in the second chapter of my dissertation.

Discrimination has many faces. Gender verification is a contentious issue which has sparked much debate and controversy, however gender discrimination extends further than this, if one considers that certain private clubs in the United States of America, that are exempt from Civil Rights Laws, discriminate and are entitled to discriminate in terms of the First Amendment of the American Constitution. Until recently, the most controversial of these private institutions was Augusta National Country Club who excluded women from becoming members.<sup>15</sup> Augusta National is the venue for the annual Masters Golf Tournament.

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<sup>11</sup> 5<sup>th</sup> IOC World Conference on Women and Sport, 16-18 February 2012, Los Angeles, California

<sup>12</sup> Olympic Charter, International Olympic Committee, July 2011

<sup>13</sup> See 12 *supra*

<sup>14</sup> See 12 *supra*

<sup>15</sup> See 3 *supra* and Dahlberg, T "Sexist Augusta should be ashamed" (April 2013), <http://www.iol.co.za/sport/golf/sexist-augusta-should-be-ashamed-1.1498776>

While this study will focus on the legal issues surrounding gender discrimination, society's perception of this issue will also be considered. This approach is supported by Lenskyj<sup>16</sup> who considers gender discrimination and society's perception of heterosexual females, lesbian and gay individuals who participate in team sport in particular.

Lenskyj details two incidents in her article, the first incident involved Denise Annetts, a female cricketer, who laid a complaint with the Australian Women's cricket team of sexual discrimination based on her heterosexuality. The author also considers the difficulties that lesbian women are faced with when they participate in a predominantly heterosexual sport, and how society discriminates against them because of this. Despite the development of a culture of non-discrimination against minorities based on sexual orientation, regrettably society's idea of what is "normal" seems to dictate.

Wage discrimination is also prevalent in professional and amateur sports, when one draws a comparison between male and female competitors and the structure of team management. Individuals who are subjected to wage and gender discrimination in sport in the United States of America may rely on federal laws to seek a remedy in respect of discriminatory practices namely,<sup>17</sup> The Equal Pay Act<sup>18</sup> which considers whether colleges have engaged in wage discrimination based on gender, Title VII of the Civil Rights Act<sup>19</sup> which prohibits discrimination of protected classes and Title IX of the Education Amendments Act<sup>20</sup> which was enacted to prevent inequality and gender discrimination in educational facilities that are federally assisted.

Perhaps the most talked about incident of gender discrimination in sport, from a South African perspective, was the debacle surrounding the young South African middle distance athlete, Caster Semenya, whose phenomenal performance was overshadowed by claims of uncertainty surrounding her gender, based on her apparent

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<sup>16</sup> Lenskyj, Helen Jefferson (1995) *Sport and the Threat to Gender Boundaries*, Sporting Traditions, volume 12, number 1, pages 47 - 60

<sup>17</sup> Giampetro-Meyer, Andrea (2000) *Recognizing and Remediating Individual and Institutional Gender based wage discrimination in Sport*, winter edition, American Business Law Journal, Westlaw, pages 343 - 386

<sup>18</sup> 29 United States Constitution, section 206 (d)(1), 1995

<sup>19</sup> 42 United States Constitution section 2000e – 2(a)(11), 1994

<sup>20</sup> 20 United States Constitution section 1681(a), 1995

masculine appearance and physique. The question is, are male athletes ever questioned and subjected to discriminatory practices based on certain genetic advantages they may have over each other when competing amongst themselves?<sup>21</sup>

Gender discrimination is rife amongst intersex, transsexual and individuals who suffer from sexual development disorders.<sup>22</sup> I will explore this in more detail in the second chapter of my dissertation.

In a synopsis on homophobia and discrimination on sexual orientation in sport, authors<sup>23</sup> consider the bodies which safeguard against these discriminatory practices in Europe and make recommendations on how to address the issue of discrimination in this regard, such as launching campaigns against homophobia by member states and advancing education which promotes tolerance. The European Gay and Lesbian Sport Federation (“EGLSF”) is one such organisation which actively takes a stand against discrimination and homophobia in sport.

Article 13 of the European Union Treaty, the European Constitution, the European Sport Charter and European Convention on Human Rights prohibits discrimination against gays, lesbians and bisexuals in Europe.

In order to answer the research question posed in this study, relevant articles, legislation, case law as well as Treaties and Declarations referred to in the preliminary literature review will be considered in detail so as to ascertain whether the legal protection which is afforded to sports people who are vulnerable to gender discrimination is both effective and accessible.

Chapter three will further consider the legal protection available to these individuals and the effectiveness thereof as well as a detailed synopsis of Charters, Declarations, Treaties, legislation and applicable case law.

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<sup>21</sup> Cooper, Emily (2010) *Gender Testing in Athletic Competitions – Human Rights Violations: Why Michael Phelps is praised and Caster Semenya is chastised*, The Journal of gender, race and justice, Volumes 13 and 14, page 235

<sup>22</sup> See 21 *supra*

<sup>23</sup> Baks and Malecek, Amsterdam (2004) *Invisible – Synopsis on homophobia and Discrimination on Sexual Orientation in Sport* pages 1-28



In the final chapter, and after consideration of the case studies and associated literature, I will draw a conclusion on whether the legal protection available to vulnerable groups which form part of this research, is effective and accessible and whether the measures which have been put in place to prevent forms of gender discrimination will have a long term effect and ultimately stamp out this practice.

## Chapter 2

### Forms of discrimination

#### 2.1 Introduction

Before considering examples and case studies which deal with discrimination in sport, it is imperative to define certain terms which will be referred to in my dissertation.

*Sex* is a biological term and refers to the biological and physical differences between men and women or the state of being male or female.<sup>24</sup> *Gender* is a social term and refers to ascribed social and cultural male and female roles.<sup>25</sup>

*Sexual orientation* is defined as a person's sexual identity in relation to the gender they are attracted to. Sexual orientation is therefore whether one is heterosexual, homosexual or bisexual.<sup>26</sup>

A *transgender* individual's gender identity does not correspond with that individual's assigned sex at birth, however being a transgender individual does not relate to that person's sexual orientation, but *inter alia* the realisation by that person that the sex they were assigned at birth does not accurately reflect who they feel they are inside.<sup>27</sup>

*Intersex* occurs when an individual is born with reproductive anatomy that does not correspond to the typical definitions of male or female anatomy, such as a girl being

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<sup>24</sup> Currie I, De Waal J, *The Bill of Rights Handbook, Fifth Edition*, Juta (2005), Page 250, *Oxford Advanced Learner's Dictionary of Current English, Sixth Edition*, Oxford University Press (2000), Page 1079

<sup>25</sup> Currie I, De Waal J, *The Bill of Rights Handbook, Fifth Edition*, Juta (2005), Page 250 - 251

<sup>26</sup> [www.oxforddictionaries.com](http://www.oxforddictionaries.com)

<sup>27</sup> <http://www.gaycenter.org/gip/transbasics/whatistrans>

born without a vaginal opening or a boy being born with a notably small penis.<sup>28</sup> These conditions are also referred to as disorders of sex development (“DSD”).<sup>29</sup>

## 2.2 The Olympic Games

The Olympic Games are no stranger to controversy when it comes to issues of discrimination, despite being governed by a Charter<sup>30</sup> that purports to advance equality and the practice of sport as a human right. It was at the Summer Olympics in Paris in 1900 that women first participated.<sup>31</sup> Helene de Pourtalès was the first woman to win a medal in a team event and Charlotte Cooper was the first woman winner of an individual event.<sup>32</sup>

Despite the lapse of 112 years since the first women participated in the Games, the games which took place in the twenty first century saw many firsts, the 2000 Olympics in Sydney saw women being allowed to compete in weightlifting for the first time<sup>33</sup> and the 2012 London Olympics marked the first time women were allowed to compete in boxing in three weight classes.<sup>34</sup> Whisler<sup>35</sup> points out that the introduction of women’s boxing at the Summer Games in 2012 is a fitting tribute to the 40<sup>th</sup> anniversary of Title IX, which will be considered in more detail in the third chapter of my dissertation.

In discussion with a veteran boxing coach, Christy Halbert, Beacham<sup>36</sup> avers that the reason for women’s exclusion from the sport for so many years stemmed from *inter alia* social perceptions and concerns that participation could be detrimental to women’s health and adversely affect their chances of rearing or nursing their children.

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<sup>28</sup> [www.isna.org/faq/what-is-intersex](http://www.isna.org/faq/what-is-intersex)

<sup>29</sup> Peterson, Anna (2010) “*But she doesn’t run like a girl...: The ethic of fair play and the Flexibility of the binary concept of sex*”, page 318

<sup>30</sup> See 12 *supra*

<sup>31</sup> <http://www.olympic.org/paris-1900-summer-olympics>

<sup>32</sup> <http://www.topendsports.com/events/summer/firsts.htm>

<sup>33</sup> *Women at the Olympics*, [www.topendsports.com/events/summer/women.htm](http://www.topendsports.com/events/summer/women.htm)

<sup>34</sup> [www.wban2012.com](http://www.wban2012.com)

<sup>35</sup> Whisler, John, *No more skirting issue: Women join Olympic boxing club, 22 July 2012*, [www.mysanantonio.com](http://www.mysanantonio.com)

<sup>36</sup> Beacham, Greg, (July 2012) “*Olympic Women’s Boxing: Lucia Rijker watches as Anna Laurell, Mary Kom bring Sport to Olympics*”, [www.huffingtonpost.com](http://www.huffingtonpost.com).

It is noteworthy however that women's boxing did not make its entry into the 2012 Olympics void of controversies relative to sex discrimination. The International Amateur Boxing Association (AIBA) was of the view that women boxers should wear skirts when participating in their events, instead of boxing trunks as worn by their male counterparts. AIBA's reasoning behind their decision was that identification of male and female boxers may be problematic as both sexes wear the same style of protective head gear. After much controversy however, AIBA changed their initial view and ruled that women boxers may choose whether they wear boxing trunks or skirts while participating.<sup>37</sup>

The 2012 London Olympics also marked the first Olympic Games that every participating nation was represented by a female competitor after Saudi Arabia's late inclusion of a female athlete in its team.<sup>38</sup>

Basketball is also a sport that has attracted negative attention at the London Games, specifically surrounding the United States of America, Japan and Australia. The governing body of Australian Basketball has been accused of sexual discrimination in light of the fact that its women's Olympic team was relegated to travelling to London in economy class, while the men's team travelled in business class.<sup>39</sup> The Japanese women's football team was also relegated to economy class in instances when the male football team travelled to London in business class.

The Japanese Football Association justified the travel arrangements on the basis that the male footballers are professionals and the female footballers are not.<sup>40</sup> The captain of the women's American Olympic Basketball team also commented in a recent article that despite the fact that her team had lost only one game in the last 16 years of participation and had won four gold medals in a row since the Atlanta Games in 1996, her team received little publicity and support.<sup>41</sup>

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<sup>37</sup> See 35 *supra*

<sup>38</sup> Wolfman-Arent, Avi (2012) "50 Biggest Storylines leading into the 2012 Olympics", [www.bleacherreport.com](http://www.bleacherreport.com)

<sup>39</sup> Sutherland, Tom (2012) "Australian basketball accused of sexual discrimination", [www.thesportfeed.com](http://www.thesportfeed.com)

<sup>40</sup> Passa, Dennis (2012) "Olympians complain of gender discrimination after complaints Japan's champion women's football team", [www.theoaklandpress.com/articles/2012/07/20/sports/doc50092d3ea02ff825133285.txt](http://www.theoaklandpress.com/articles/2012/07/20/sports/doc50092d3ea02ff825133285.txt)

<sup>41</sup> Schoch, John (2012) "US Olympic Basketball: Diana Taurasi says "What about us", [www.bleacherreport.com](http://www.bleacherreport.com)

Even though women have been participating in the Games for the past 112 years, after the Beijing Games in 2008, British cyclist, Victoria Pendleton voiced her anger about the inability of women to participate in more events, as is the case with her male counterparts.<sup>42</sup> The Women's Sports and Fitness Foundation (WSFF) stated that in the 2008 games, 1704 more men participated in the games than women. The Chief Executive of WSSF was of the view that before the IOC could achieve real equality, equal participation in sport must be resolved.<sup>43</sup>

The 2012 Olympic Games were the first in which the same amount of events can be competed in by both men and women in cycling;<sup>44</sup> however flagship sports like athletics still showcase more events for men than women.<sup>45</sup>

### 2.3 The Winter Olympic Games

In an article by Morris<sup>46</sup> another instance of discrimination against woman in the Olympic Games is considered, namely the exclusion of a female event for ski jumping in the Winter Olympics. Until the 1950's woman participated in this event in Nordic competitions, but doctors believed that dangerous sports such as ski jumping had the potential to adversely affect fertility in woman.

The IOC's reasoning for its policy on the exclusion of a women's ski jumping event is to prevent a situation in which medals are "diluted", due to the fact that there are fewer elite woman ski jumpers in the world than their male counterparts. Female athletes of the United States attempted to place reliance on Title IX of the Education Amendment Act<sup>47</sup> during the 2002 Olympic Games to ensure that they could partake in this

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<sup>42</sup> [www.insidethegames.com/show-news.php?id=6402](http://www.insidethegames.com/show-news.php?id=6402), (2012) "IOC needs to take action on gender equality claim WSFF"

<sup>43</sup> See 42 *supra*

<sup>44</sup> [http://www.olympic.org/Documents/Reference\\_documents/Factsheets/Olympic\\_Summer\\_Programme.pdf](http://www.olympic.org/Documents/Reference_documents/Factsheets/Olympic_Summer_Programme.pdf) - The Programme of the Games of the Olympiad / 2 July 2012, Page 3

<sup>45</sup> Laine, Kate (2012), "Gender Equality and the 2012 Olympic Games", <http://www.iwg-gti.org/catalyst/july-2012/gender-equality-and-the-2012-oly/>

<sup>46</sup> Morris, Michele (2010) *Olympic Gender Discrimination*, Huffington Post Sports, [www.huffingtonpost.com/michele-morris/olympic-gender-discrimination\\_b\\_46159](http://www.huffingtonpost.com/michele-morris/olympic-gender-discrimination_b_46159)

<sup>47</sup> 20 United States Constitution section 1681(a), 1995. Legislation enacted in 1972

discipline to no avail. The Canadian Supreme Court upheld a lower court decision which acknowledged gender discrimination in this instance; however the court refused to hold the IOC to the Canadian Human Rights Charter.<sup>48</sup>

The IOC has recently approved the inclusion of ski jumping and four other events in the women's programme for the Winter Olympics in Sochi in 2014. Wilson<sup>49</sup> is of the view that the IOC's decision was sealed by the women's performance in this event in the Nordic World Championships, during which the competitors jumped under very challenging weather conditions.

## 2.4 Soccer

The South African National Women's team, Banyana Banyana received a bonus for qualifying for the 2012 Olympics. According to an article in the City Press newspaper, the women's teams' bonus for Olympic qualification was less than the team's male counterparts received per match if they were successful.<sup>50</sup>

## 2.5 Boxing

In 1993, American boxer, Dallas Malloy's dreams of being an Olympic boxer were thwarted, as team USA prevented her from fighting. As a result of this, an American Civil Liberties Group filed a Court Application based on this discrimination. Due to these actions, the presiding Judge temporarily nullified the ban on women's boxing. Even though Malloy never realised her dream, her plight raised media and public awareness to the obstacles facing female boxers, simply because they were women.<sup>51</sup>

In 1998, British boxer Jane Couch took the British Boxing Board to court for sex discrimination as the Board refused to grant her a license to fight in the United

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<sup>48</sup> 2009 (BCSC) 942 (Sup Ct. (BC) and Patel S, "Gender Issues – Women Ski jumping and Olympic programme included" - Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, (VANOC) (2009) BCSC 942.

<sup>49</sup> Wilson, Stephen (2011) "IOC approves inclusion of ski jumping in 2014 Winter Olympics in Sochi" [www.utsandiego.com/news/2011/apr/06\\_IOC\\_approves\\_womens\\_ski\\_jumping\\_for\\_2014\\_games/](http://www.utsandiego.com/news/2011/apr/06_IOC_approves_womens_ski_jumping_for_2014_games/)

<sup>50</sup> Moleme, Ntombi (2012) "SAFA in gender equality row", [www.sport24.co.za/Soccer/SAFA-to-face-gender-commission](http://www.sport24.co.za/Soccer/SAFA-to-face-gender-commission).

<sup>51</sup> Charette, Mitch (2012) "London 2012: 10 Things you should know about women's boxing in Its Olympic debut" [www.bleacherreport.com](http://www.bleacherreport.com)

Kingdom. After a long litigious battle however, she was eventually able to fight in the United Kingdom.<sup>52</sup>

It is noteworthy, that until the enactment of the South African Boxing Act,<sup>53</sup> which amended to a great extent, and partially repealed the Boxing and Wrestling Control Act,<sup>54</sup> it was prohibited for women to partake in tournaments as boxers or wrestlers in South Africa.<sup>55</sup>

## 2.6 Gender and sex discrimination in sports teams' management and support staff

In 1994, the now retired manager of Manchester United Football Club, Sir Alex Ferguson, wrote a letter to a young female physiotherapist in response to a job application received from her. Ferguson justified his rejection of her application, not on her ability, but on the basis that the “lads” in his team were not comfortable with females treating sports injuries in the training complex, although they were not averse to having a female physiotherapist treat their injuries in hospital.<sup>56</sup>

That unfortunate incident happened almost two decades ago; however it seems that the playing field is yet to be leveled when one considers women's roles in employment and management, specifically in English Football. The first female lines person in English Premiership Football Sian Massey, was the subject of a sexist row in 2011 when two male football commentators commented on Ms Massey's knowledge of the

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<sup>52</sup> *Couch v British Board of Boxing Control*, Unreported Case Number 2304231/97, a decision of Employment Tribunal of 31 March 1998, and see 51 *supra*, and see James, Mark “*Sports Law*” Palgrave Macmillan (2010) Part 4, Chapter 11, The commercialisation of sport – Regulating sporting relationships in English Law, Page 236-7.

<sup>53</sup> SA Boxing Act (2011)

<sup>54</sup> Act (1954) and Louw, A with Blanpain, R, Colucci, M – “*International Encyclopedia of Laws*”, Wolters Kluwer (2009) Part I, Chapter 1, Page 65 – Public Regulation of Sport, Legislation Affecting Sport

<sup>55</sup> Basson, Loubser - “*Sport and the Law in South Africa*”, Butterworths (2000), Chapter 2 – Sport, Public Policy and the role of the State, Chapter 2-9

<sup>56</sup> Gallagher, Ian (2011) “*A woman physio? My lads won't like that, said Sir Alex, as his comments spark new 'sexism in football' claims*”, [www.dailymail.co.uk/news/article-1356474/Sir-Alex-Ferguson-sexism-football-row-Woman-physio-My-lads-wont-like-that-html#ixzz23R3Cz4Av](http://www.dailymail.co.uk/news/article-1356474/Sir-Alex-Ferguson-sexism-football-row-Woman-physio-My-lads-wont-like-that-html#ixzz23R3Cz4Av)

off-side rule and that it would probably be best if she was taken aside and have the rules explained to her by a man.<sup>57</sup>

Even in management positions, the attitude to woman is similar. Karren Brady, the first female Chief Executive of West Ham United, was also criticised by the same commentators who took issue with Ms Massey, when Brady remarked in a newspaper column that she had experienced sexism in its worst form as a woman in football.<sup>58</sup>

In October 2000, Maria Grant took the Lancashire Cricket Club in the United Kingdom to an employment tribunal, as she alleged sexual discrimination due to her application for a position at the club being turned down, apparently due to the fact that she had insufficient knowledge of the men's game, this despite holding an executive position in women's cricket.<sup>59</sup> In November 2000, the employment tribunal ruled in her favour and awarded her a monetary amount as compensation.<sup>60</sup>

In the United States, a number of women were successful in legal action which they instituted against sporting bodies for sexual discrimination and sexual harassment. In 2004, Deborah Theobald, an employee in the employ of the White Sox, an American baseball team alleged sex discrimination when she was passed over for a promotion after working for the team for eight years and receiving exemplary work reviews.

Theobald was again passed over for promotion in 2008 and 2010, in both instances; men who were less qualified than her were promoted.<sup>61</sup>

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<sup>57</sup> "Off duty: The female referee in sexism storm pictured as a party girl", (2011) [www.dailymail.co.uk/femail/article-1350265/Andy-Gray-Richard-Keys-sexism-storm-Sian-Massey-party-girl.html#ixzz23RCTVJ5h](http://www.dailymail.co.uk/femail/article-1350265/Andy-Gray-Richard-Keys-sexism-storm-Sian-Massey-party-girl.html#ixzz23RCTVJ5h), S, O'Leary, J, Welch, R, Boyes, S and Naidoo, U, "Sports Law, Fourth Edition", Routledge (2012), Chapter 10 – Sports Participants and the Law of Discrimination, Page 464

<sup>58</sup> "Sky Sports presenters Keys and Gray score an own goal as microphone picks up sexist diatribe against female linesman and West Ham chief, Karen Brady" (2011) [www.dailymail.co.uk/sport/football/article-1349790/Sky-sports-Richard-Keys-Andy-Grays-sexist-diatribe-female-linesman.html](http://www.dailymail.co.uk/sport/football/article-1349790/Sky-sports-Richard-Keys-Andy-Grays-sexist-diatribe-female-linesman.html) and Booth, R, "The return of sexism in football" The Guardian, 24 January 2011, [www.guardian.co.uk/football/2011/jan/24/return-sexism-in-football](http://www.guardian.co.uk/football/2011/jan/24/return-sexism-in-football).

<sup>59</sup> Tolputt, Harriet (2000) "Woman cricket enthusiast claims discrimination in job rejection" [www.independent.co.uk/news/uk/home-news/woman-cricket-enthusiast-claims-discrimination-in-job-rejection-634330.html](http://www.independent.co.uk/news/uk/home-news/woman-cricket-enthusiast-claims-discrimination-in-job-rejection-634330.html)

<sup>60</sup> "Lancs lose sex discrimination case" (2000) <http://news.bbc.co.uk/sport2/hi/cricket/counties/1004143.stm>

<sup>61</sup> Lu, Andrew (2011), "Sex discrimination in Sports? Woman sues the White Sox" [www.chicagoemploymentattorneysblog.com/2011/08/sex-discrimination-in-sports-woman-sues-the-white-sox.html](http://www.chicagoemploymentattorneysblog.com/2011/08/sex-discrimination-in-sports-woman-sues-the-white-sox.html)



In 2005, NASCAR was rocked by scandal when the first female inspector, Mauricia Grant instituted action against the body on the basis of sexual discrimination and wrongful termination of employment. She was fired from her position in 2007, after laying a complaint about the sexual and racial discrimination that she was being subjected to. She filed a \$225 million lawsuit, which was later settled in a private arbitration.<sup>62</sup>

In 2007, Anucha Browne-Sanders, an American basketball executive, sued and was successful in her litigation against both the coach of the New York Knicks, Isiah Thomas for sexual harassment and the owner of the team, Madison Square Garden for unlawfully dismissing her when she complained about Thomas' conduct. She was awarded \$11, 6 million as damages in the lawsuit.<sup>63</sup>

The problems which plague the international sports management and discrimination, rear their head in South Africa as well. The South African Women's Football Association (SAWFA) referred the South African Football Association (SAFA) to the Commission for Gender Equality due to SAFA's slow progress in addressing gender equality in the sport.<sup>64</sup> In a press release issued by the Commission of Gender equality on 28 June 2012, The issues which were of concern to SAWFA including the disparity between its budget and SAFA's budget and inadequate support for women's football were brought to the fore. In this regard, the Commission for Gender Equality urged SAFA to develop an appropriate strategic direction and set of targets as well as put measures in place to attain equality.<sup>65</sup>

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<sup>62</sup> Zirin, Dave (2008) "Who is Mauricia Grant? NASCAR knows", [www.huffingtonpost.com/dave-zirin/who-is-mauricia-grant-nas\\_b\\_111913.html](http://www.huffingtonpost.com/dave-zirin/who-is-mauricia-grant-nas_b_111913.html)

<sup>63</sup> Case 1:06-cv-00589-GEL-DCF, and Zambito, Thomas, (2007), "Browne-Sanders slams Isiah Thomas in sex-harass lawsuit" [www.nydailynews.com/sports/basketball/knicks/browne-sanders-slams-isiah-thomas-sex-harass-lawsuit-article-1.2478237](http://www.nydailynews.com/sports/basketball/knicks/browne-sanders-slams-isiah-thomas-sex-harass-lawsuit-article-1.2478237)

<sup>64</sup> See 50 *supra*

<sup>65</sup> Commission for Gender Equality SAFA hearing – Press release 28 June 2012 – [http://www.cge.org.za/index.php?option=com\\_content&view=article&id=149:commission-for-gender-equality-safa-hearing--press-release-28-june-2012-&catid=3:newsflash&Itemid=91](http://www.cge.org.za/index.php?option=com_content&view=article&id=149:commission-for-gender-equality-safa-hearing--press-release-28-june-2012-&catid=3:newsflash&Itemid=91)

## 2.7 Gender and sex discrimination in amateur and collegiate sports

Title IX of the Education Amendments Act is American legislation which was passed in 1972.<sup>66</sup> I will deal with the enactment of this legislation as well as the effects of its enactment on female participation in collegiate sports in chapter three of my dissertation. This legislation states that women are entitled to equal participation in all sports which men participate in agencies which receive state funding.<sup>67</sup>

## 2.8 Gender Testing

Gender testing was first introduced at the Winter Olympic Games in 1968 in Grenoble.<sup>68</sup> The first athlete to ever fail a gender test at the Olympic Games was Ewa Klobukowska. Despite the fact that the genetic condition which led to her failure of the gender test gave her no advantage over her competitors; she was banned from competing in the Olympic Games and professional sport.<sup>69</sup> It is noteworthy that years after being banned from participation in the Olympics due to doubts raised surrounding her gender she gave birth to a child.<sup>70</sup>

Even though eight athletes failed gender tests at the Atlanta Olympics in 1996; they were all cleared after undergoing physical examinations.<sup>71</sup> In 1999, athletes were no longer required to submit to gender testing, unless questions were raised surrounding their gender identity.<sup>72</sup>

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<sup>66</sup> Title IX of the Education Amendments of 1972 20 U.S.C. §§ 1681 - 1688

<sup>67</sup> Castle, KJ Jean (2010) "Gender discrimination in sports", [www.livestrong.com/article/247625-gender-discrimination-in-sports](http://www.livestrong.com/article/247625-gender-discrimination-in-sports)

<sup>68</sup> "Gender testing at the Olympic Games", [www.topendsports.com/events/summer/gender-testing.htm](http://www.topendsports.com/events/summer/gender-testing.htm)

<sup>69</sup> See 68 *supra*

<sup>70</sup> [www.independent.co.uk/sport/olympics/tarnished-gold-some-of-the-great-Olympic-cheats-7869830.html](http://www.independent.co.uk/sport/olympics/tarnished-gold-some-of-the-great-Olympic-cheats-7869830.html)

<sup>71</sup> <http://www.theguardian.com/sport/2008/jul/30/olympicgames2008.gender>

<sup>72</sup> Genel, Myron (2000) Medscape Women's Health 5(3)- "Gender Verification No More?"  
<http://ai.eecs.umich.edu/people/conway/TS/OlympicGenderTesting.html>

Despite the IOC's decision to stop mandatory gender testing at the Olympics in 1999, the 21<sup>st</sup> century saw more instances of gender testing with sometimes dire consequences. Although Mozambican sprinter and gold medalist at the Sydney Games in 2000, Maria Mutola, was never subjected to a gender test, allegations and doubts surrounding her gender followed her throughout her career due to her apparent male physique and appearance.<sup>73</sup> During 2006, Indian runner, Santi Sandarajan failed a gender test, and as a result attempted to commit suicide during 2007.<sup>74</sup>

Perhaps the most recent and contentious case surrounding gender testing was that of South African 800 metre sprinter, Caster Semenya at the 2009 World Championships. In an incredible race, she beat the defending world champion by 2.45 seconds. Her performance raised eyebrows about her gender in light of her apparent masculine features.<sup>75</sup> The International Association of Athletics Federations (IAAF) requested Semenya to undergo gender verification tests. Before the IAAF could publicise the results, an Australian newspaper reported that Semenya had male internal organs, despite having genitalia of a female. The IAAF never disclosed its results; however the newspaper report caused uproar and much discontent.<sup>76</sup>

The question that authors like Peterson,<sup>77</sup> Jordan-Young and Karkazis<sup>78</sup> have asked is "has the real reason for the adoption of gender testing in sport been lost in translation"?

During the 1960's, when gender testing was first instituted, as well as during the 1980's and early 1990's the purpose was to prevent fraud by male imposters attempting to

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<sup>73</sup> Silkstone, Dan (2009) "Athlete could be disqualified over gender doubts", [www.theage.com.au/articles/2009/08/18/1250362070807.html](http://www.theage.com.au/articles/2009/08/18/1250362070807.html)

<sup>74</sup> Farquhar, Gordon (2009) "Semenya's sex test explained", [www.bbc.co.uk/bloga/gordonfarquhar/2009/8/this\\_must\\_be\\_an\\_awesome.html](http://www.bbc.co.uk/bloga/gordonfarquhar/2009/8/this_must_be_an_awesome.html)

<sup>75</sup> Peterson, Anna (2010) "But she doesn't run like a girl...: The ethic of fair play and the Flexibility of the binary concept of sex", pages 315 - 335

<sup>76</sup> Gleeson, Mark (2012) "Semenya keen to shrug off suspicion", [www.iol.co.za/sport/athletics/semenya-keen-to-shrug-off-suspicion-1.1323887](http://www.iol.co.za/sport/athletics/semenya-keen-to-shrug-off-suspicion-1.1323887)

<sup>77</sup> See 71 *supra*

<sup>78</sup> Jordan-Young, Rebecca and Karkazis, Katrina (2012) "The IOC's superwoman complex: how flawed sex-testing discriminates", [www.guardian.co.uk](http://www.guardian.co.uk)

participating in women's events.<sup>79</sup> Even though gender testing is no longer mandatory, the IOC has indicated that in respect of the 2012 games, it would likely change its sex verification policy to target women who produce or secrete high levels of testosterone, a condition known as hyperandrogenism.<sup>80</sup> In June 2012, the IOC published regulations and procedures to be followed in respect of female hyperandrogenism which would govern the 2012 London Games. The IOC avers that the regulations are not intended to determine sex, simply eligibility to participate.<sup>81</sup>

Jordan-Young and Karkazis<sup>82</sup> submit that even though men produce more androgen than women, the androgen levels of men and women can overlap and a 2000 study funded by the IOC and European Union show that 8% of female athletes tested above what was considered to be the normal range for females, and interestingly 25% of men tested below the male range for testosterone production. Jordan-Young and Karkazis also suggest that testosterone is not a foreign hormone to women's bodies and often women who produce more testosterone and who get taken to task about a masculine appearance, have no edge over their fellow competitors.<sup>83</sup>

How does society's perception of gender and performance in sport affect the need for gender testing?

In her article, Cooper<sup>84</sup> considers this point and asks the question why Caster Semenya is chastised due to her athletic prowess which is put down to genetic advantage, but Michael Phelps, who also possess unusual genetic features such as an armspan longer than his height and increased flexibility, which no doubt gives him an advantage over his peers, is lauded as a hero. There has been much debate during

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<sup>79</sup> Wolfe, Lahle, "Sex Testing Women Athletes: Another double standard for Women – The degrading, discriminatory practice of gender testing female athletes, Part 1" [www.womeninbusiness.about.com/od/sexism/a/Sex-Testing-Women-Athletes-Another-Double-Standard-for-women](http://www.womeninbusiness.about.com/od/sexism/a/Sex-Testing-Women-Athletes-Another-Double-Standard-for-women)

<sup>80</sup> See 74 *supra*

<sup>81</sup> *The IOC Regulations on Female Hyperandrogenism, Games of the XXX Olympiad in London, 2012*. Issued in accordance with Rule 19.3.10 of the Olympic Charter, pursuant to Rule 44 of the Olympic Charter

<sup>82</sup> See 74 *supra*

<sup>83</sup> See 74 *supra*

<sup>84</sup> Cooper, Emily J (2011) "Gender testing in Athletic Competitions – Human Rights Violations: Why Michael Phelps is Praised and Caster Semenya is Chastised", Volume 13 and 14 of *The Journal of Gender, Race and Justice* – pages 233 - 264

Phelps' career about whether Phelps has Marfan syndrome, which is a syndrome which affects the body's connective tissue.<sup>85</sup>

Cooper leaves the reader with the following food for thought. Why is the possible genetic advantage which Phelps has over competitors not questioned, when Semenya's supposed genetic advantage is? Perhaps the outward appearance of Phelps as a fit, attractive male role model is in tune with society's perception of high performance in sport, whereas the perhaps masculine appearance of a female athlete who excels is frowned upon.

In this regard, one must consider the case of American volleyball player, Flo Hyman, who became captain of the team during 1984 and was diagnosed with Marfan syndrome after her death in 1986.<sup>86</sup> In an article by Reeser,<sup>87</sup> the author states that as far as he was aware, Hyman was never subjected to gender testing or any scrutiny surrounding her gender and the physical advantage she had over her competitors. In light of the Semenya debacle decades later, one wonders if Hyman's feminine features and physique saved her from Semenya's fate.

In an article written by Wolfe,<sup>88</sup> regarding the double standards on display when women are subjected to sex testing, the author suggests that perhaps, even in the modern era in which we live, a female athlete cannot possibly be excellent, unless of course she fits society's perception of how a woman should look. If she does not, her excellence and elite performance is subject to scrutiny.

## 2.9 Gender discrimination against homosexual sportspeople

The Olympic Charter advocates a policy of non discrimination in respect of participants at the Olympic Games.<sup>89</sup> Rights campaigner, Peter Tatchell, states in an article written

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<sup>85</sup> Kent, Julie (2008) "Marfan's Syndrome: Michael Phelps – blessing or curse", [www.clevelander.com/node/6446](http://www.clevelander.com/node/6446)

<sup>86</sup> Demak, Richard(1986) "Marfan Syndrome: A silent killer", [www.sportsillustrated.cnn.com/siforwomen/top\\_100/69/](http://www.sportsillustrated.cnn.com/siforwomen/top_100/69/)

<sup>87</sup> Reeser, JC (2005) "Gender identity and sport: is the playing field level?" [www.bjsm.bmj.com/content/39/10/695.full](http://www.bjsm.bmj.com/content/39/10/695.full)

<sup>88</sup> See 79 *supra*

<sup>89</sup> Tatchell, Peter (2012), "Olympics: Open letter to Lord Coe and the IOC" [www.petertatchell.net/sport/Olympics-Open-Letter-to-Lord-Coe-&-IOC.htm](http://www.petertatchell.net/sport/Olympics-Open-Letter-to-Lord-Coe-&-IOC.htm)

regarding discrimination against homosexual athletes, that while the IOC prohibits discrimination, it fails to take steps to enforce its anti-discriminatory stance.<sup>90</sup> Tatchell suggests that the IOC disqualify countries who discriminate against homosexual athletes and further issue a statement that Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) athletes are welcome to participate in the Games.

In many instances, athletes are reluctant to “come out” because of the real fear of discrimination which may have an adverse effect on their careers. Tatchell states that in more than 150 countries, athletes fail to disclose their sexual status for fear of not being selected to the team,<sup>91</sup> it must also be remembered that in more than 78 countries, homosexuality is still illegal, says Chief Executive of the Human Dignity Trust, Jonathan Cooper.<sup>92</sup>

South African Olympic archer, Karen Hultzer waited until after her event at the 2012 Games to announce that she is a lesbian,<sup>93</sup> unfortunately many sportspeople chose to publicise their sexual orientation after their careers, as was evident in the case of Olympic mens’ trampoline medalist in the 2000 Games, Ji Wallace.<sup>94</sup> He only went public about being gay in 2005, as he feared that he would be bullied and not have support from his team, and also feared losing endorsements and sponsorships because of his sexual orientation and the stigma attached to it.

Another blatant discriminatory practice against lesbians was the policy of Rene Portland, the erstwhile coach of the Penn State University women’s basketball programme.<sup>95</sup> Portland set out her policy very clearly as “no drinking, no drugs, no lesbians”. In 2006 a heterosexual student, Jennifer Harris filed a lawsuit, as she

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<sup>90</sup> Shaw, Andrew “Olympic Protesters Urge: No discrimination”[www.gaynewsnetwork.com.au/news/national/7941-olympic-protestors-urge-no-discrimination.html](http://www.gaynewsnetwork.com.au/news/national/7941-olympic-protestors-urge-no-discrimination.html)

<sup>91</sup> See 90 *supra*

<sup>92</sup> “Hultzer fighting homophobia” (2012), [www.sport24.co.za/othersport/olympics2012/news/Hultzer-fighting-homophobia-20120805](http://www.sport24.co.za/othersport/olympics2012/news/Hultzer-fighting-homophobia-20120805)

<sup>93</sup> “SA archer comes out as gay role model” (2012), <http://olympics.mobi.supersport.com/olympics/blogs/guest-column/SA-archer-comes-out-in-London-as-gay-role-model>

<sup>94</sup> See 93 *supra*. The problem of homophobia in sport had had tragic consequences, when in 1990, footballer Justin Fashanu committed suicide when he revealed that he was gay.

<sup>95</sup> Belge, Kathy, “Training Rules – Documentary film about homophobia in women’s sports”, [www.lesbianlife.about.com/od/lesbianmoviereview/p/TrainingRules.htm](http://www.lesbianlife.about.com/od/lesbianmoviereview/p/TrainingRules.htm)

alleged that she was harassed and discriminated against because Portland believed that she was gay.<sup>96</sup> Portland finally resigned in 2007, however she had been the team's coach for 27 years before that, and her openly discriminatory policy was implemented unchecked.<sup>97</sup>

It is noteworthy however that Ron Brown the assistant coach of an American football team, The Nebraska Cornhuskers, openly discriminated against gay people and went as far as saying that it would be an honour to be fired for his anti-gay views still holds his position.<sup>98</sup>

Brown also testified against an anti-discrimination ordinance in March 2012, which sought to extend protection to gay and transgender people.<sup>99</sup> Brown has attracted much success throughout his career as a coach.<sup>100</sup> It must then be considered whether success at all costs in sports takes precedence over human rights and people's right to choose.

## 2.10 Discrimination against women on the basis of club membership

Augusta National Golf Club, the venue for the annual Masters tournament admitted its first two female members in August 2012.<sup>101</sup> Augusta's discriminatory policies were protected from state scrutiny in the United States of America in light of the fact that Augusta is a privately funded club and receives no state assistance.<sup>102</sup> While the club is privately funded, the publicity and hype which surrounded Augusta's erstwhile policies on membership and its recent admittance of female members places Augusta squarely into the public arena.

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<sup>96</sup> see 95 *supra*

<sup>97</sup> see 95 *supra*

<sup>98</sup> "Ron Brown, University of Nebraska Assistant Coach: being fired for my anti-gay views would be an honor", [www.huffingtonpost.com/.../ron-brown-nebraska-football-coach-anti-gay-views\\_n\\_1455712.html](http://www.huffingtonpost.com/.../ron-brown-nebraska-football-coach-anti-gay-views_n_1455712.html)

<sup>99</sup> see 98 *supra*

<sup>100</sup> Ron Brown's profile, assistant coach, [http://www.huskers.com/ViewArticle.dbml?DB\\_OEM\\_ID=100&ATCLID=1354986](http://www.huskers.com/ViewArticle.dbml?DB_OEM_ID=100&ATCLID=1354986)

<sup>101</sup> See 3 *supra*

<sup>102</sup> Jolly-Ryan, Jennifer (2006) "Teed off about private club discrimination on the taxpayers dime: tax exemptions and other government privileges to discriminatory private clubs" William and Mary Journal of Women and the Law, Fall edition, page 2, Westlaw

The current chairman of Augusta National, Billy Payne was once an advocate of women's rights and a severe opponent to Augusta's policies relative to membership. During April 2012 when Payne was questioned about Augusta's rather antiquated stance in this regard, he hid behind the statement that membership issues were private,<sup>103</sup> however in the same breath, voiced his concerns and battled to understand why the participation and growth rate of golf in the world was declining.<sup>104</sup> The author of that article, Brennan, pointed out the irony of Payne's statement in circumstances where Augusta National is a symbol of exclusion and selective participation.

While some see the change in policy as a victory for female equality in sports, an article by White<sup>105</sup> begs the following question: Is the end of this exclusionary era perhaps a case of "too little too late", has the club's choice of female members, who are both well connected and successful added insult to injury, and is the real injustice that we find ourselves praising a long overdue decision by Augusta National to change its policies?

Augusta National is not the only sports club with a history of excluding women from being members. St Andrews Golf Club in Scotland had no female members since its establishment in 1843. The club was concerned with the enactment of the Equality Act in United Kingdom's legislation in 2010, which may have resulted in the club facing prosecution for its failure to allow women members to join the club.<sup>106</sup> While the club never expressly excluded women from membership, its rules and guidelines surrounding membership never dealt with the application procedures for women and focused only on the categories of male membership available.<sup>107</sup>

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<sup>103</sup> Brennan, Christine (2012) "Keeping Score – Payne ducks issue he once championed" USA Today newspaper, 5 April 2012 edition, page 3C

<sup>104</sup> See 103 *supra*

<sup>105</sup> White, Gordon (2012), "At Augusta National, It's Too Little, Too Late", [www.thepilot.com/news/2012/aug/26/augusta-national-its-too-little-too-late](http://www.thepilot.com/news/2012/aug/26/augusta-national-its-too-little-too-late)

<sup>106</sup> "Now for the birdies: historic all-male St Andrews Golf Club forced to admit women" (2011), [www.dailymail.co.uk/news/article1381844/historic-male-St-Andrews-golf-club-forced-to-admit-women.html](http://www.dailymail.co.uk/news/article1381844/historic-male-St-Andrews-golf-club-forced-to-admit-women.html)

<sup>107</sup> See 106 *supra*



The Marylebone Cricket Club (MCC), the owner of Lords Cricket Ground in London, only admitted female members to the club in 1998, despite being in existence for 200 years prior to the admission of its first female member.<sup>108</sup>

This chapter has simply highlighted examples of gender and sex discrimination on various grounds involving high profile individuals and well known institutions. What is more concerning perhaps are the discriminatory practices that take place daily in sport which are committed against lesser known participants.

In Chapter three of my dissertation, I will consider the legal mechanisms available which are designed to protect vulnerable groups against discrimination in sport, and the efficacy of those protective measures in preventing exploitation.

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<sup>108</sup> Agence France-Presse, "England's women cricketers Charlotte Edwards and Claire Taylor get MCC honour", [www.sport.ndtv.com/cricket/.../192811-englands-women-cricketers-charlotte-edwards-and-claire-taylor-get-MCC-honour](http://www.sport.ndtv.com/cricket/.../192811-englands-women-cricketers-charlotte-edwards-and-claire-taylor-get-MCC-honour)

## Chapter 3

### Legal mechanisms to protect against gender and sex discrimination

#### 3.1 The position in South Africa

South Africa's democracy is founded on its Constitution which is an Act of parliament adopted during 1996.<sup>109</sup> The Bill of Rights<sup>110</sup> which is set out in the Constitution enshrines the rights of all people in South Africa and affirms *inter alia* the right to equality.<sup>111</sup> The right to equality encompasses the right not to be discriminated against on the basis of *inter alia* sex and gender either by the State or any other individual.<sup>112</sup>

The Commission for Gender Equality is a state institution that must act impartially as it has been created to ensure the right to gender equality is safeguarded and promoted.<sup>113</sup> Its functions include the protection, development and attainment in society of gender equality. The Commission's powers include monitoring, investigating and reporting on issues in this regard. In order to give effect to Section 9 of the Constitution it was necessary to enact applicable legislation.<sup>114</sup> As such, The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>115</sup> was enacted so as to prohibit unfair discrimination and promote equality.

The preamble of this Act affirms South Africa's obligations in respect of binding treaties and international law including the Convention on the Elimination of All Forms of

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<sup>109</sup> The Constitution of the Republic of South Africa 1996, adopted on 8 May 1996, amended on 11 October 1996

<sup>110</sup> Chapter 2 of The Constitution

<sup>111</sup> Chapter 2, Section 9 of The Constitution

<sup>112</sup> Section 9 (3) and (4) of The Constitution

<sup>113</sup> Section 181 (1)(d) and Section 181(2) of The Constitution and Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman, "Constitutional Law of South Africa" (First published 1996)(Revision service 5 – 1999), Chapter 14, Page 64

<sup>114</sup> Section 9(2) of The Constitution

<sup>115</sup> Act 4 of 2000

Discrimination against Women (CEDAW)<sup>116</sup> which will be discussed in more detail in this Chapter of my dissertation.

The Promotion of Equality and Prevention of Unfair Discrimination Act states that no person may be unfairly discriminated against, which conduct would include the limitation of access of women in respect of resources as well as any practice that undermines equality between men and women.<sup>117</sup>

The Schedule to the Act sets out illustrative lists of unfair practices in certain sectors. The tenth practice of the Schedule makes specific reference to sport and membership of clubs and associations, more specifically unfairly refusing to consider application for membership of a club or denying a member access to any benefit which the club may offer.<sup>118</sup> It is noteworthy that even though the section deals with gender inequality, the focus is squarely on the prevention of differentiation between men and women which is indicative of the prevention of sex discrimination, this section of the Act does not seem to deal with gender discrimination. The term gender is in fact not even defined in the Act. The term “intersex” is defined; however the term “sex” is defined to include the definition of intersex.

I am of the view that the legislature’s failure to carefully distinguish between the definitions of intersex, sex, gender and sexual orientation, as defined in Chapter two of my dissertation is problematic and has the potential to result in incomplete protection for all vulnerable groups who are subject to discrimination. The Act makes provision for special Courts to deal with issues arising therefrom. For purposes of the Act, all High Courts in South Africa are Equality Courts as well as in certain instances, Magistrates Courts, provided that the Minister designates such Magistrates Court to also act as an Equality Court.<sup>119</sup>

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<sup>116</sup> Adopted on 18 December 1979 by the United Nations General Assembly, became an international treaty on 3 September 1981

<sup>117</sup> Section 8 of Act 4 of 2000

<sup>118</sup> Schedule entitled Illustrative List of Unfair Practices in certain sectors. Item 10 – Clubs, Sport and Associations, as read with Section 29 of Act 4 of 2000

<sup>119</sup> Section 16(1) of Act 4 of 2000

Any action which is instituted in the Equality Court may be so instituted by a person acting in their own interest, for a class of persons, a person acting in the public interest or by the Commission for Gender Equality.<sup>120</sup>

The Presiding officer of the Equality Court will make a determination whether the matter which has been referred to him, and whether the complainant is before the correct Court. In the event that the Presiding Officer determines the matter is before the Court correctly, he will request the Clerk of the Court to allocate a date for the hearing of the matter.<sup>121</sup> The order which the Presiding Officer makes may be an interim order, a declaratory order, an order for damages to be paid by the offending party or an order that an unconditional apology be made by the offending party. The order is of course subject to appeal or review to the High Court, Supreme Court of Appeal or Constitutional Court as the case may be.<sup>122</sup>

Equality Courts are designed to be accessible. It is not necessary for a complainant to be legally represented, although legal representation is not prohibited. The formalities associated with the Courts are minimal and members of the public can turn to the Clerk of the Equality Court for assistance and to obtain information to help them progress in their litigation.<sup>123</sup>

In principle, the Equality Courts should be popular avenues for airing complaints, specifically in a country where inequality is rife. Despite this, many lay persons do not know that the Equality Courts exist and the Clerks of the Court often receive inadequate training which prevents the process from being undertaken expeditiously.<sup>124</sup>

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<sup>120</sup> Section 20(1) of Act 4 of 2002

<sup>121</sup> Lane, Phillipa (2005) The Transformative Human Rights Unit "South Africa's equality Courts: An early assessment"  
<http://www.csvr.org.za/wits/papers/paprctp5.htm>

<sup>122</sup> Section 21 (1) of Act 4 of 2002, Currie I, De Waal J, The Bill of Rights Handbook, Fifth Edition, Juta (2005), page 271

<sup>123</sup> Section 23 (1) to (5) of Act 4 of 2002

<sup>124</sup> Kaersvang, Dana (2008) The Journal of the International Institute Volume 15, Issue 2, "Equality Courts in South Africa: Legal Access for the poor", <http://quod.lib.umich.edu/j/iii/4750978.0015.203?rgn=main;view=fulltext>.

### 3.2 The Definitions of Treaties, Declarations and Conventions

*Treaties* are instruments which are binding at international law concluded between international entities.<sup>125</sup>

*Declarations* are not always legally binding and are formed in instances when the parties involved wish to declare their aspirations, instead of creating legal obligations. A declaration may well be legally binding on the parties, provided it accords with the intention of the parties to create such rights and reciprocal obligations.<sup>126</sup>

*Conventions* are generally used in instances where parties wish to conclude multilateral treaties, and the provisions of same are therefore legally binding on the parties involved provided the parties ratify same.<sup>127</sup>

### 3.3 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted in 1948 by the United Nations General Assembly. The need for this Declaration arose after World War Two with a view to never again subject individuals to human rights abuses.<sup>128</sup>

Even though the UDHR is not a treaty, it gives effect to principles in the United Nations Charter which are binding. It is also noteworthy that despite the UDHR not being binding, significant diplomatic pressure can be exerted on countries that elect to violate its provisions.<sup>129</sup> During 2011, the United Nations Human Rights Council adopted a Resolution called “Promoting awareness, understanding and the application of the Universal Declaration of Human Rights through sport and the Olympic ideal”.<sup>130</sup>

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<sup>125</sup> [http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1\\_en.xml](http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml)

<sup>126</sup> See 125 *supra*

<sup>127</sup> See 125 *supra* and <http://www.un.org/womenwatch/daw/cedaw/history.htm>

<sup>128</sup> <http://www.humanrights.com/what-are-human-rights/brief-history/the-united-nations.html>

<sup>129</sup> The United National Association Canada – Questions and Answers about the Universal Declaration of Human Rights  
<http://www.unac.org/rights/questions.html>

<sup>130</sup> 18/23 (A/HRC/RES/18/23)

The Resolution recognises that sport can be used to promote the Universal Declaration of Human Rights, the potential that sport has in educating the youth to promote the practice of sport without discrimination and the principles enshrined in the Olympic Charter.<sup>131</sup>

### **3.4 The Convention of Elimination of All Forms of Discrimination against Women (CEDAW)**

This convention was adopted in 1979 by the United Nations General Assembly and became an international treaty in 1981. The Convention was adopted to incorporate principles of equality between men and women and to ensure that steps are taken to facilitate effective protection against discrimination and its ultimate elimination.<sup>132</sup> CEDAW defines discrimination against women as follows:<sup>133</sup>

*“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or other fields”*

The countries which have ratified the convention agree to be legally bound to put provisions in place and submit national reports on the measures taken in their countries to confirm compliance with their treaty obligations.<sup>134</sup> 187 countries have ratified the treaty and six have not, including the United States of America.<sup>135</sup> Lowen<sup>136</sup> is of the view that while the Obama administration is in support of the ratification of the treaty, concerns have been raised by more conservative groups, such as The

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<sup>131</sup> See 130 *supra*

<sup>132</sup> <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

<sup>133</sup> See 132 *supra*

<sup>134</sup> Article 1 of CEDAW, and see Overview of the Convention, United Nations Division for the advancement of women  
<http://www.un.org/womenwatch/daw/cedaw/>

<sup>135</sup> [www.womenstreaty.org/index.php/about-Cedaw/cedaw-by-the-numbers](http://www.womenstreaty.org/index.php/about-Cedaw/cedaw-by-the-numbers)

<sup>136</sup> Lowen, Linda (March 2012) “Why won’t the United States ratify CEDAW? US – The only democracy opposed to the International Bill of Rights for women”, <http://womensissues.about.com/od/feminismequalrights/a/CEDAWUS.htm>

Concerned Women for America who fear that the ratification of this treaty may result in the acceptance of same sex marriages, force the Government to pay men and women equally for work they may do as well as have a negative impact on family values. Lowen<sup>137</sup> also avers that the difficulties surrounding the ratification of this treaty are largely politically motivated, with neither political party in America wanting to “rock the boat”.

Article 10(g) and Article 13(c) of CEDAW deal specifically with the equal access of women to *inter alia* sports and cultural life. In order to illustrate the application of CEDAW and the importance of its provisions, I refer to Australian case law, namely *Fernley v Boxing Authority of New South Wales and another (2001) FCA 1740 (10 December 2001)*.

The applicant sought to be registered with the Boxing Authority of New South Wales, her application for registration was denied in light of the fact that only men could apply to be registered with the aforementioned Boxing Authority. The Applicant applied to the Federal Court in Sydney on the basis of a contravention of the Sex Discrimination Act 1984.<sup>138</sup> One of the objectives of the aforementioned Act, namely Section 3 thereof is to give effect to CEDAW. Despite this provision and the emphasis which is placed on the underlying principles in Australian legislation, the Presiding Judge ruled against the Applicant due to the Court’s consideration of other provisions of the Sex Discrimination Act.<sup>139</sup>

Despite the obvious advantages associated with CEDAW’s principles and the purpose for which it was created, it is marred not only by weak and selective enforcement measures but also by a lengthy process to have a compliant adjudicated upon by the

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<sup>137</sup> Lowen, Linda (March 2010) “CEDAW – What is President Obama’s position on CEDAW? Bipartisanship influences Obama Administration’s reluctance to ratify CEDAW” [www.womenstreaty.org/indexhttp://womensissues.about.com/d/internationalwomensrights/a/CEDAWObama.htm](http://www.womenstreaty.org/indexhttp://womensissues.about.com/d/internationalwomensrights/a/CEDAWObama.htm)

<sup>138</sup> An Australian Act of parliament which prohibits discrimination on *inter alia* the grounds of sex

<sup>139</sup> [www.globaljusticecenter.net/casebank/bykeywrod/sex-gender.html](http://www.globaljusticecenter.net/casebank/bykeywrod/sex-gender.html), *Fernley v Boxing Authority of New South Wales and another (2001) FCA 1740 (10 December 2001)*

Committee on the Elimination of Discrimination Against Women (COM) which is a body created by CEDAW to monitor the implementation of CEDAW.<sup>140</sup>

### 3.5 The Beijing Declaration and Platform for Action – Fourth World Conference on Women

The Beijing Declaration and Platform for Action was adopted in 1995.<sup>141</sup> It reaffirmed the principle of equal rights for women enshrined in *inter alia* the Universal Declaration of Human Rights<sup>142</sup> and CEDAW.<sup>143</sup> The delegates proposed that numerous actions be taken by Governments in various spheres, including making sports facilities available in support of the advancement of women in athletics and physical activity including coaching and participation in sport on all levels,<sup>144</sup> create and support programmes to educate the community to make opportunities available for women to participate in sport, similar to those opportunities available to men and boys,<sup>145</sup> and make provision for the full and equal participation in sports activities relative to the girl child.<sup>146</sup>

### 3.6 The Yogyakarta Principles

The Yogyakarta Principles are principles on applying international human rights law in relation to sexual orientation and gender identity as well as the standards with which States must comply to ensure the human rights of these individuals are upheld. The Principles were adopted in 2006.<sup>147</sup>

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<sup>140</sup> Forgues, Chantelle (2000) Boston University Law Journal, “A global hurdle: The implementation of an international non-discrimination norm protecting women from gender discrimination in international sports”

<sup>141</sup> <http://www.un.org/womenwatch/daw/beijing/platform/plat1.htm#statement>

<sup>142</sup> See 125 *supra*

<sup>143</sup> See 112 *supra*

<sup>144</sup> [http://www.unesco.org/education/information/nfsunesco/pdf/BEIJIN\\_E.PDF](http://www.unesco.org/education/information/nfsunesco/pdf/BEIJIN_E.PDF) - Strategic objective B.4, provision 83(m)

<sup>145</sup> [http://www.unesco.org/education/information/nfsunesco/pdf/BEIJIN\\_E.PDF](http://www.unesco.org/education/information/nfsunesco/pdf/BEIJIN_E.PDF) - Women and Health - provision 107(f)

<sup>146</sup> [http://www.unesco.org/education/information/nfsunesco/pdf/BEIJIN\\_E.PDF](http://www.unesco.org/education/information/nfsunesco/pdf/BEIJIN_E.PDF) - Strategic objective L.4, provision 280(d)

<sup>147</sup> The Official version of the Yogyakarta Principles, [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)



The Principles encourage the rights and recognition of these rights regardless of one's sexual orientation and gender identity.<sup>148</sup> It is noteworthy that the Principles fail to deal with sport, however I am of the view, upon reading the document which embodies the Principles that it may be wide enough to be of assistance should it become necessary in the sporting sphere.

### 3.7 The Brighton Declaration on Women and Sport

The aim of the Declaration is to develop a culture which acknowledges the value of women's involvement in sport in every respect,<sup>149</sup> as well as ensuring all women and girls have an opportunity to participate and to recognise the contributions women make in sport.<sup>150</sup>

The Principles of the Brighton Declaration are to foster equity and equality in society and sport,<sup>151</sup> promote equal opportunities to participate in sport and the fair allocation of resources to women,<sup>152</sup> the planning and management of sporting facilities to ensure that they are appropriately designed to meet women's needs,<sup>153</sup> the provision of an equitable range of opportunities to girls who are participating in sport,<sup>154</sup> development of high performance sports opportunities for girls and women - taking the needs of women into consideration and ensuring that aspects such as sponsorship and recognition are equal to those opportunities afforded to men,<sup>155</sup> making provision for more female involvement in leadership roles in sport including management and coaching,<sup>156</sup> facilitate education, training and research surrounding women's involvement in sport,<sup>157</sup> put resources in place to advance the Declaration's principles

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<sup>148</sup> The Yogyakarta Principles, Preamble, [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)

<sup>149</sup> Brighton Declaration on Women and Sport – Scope and Aims of the Declaration  
[http://www.sportsbiz.bz/womensportinternational/conferences/brighton\\_declaration.htm](http://www.sportsbiz.bz/womensportinternational/conferences/brighton_declaration.htm)

<sup>150</sup> See 149 *supra*

<sup>151</sup> See 149 *supra*

<sup>152</sup> See 149 *supra* – First principle

<sup>153</sup> See 149 *supra* – Second principle

<sup>154</sup> See 149 *supra* – Third principle

<sup>155</sup> See 149 *supra* – Fifth principle

<sup>156</sup> See 149 *supra* – Sixth principle

<sup>157</sup> See 149 *supra* - Seventh principle

and urge governments to incorporate gender equity in sport in both domestic and international policies.<sup>158</sup>

### 3.8 The Los Angeles Declaration

The World Conference on Women and Sport meets every four years to assess the progress made in achieving gender equality in sports.<sup>159</sup> The Fifth World Conference on Women and Sport was held during February 2012 in Los Angeles.<sup>160</sup> At the end of the conference, the delegates approved the Los Angeles Declaration which included recommendations relative to the promotion of gender equality and participation in sports both on the field and in leadership positions. The focus of the conference centered around the fact that while gradual progress was being made in achieving gender equality in sports participation, not enough emphasis was being placed on achieving equality when it came to leadership roles and management positions.<sup>161</sup>

The delegates acknowledged that female and male participation in sport in the Olympic movement has leveled somewhat as well as the fact that programmes have been put in place and resources employed which have been utilised to train, educate and promote the concept of fair play in sport.<sup>162</sup>

The delegates also made certain recommendations which form part of the Los Angeles Declaration namely *inter alia* that more resources should be attributed to the advancement of skills in sports management and leadership roles, the IOC's decision to link gender equality to good governance into the Olympic Movement should be adopted as policy by sports organisations as well as recommending that the IOC establish a platform for sharing ideas relative to women and sport.<sup>163</sup>

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<sup>158</sup> See 149 *supra* – Ninth and Tenth principles

<sup>159</sup> <http://www.olympic.org/losangeles2012>, "5th World Conference on Women and Sport calls for more women in leadership roles"

<sup>160</sup> The Los Angeles Declaration published on [www.olympic.org/losangeles2012](http://www.olympic.org/losangeles2012)

<sup>161</sup> See 160 *supra*

<sup>162</sup> See 160 *supra*

<sup>163</sup> See 160 *supra*

### 3.9 The Olympic Charter

The Olympic Charter is the codification of the principles of Olympism and Rules which have been adopted by the International Olympic Committee. As discussed earlier in my dissertation, the Charter states that the practice of sport is a human right and should be practiced without the presence of any form of discrimination.<sup>164</sup>

The Olympic Charter is a legally binding document on all states that are a party to it and various sanctions exist for non-compliance such as a reprimand or suspension from the IOC for periods of time. Chapter 6 of the Charter, more specifically Item 61 thereof states that the Court of Arbitration for Sport has exclusive jurisdiction to adjudicate on any dispute which may arise in connection with the Olympic Games.<sup>165</sup>

The IOC is the enforcer of the Olympic Charter.<sup>166</sup> There are however potential pitfalls which arise from the IOC's supreme authority in all Olympic related matters. In light of the fact that the IOC is a non governmental organisation, it does not have to uphold the principles set out in anti-discrimination treaties such as CEDAW. As such, failure to comply with the Olympic Charter has the potential to attract real consequences, while failure by member states to adhere to treaties such as CEDAW attracts little or no penalties for non-compliance.<sup>167</sup>

### 3.10 The Court of Arbitration for Sport (CAS)

The Court of Arbitration for Sport is an international arbitration body which resolves disputes related to sport. The headquarters of CAS is located in Switzerland, as well as

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<sup>164</sup> The Olympic Charter, [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf)

<sup>165</sup> Chapter 6 of the Olympic Charter relating to measures and sanctions, disciplinary procedures and dispute resolution.

<sup>166</sup> See 140 *supra*

<sup>167</sup> See 140 *supra*

two courts in Sydney and New York.<sup>168</sup> The primary function of CAS is to facilitate the settlement of all types of sports disputes by way of arbitration and mediation.

The matters which are referred to CAS are referred either by way of an arbitration agreement concluded between the parties who seek recourse from CAS, or in terms of Rule 61 of the Olympic Charter which are disputes related to the Olympic Games, in light of the proviso in the Olympic Charter that states that CAS has exclusive jurisdiction in resolving these disputes.<sup>169</sup>

CAS was originally conceived by the IOC and became a part of the IOC in 1984. However, due to concern surrounding the impartiality of CAS, the Court of Arbitration for Sport is currently overseen by the International Council for Arbitration in Sport (ICAS).<sup>170</sup>

It must also be noted that besides facilitating the process of dispute resolution, CAS may also be called upon by sporting bodies to give an advisory opinion on legal questions as well as establish non-permanent tribunals at sporting events which initiate proceedings relative to those events.<sup>171</sup>

The following parties and/or bodies are entitled to apply to CAS for relief:<sup>172</sup>

- Athletes/Sports people in their personal capacities;
- Clubs and Sports Federations;
- Organising Committees and Event Sponsors; and

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<sup>168</sup> Gardiner, S, James, M, O'Leary, J, Welch, R with Blackshaw I, Boyes, S and Caiger, A "Sports Law – Third Edition" (2006) Cavendish Publishing, Chapter 6 – Alternative Dispute Mechanisms in Sport, Page 232. Also known as TAS (*Tribunal Arbitral du Sport*); [www.tas-cas.org](http://www.tas-cas.org) and The Court of Arbitration for Sport, [www.inbrief.co.uk/sports-law/court-of-arbitration-for-sport.html](http://www.inbrief.co.uk/sports-law/court-of-arbitration-for-sport.html)

<sup>169</sup> McLaren, Richard (2001) Marquette Sports Law Review, Volume 12, Issue 1, Article 20 "Introducing the Court of Arbitration for Sport: the ad hoc division of the Olympic Games", <http://scholarship.law.marquette.edu>, pages 517 – 541.

<sup>170</sup> See 168 *supra*

<sup>171</sup> Gardiner, S, James, M, O'Leary, J, Welch, R with Blackshaw I, Boyes, S and Caiger, A "Sports Law – Third Edition" (2006) Cavendish Publishing, Chapter 6 – Alternative Dispute Mechanisms in Sport, Page 234 and Cloete, R "Introduction to Sports Law in South Africa", LexisNexis Butterworths (2005) Chapter 12 – Dispute Resolution and the Court of Arbitration for Sport, Page 207

<sup>172</sup> Cloete, R "Introduction to Sports Law in South Africa", LexisNexis Butterworths (2005) Chapter 12 – Dispute Resolution and the Court of Arbitration for Sport, Page 210

- Television companies in the context of broadcasting rights in respect of sporting events.

The procedure that CAS will follow will depend largely on the dispute it is called to adjudicate on. The dispute may be of a contractual nature, in which case CAS will apply the principles relative to ordinary arbitration or in the event that a decision is required to be made relating to the appeal of a decision made by a sporting body, the principles relative to appeal arbitration will apply.<sup>173</sup>

In light of the fact that CAS adjudicates on disputes from all over the world, the parties generally agree on which law will be applicable to the arbitration, failing which Swiss law will apply.<sup>174</sup>

There are limited instances in which parties can appeal the decision of CAS, to the Swiss Federal Tribunal, which include *inter alia* lack of jurisdiction, a procedural violation or failure to act in accordance with public policy.<sup>175</sup>

Due to the limited circumstances in which a party may appeal a decision, CAS is generally the final decision maker in sporting disputes and Anderson submits that it is for this reason that its influence on administration in sport will be amplified.<sup>176</sup> While CAS has the jurisdiction to adjudicate on any dispute relating to sport, provided it is correctly referred, CAS have never, since its inception in 1984 adjudicated on a case relative to gender or sex discrimination. CAS generally adjudicates on anti-doping

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<sup>173</sup> See 168 and 169 *supra*

<sup>174</sup> Lewis, A, Taylor, J “Sport: Law and Practice – 2<sup>nd</sup> edition (2008) Tottel Publishing, Chapter A7 – The Court of Arbitration for Sport, Paragraph A7.72, Page 342

<sup>175</sup> Article 190(2) and Article 191 of the Swiss Federal Code on Private International Law of 18 December 1987 and Lewis,A, Taylor, J “Sport: Law and Practice – 2<sup>nd</sup> edition (2008) Tottel Publishing, Chapter A7 – The Court of Arbitration for Sport, Paragraph A7.108 Page 353 and see 176 *infra*

<sup>176</sup> Gardiner, S, James, M, O’Leary, J, Welch, R with Blackshaw I, Boyes, S and Caiger, A “*Sports Law – Third Edition*” (2006) Cavendish Publishing, Chapter 6 – Alternative Dispute Mechanisms in Sport, Page 243. See 167 and 168 *supra* and Anderson, J “*Modern Sports Law – A textbook*” Hart Publishing (2010), Page 88, Chapter 3 – Arbitration and Alternative Dispute Resolution in Sport

matters, commercial issues such as transfer of players as well as corruption in sport.<sup>177</sup>

It is certainly an advantage that having CAS adjudicate on a dispute will result in an expeditious outcome which is only appealable in very limited instances, however the costs involved in proceeding in this forum are likely very high, which may be a factor which turn affected persons away.

### 3.11 The United Kingdom's position on addressing gender discrimination

The current legislation which regulates the position relative to gender discrimination in the United Kingdom is the Equality Act of 2010,<sup>178</sup> however in order to draw a comparison between the current and past dispensation, I will also briefly consider the position as was regulated by the 1975 Sex Discrimination Act.<sup>179</sup>

The Sex Discrimination Act was an act of parliament which sought to prevent direct and indirect discrimination in all areas, including employment, education and training as well as participation in sporting activities.<sup>180</sup> The provisions of the Act also promoted equality of opportunity between men and women. The Act also made provision for the establishment of the Equal Opportunities Commission which amongst other things was an advisory body whose function it was to eliminate discrimination.

In two articles, by Pearson<sup>181</sup> and Mcardle<sup>182</sup> which will be discussed briefly below, the sections of the act which pertain to sport are considered, namely Section 7 and Section 44. Section 7 relates to employment scenarios where employing a man is a genuine

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<sup>177</sup> Recent cases adjudicated by CAS related to anti-doping were the matters of Dwayne Chambers and the matter of Pakistani cricketers Butt and Asif for involvement in match fixing.

<sup>178</sup> <http://www.legislation.gov.uk/ukpga/2010/15/introduction>

<sup>179</sup> The 1975 Sex Discrimination Act has been repealed in its entirety by the Equality Act 2010.

<sup>180</sup> Sex Discrimination Act 1975 - <http://www.legislation.gov.uk/ukpga/1975/65/enacted> and Lewis, A, Taylor, J "Sport: Law and Practice – 2<sup>nd</sup> edition (2008) Tottel Publishing, Chapter D3 – Discrimination (Claire Weir, Blackstone Chambers), Paragraph D3.28, Page 645

<sup>181</sup> Pearson, Geoff (2002) Liverpool Law review 24, Pages 137 - 156 "A game of the half: The manageress and the Sex Discrimination Act"

<sup>182</sup> Mcardle, David (1999) Culture, Sport, Society, Volume 2 pages 44-57 "Can Legislation Stop me from playing? The Distinction between Sports Competitors and Sport Workers under the United Kingdom's Sex Discrimination Laws"

occupational requirement due to the physical strength required to perform the duties associated with the position or where the appointment of a women would be uncomfortable or indecent for reasons of privacy and dignity. Section 44 of the Act offered protection from discrimination in instances where the parties were actually participating, in same sex competitions and evidence existed that a participant was factually at a disadvantage when compared to her competitors.<sup>183</sup>

Pearson considers the non application of the Act and the resultant lack of progress in football by women on the basis of direct and in some instances indirect discrimination. Section 7 could of course relate to a female football club manageress having to address her players at half or full time in the change rooms while players were in a state of undress. Pearson states that there are of course alternatives to this, including the possibility that a manager or coach could address her players at a time when it could not be alleged that her presence infringed on her players rights to dignity or privacy.<sup>184</sup>

Pearson argues that while the 1975 Act sought to protect women and promote their entry into the football industry, the “old boys club” ideology which is still very much alive has resisted advancement by women in the sport. He also avers that the football industry can hardly rest easy when it comes to steps taken in leveling the playing field in this regard, because employing women as receptionists or tea ladies is not enough. Until such time as women are the ones running the boardroom and not cleaning it, true gender equality cannot said to be achieved.

In an article by Mcardle, the focus is shifted to Clause 44 of the 1975 Sex Discrimination Act. Section 44 deals specifically with participation in sport. This clause draws a distinction between women participating in events against women and women participating against men in sporting events. In the former instance, discrimination was

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<sup>183</sup> see 52 *supra*, Page 237 and *Thompson v Professional Pool Players Organisation*, Unreported case, Employment Appeal Tribunal, 11/3/1992 and James, Mark “*Sports Law*” Palgrave Macmillan (2010) Part 4, Chapter 11, The commercialisation of sport – Regulating sporting relationships in English Law, Page 237

<sup>184</sup> see 181 *supra*, page 149 – 150 and Gardiner, S, James, M, O’Leary, J, Welch, R with Blackshaw I, Boyes, S and Caiger, A “*Sports Law – Third Edition*” (2006) Cavendish Publishing, Chapter 14 – Sports Participants and the Law of Discrimination, Page 565

not permitted, however in the latter case when parties seek to participate in mixed sex events, discrimination is permitted.<sup>185</sup>

Mcardle discusses landmark cases relating to gender discrimination in sport,<sup>186</sup> however the only case discussed in the article in which a Section 44 defence was successful was that of *Bennet v The Football Association*.<sup>187</sup>

In Bennett, a young girl wanted to join a boy's football team; this was contrary to the rules of both the regional Football Association and the national body that governed the sport. The action was taken on appeal, which was also upheld, primarily on the basis that the physical strength of the average women would not be able to match the physical rigours associated with mixed football.<sup>188</sup>

Mcardle is of the view that a three stage test could be employed to ascertain whether discrimination is lawful in terms of Section 44, namely whether the applicant seeks to participate in the sport, whether she seeks to participate as a competitor, and whether she seeks to compete against men in the same event. If the answer to all of these questions is in the affirmative, discrimination against women who seek to participate may be legal, but this section makes no reference to instances in which a woman applies for a coaching or managerial position in light of the fact that coaches and managers are not participants.<sup>189</sup>

### 3.12 The current position – the 2010 Equality Act

This Act repealed the previous anti-discrimination laws which were applicable in the United Kingdom, including the Sex Discrimination Act of 1975. The Equality Act was

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<sup>185</sup> See 182 *supra*

<sup>186</sup> *Greater London Council v Farrar* (1980) ICR 266, *The British Judo Association v Petty* (1981) ICR 660 EAT pp 665-66, *Hardwick v The Football Association* EAT/1036/97; EAT/54/98, unreported, decision of employment tribunal of 30 April 1999 and *Couch v The British Boxing Board of Control - Unreported case 2304231/97(1997)*

<sup>187</sup> Unreported case – decided in 1978 CA transcript 591 and Gardiner, S, James, M, O'Leary, J, Welch, R with Blackshaw I, Boyes, S and Caiger, A "Sports Law – Third Edition" (2006) Cavendish Publishing, Chapter 14 – Sports Participants and the Law of Discrimination, Page 565 and Lewis, A, Taylor, J "Sport: Law and Practice – 2<sup>nd</sup> edition ( 2008) Tottel Publishing, Chapter D3 – Discrimination, Paragraph D3.59.

<sup>188</sup> See 187 *supra* as well as 182 *supra*

<sup>189</sup> See 182 *supra*



intended to simplify and consolidate the law regulating issues surrounding discrimination, including discrimination on the basis of sex and sexual orientation in the form of either direct or indirect discrimination. In terms of Section 4 of the Act, sex and sexual orientation are defined as protected characteristics for the purposes of interpreting the Act.<sup>190</sup>

The Equality Act, like its predecessor makes specific provision regulating discrimination in sport as set out in Section 195 of the Act<sup>191</sup>

*“ (1) A person does not contravene this Act, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity.*

*(2) A person does not contravene Section 29,33,34 or 35 so far as relating to gender re-assignment, only doing anything in relation to the participation of a transsexual person as a competitor in a gender-affected activity if it is necessary to do so in relation to the activity –*

- (a) fair competition; or*
- (b) the safety of competitors.*

*(3) A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to the average person of the other sex as competitors in events involving the activity;*

*(4) In considering whether a sport, game or other activity is a gender-affected activity in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors.*

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<sup>190</sup> Section 4 of the Equality Act, 2010 and Gardiner, S, O’Leary, J, Welch, R, Boyes, S and Naidoo, U, “*Sports Law, Fourth Edition*” Routledge (2012), Chapter 10 – Sports Participants and the Law of Discrimination, Page 461

<sup>191</sup> Section 195 of the Equality Act, 2010

(5) ...

(6) ...”

Subsections 5 and 6 of this section deal with the selection of participants for a country or association on the basis of nationality, and are as such not necessarily related to the topic of my dissertation.

This Act also regulates the position in respect of associations and sports clubs in certain instances. A club with 25 members or more will not be permitted to discriminate against their members or their guests.<sup>192</sup> The Act does however not prevent clubs from forming when the basis of its formation relates to a specific and joint interest of a certain group of people.<sup>193</sup>

As such, a club cannot grant membership to a person on less favourable terms, then it would a person whose interests are protected in terms of the Act,<sup>194</sup> including refusing entry to a guest on the grounds of a protected characteristic as defined above as well as apply indirect discrimination by applying different standards to women by, for example preventing them from using the club facilities on certain days of the week, even if membership is offered to them at a reduced rate.<sup>195</sup>

In a lecture delivered by Michael J Beloff QC, entitled “*The specificity of sport – Rhetoric or Reality*”, Beloff considers amongst other things, how the law which regulates sexual discrimination in sport in fact supports the contention that sport is regulated differently when one considers the common law.<sup>196</sup>

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<sup>192</sup> Government Equalities Office - “*Equality Act 2012: What do I need to know? A summary guide to your rights*”[http://sta.geo.useconnect.co.uk/pdf/401727\\_GEO\\_EqualityLaw\\_Rights\\_acc.pdf](http://sta.geo.useconnect.co.uk/pdf/401727_GEO_EqualityLaw_Rights_acc.pdf)

<sup>193</sup> See 192 *supra*

<sup>194</sup> The Equality and Human Rights Commission – Equality Act 2010 – Guidance for service providers, Volume 1 of 3, [http://www.equalityhumanrights.com/uploaded\\_files/EqualityAct/service\\_providers\\_association\\_club\\_society.pdf](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/service_providers_association_club_society.pdf)

<sup>195</sup> The Equality Act, Factsheet of Frequently asked questions, issued June 2011, <http://www.sportandrecreation.org.uk/news/13-06-2011/equality-act-toolkit>

<sup>196</sup> The Edward Grayson Lecture, delivered on 15 May 2012 , Page 17 and 18

Beloff is of the view that Section 195 of the Equality Act seems to have picked up where Section 44 of the Sex Discrimination Act of 1975 left off, due to the fact that Section 195 essentially renders discrimination lawful if it can be established that the physicality and stamina of one competitor will have an unfair advantage over the physical attributes of the other.<sup>197</sup>

Ironically, as was pointed out by Matthew Syed,<sup>198</sup> a British journalist and broadcaster, the organisation of sporting events, in which the issue of physical attributes and stamina of competitors is hardly an issue, such as snooker and billiards, are still governed by competitions being arranged in which men and women compete separately.

In this regard, it would appear that a sporting body would no longer be able to rely on the provision of a gender specific employment opportunity, this would for example, prevent sportsmen or sports bodies from alleging that the presence of a woman in the change room, may infringe rights to dignity and privacy.<sup>199</sup>

### 3.13 Gender discrimination and the United States of America

Title IX of the Education Amendments Act<sup>200</sup> became law in the United States in June 1972. The content of Title IX is set out below:

*“No person in the United States shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education programme or activity which receives federal funding and assistance”*

While the legislation does not force an institution to implement sport programmes and facilities in instances when the institution does not currently practice that sport, the legislation requires any sporting activity which is currently being performed to receive

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<sup>197</sup> See 196 supra

<sup>198</sup> See 196 supra

<sup>199</sup> In terms of Section 7 of the now repealed Sex Discrimination Act, it would not have been unlawful to discriminate against a woman if it could be established that the position was gender specific.

<sup>200</sup> Lowen, Linda “What is Title IX”, <http://womensissues.about.com/od/milestonesadvancements/f/WhatisTitleIX.htm>

proportional federal funding as between the men and women's programmes.<sup>201</sup> As such, the entire men's programme must be compared to the women's programme and not just the comparison of certain sports in the programme.<sup>202</sup>

The United States Department of Education's Office for Civil Rights (OCR) is tasked with the enforcement of the legislation and compliance therewith.<sup>203</sup> The penalty for failing to adhere to Title IX is the withdrawal of state funds from the institution; however this action has never been taken, despite there being numerous instances in which the provisions of Title IX are not upheld.<sup>204</sup>

The OCR uses a three prong test to establish compliance with Title IX. The landmark decision of *Cohen v Brown University*,<sup>205</sup> which will be discussed in more detail further on in this chapter referred to 10 factors which are required to be considered by the OCR in assessing whether the provisions of Title IX have been complied with. These provisions are:

- selection levels of competition are required to accommodate the interest and ability of both sexes;
- availability of equipment and supplies;
- fair scheduling of games and practices;
- travel allowances;
- opportunity of receiving coaching and tutoring;
- assignment of and compensation of coaches;
- provisions relative to change rooms and practice facilities;

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<sup>201</sup> Glover, William Jr (2011) "Gender Participation Issues Related To Sports - Title IX Of The Education Amendments Of 1972" <http://www.lexisnexis.com/community/lexishub/blogs/practiceareacommentary/archive/2011/03/25/gender-participation-issues-related-to-sports-title-ix-of-the-education-amendments-of-1972.aspx>

<sup>202</sup> See 201 *supra*

<sup>203</sup> Galles, Kristen (2010) American Bar Association publication, Volume 37, "Title IX and the importance of a reinvigorated OCR", [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol37\\_2010/summer2010/title\\_ix\\_and\\_the\\_importance\\_of\\_a\\_reinvigorated\\_ocr.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/summer2010/title_ix_and_the_importance_of_a_reinvigorated_ocr.html)

<sup>204</sup> "A title IX Primer" <http://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/what-is-title-ix/title-ix-primer>

<sup>205</sup> 101 F.3d 155 (1st Cir.1996)

- medical and training facilities;
- housing and dining facilities; and
- publicity

The first consideration forming part of the three pronged test is the concept of substantial proportionality,<sup>206</sup> which is perhaps the easiest yardstick by which to measure Title IX compliance, but arguably the most challenging to achieve in practice.

In the matter of *Roberts v Colorado State Board of Agriculture*,<sup>207</sup> the Colorado State University's female softball team sought relief against the University on the basis of its violation of the principle of substantial proportionality. The University removed the women's softball programme, and after doing this, the difference between female enrolment and participation in sport was 10,5%.

Both the relevant District and Appeal Court decided that 10,5% differential was insufficient for the purposes of complying with the principle of substantial proportionality, however neither court offered any insight into what it would consider equitable for this purpose.<sup>208</sup>

The second leg of the three part test is the historical practices applied as well as the continuing practice in respect of the expansion of programmes for women.

In the case of *Boucher v Syracuse University*,<sup>209</sup> the University was sued on the basis of its alleged failure to provide equal opportunities to women. Syracuse University was successful in this case; on the basis that it alleged an increase of over 47% in the participation rate of female students over the years.

The Court ruled that in light of this historical practice which saw the increase of participation amongst women, the University had complied with Title IX. Due to its

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<sup>206</sup> Based on the respective rates of undergraduate students enrolled and Brake D (2011) *Revisiting Title IX's Feminist Legacy: Moving beyond the three-part test*, Journal of Gender, Social Policy and the Law, Vol. 12 Issue 3, Page 454

<sup>207</sup> Decided in 1992. 998 F.2d 824 (1993)

<sup>208</sup> See 201 *supra*

<sup>209</sup> 164 F.3d 113 (2d Cir.1999)

compliance with the second leg of the test to establish compliance, it was not necessary for the University to clear the hurdle relative to proportionality.<sup>210</sup>

The court's decision in the *Quinnipiac* case<sup>211</sup> also sent a strong message to schools that it is imperative that precise calculations be undertaken to ensure that the law is complied with in terms of granting women adequate and equal opportunities in sports programmes.

*Boucher* was the first case in the history of Title IX in which a University successfully defended litigation on the basis of historical steps it had taken to ensure the promotion of equal opportunities for women.<sup>212</sup> The final requirement for consideration is the effective accommodation of women's interests in sport by educational institutions.<sup>213</sup>

In the matter of *Cohen v Brown University*,<sup>214</sup> the university announced that it would no longer continue with four sports in its programme, namely women's volleyball and gymnastics and men's golf and waterpolo. In light of this decision, a female member of the gymnastics team sued the university. The District Court ruled in Cohen's favour and ordered the university to immediately reinstate the female volleyball and gymnastics programmes. The university in turn appealed the decision and in 1996, the First Circuit Court of Appeals confirmed the lower court's decision.<sup>215</sup> In a further attempt to overturn the ruling, the university again appealed the decision; however the United States Supreme Court of Appeal refused to hear the matter, which resulted in the confirmation of the First Circuit Court of Appeals' decision.<sup>216</sup>

The Appeal Court found that not only had the university failed to pass the test in respect of effective accommodation of women's interest in sport to the necessary extent, the university had also failed the first and second legs of the test.<sup>217</sup>

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<sup>210</sup> See 201 *supra*

<sup>211</sup> *Biediger v Quinnipiac University* 3:09 – cv- 00621 – SRU (D.Conn) and [www.csmonitor.com/USA/2012/0807/us-appeals-court-agrees-Quinnipiac-violated-TitleIX-what-it-did-wrong](http://www.csmonitor.com/USA/2012/0807/us-appeals-court-agrees-Quinnipiac-violated-TitleIX-what-it-did-wrong)

<sup>212</sup> See 201 *supra*

<sup>213</sup> See 201 *supra*

<sup>214</sup> See 205 *supra*

<sup>215</sup> See 201 *supra*

<sup>216</sup> Resources – Legal Cases - <http://www.titleix.info/resources/Legal-Cases/Cohen-v-Brown-University.aspx>

<sup>217</sup> See 201 *supra*

### 3.14 Title IX and the right of an affected party to claim monetary damages

In 1992, the matter of *Franklin v Gwinnett County Public Schools*,<sup>218</sup> came before the courts for determination. In this case, the plaintiff sought to claim monetary damages relating to claims of sexual harassment she suffered at the hands of a High School coach. The District Court that was approached to make a determination in this regard dismissed the Plaintiff's claim on the basis that Title IX did not make provision for the award of damages as a remedy for an affected person. The United States Court of Appeal confirmed the District Court's decision.<sup>219</sup>

The United States Supreme Court of Appeal however reversed the decision and awarded the Plaintiff damages as a result of the sexual harassment. This was the first case in which a Plaintiff sought damages as relief against another party and was successful. As a result of this decision, the way has been paved for affected parties seeking an award of damages in terms of Title IX.<sup>220</sup>

### 3.15 Men and Title IX – a case of reverse gender discrimination

There has been much criticism of Title IX and many people have laid the blame squarely at its feet in instances where male sports have been removed from School programmes to ensure for compliance with Title IX.<sup>221</sup>

Title IX does not advocate the scrapping of sports from school programmes and also does not force a School to create programmes which are not currently in existence. In an article written by Cornelius,<sup>222</sup> the author submits that while the equality which the legislation has sought to achieve, by equalising the number of participants in sports programmes has to an extent been realised, many schools have simply reduced the

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<sup>218</sup> 503 U.S (60) 1992

<sup>219</sup> See 201 *supra*

<sup>220</sup> Clearinghouse of North Carolina School of Law, a summary compiled by the School of Government Faculty (1992) – “A violation of Title IX may result in an award for damages – *Franklin v Gwinnett County School*, 112S. Ct. 1028(1992)”, <http://csl.sog.unc.edu.print/990>

<sup>221</sup> Leung, Rebecca (2009) “The battle over Title IX”, [http://www.cbsnews.com/2102-18560\\_162-560723.html](http://www.cbsnews.com/2102-18560_162-560723.html)

<sup>222</sup> Cornelius S, “Women Participating in Men's Events – Affirmation of (In)Equality”, *The International Sports Law Journal*, 2004/3-4, Pages 72 - 75

programmes available to men to ensure compliance with the legislation, which has resulted in a statistical illusion of compliance.

It is also noteworthy that while reference is made to the necessity to achieve equality in terms of Title IX as far as women's sport is concerned, this is done on the basis that women are often the underrepresented dynamic, however the wording of the provision is in fact gender neutral which means that it would in theory also be able to be relied upon in the case of men seeking the enforcement of access to equal opportunities in sports in which men are the underrepresented group.<sup>223</sup>

Title IX further allows women to try out for positions in men's teams in instances where the specific sporting code does not have a female equivalent, except in the case of contact sport.<sup>224</sup>

Similarly, men would be entitled to play on women's teams in the case of there being no male programme for that sport. While men have experienced difficulty in succeeding in this regard, the matter of *Williams v School District of Bethlehem*<sup>225</sup> ruled that a man could play on a female field hockey team in instances where a men's team was not in existence, to ensure the equal rights of the Plaintiff were upheld.

Cloete<sup>226</sup> and Cornelius<sup>227</sup> consider the issue of the participation of transsexuals in women's events, as well as men who have undergone sex changes,<sup>228</sup> and submit that while one must guard against discrimination to these individuals, their participation in women's events can likely be open to abuse.

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<sup>223</sup> See 201 *supra*

<sup>224</sup> See 201 *supra*

<sup>225</sup> 799 f. supp. 513 (E.D Pa. 1992)

<sup>226</sup> See 171 *supra*, Pages 147 - 148

<sup>227</sup> See 222 *supra*

<sup>228</sup> Transsexual Australian Golfer, Mianne Bagger competed in the 1995 Australian Women's Open on the basis that her body produced significantly less testosterone post her gender reassignment.



### 3.16 The application of Title IX to professional sport

The provisions of Title IX only extend to collegiate and school level sport. In light of this, women who participate at a professional level do not have any specific anti-discrimination legislation to rely on.<sup>229</sup>

### 3.17 Is Title IX still relevant in 2013?

The forty year anniversary of the enactment of Title IX was celebrated in June 2012. Despite this, questions have been raised about its current relevance in instances where it seems to have achieved its purpose.<sup>230</sup>

In an article by Bryant<sup>231</sup> he states that the statistics relative to participation in sport by women during the period 1972 – 2011 increased overall by 44% in high schools and 43% in universities. Despite these increases which appear as though great strides have been made on the face of it, the author submits that the participation ratios in athletic programmes, specifically in universities are still not where they need to be in light of the fact that the majority of undergraduate students are women.

It is evident that a plethora of court decisions have been made in the United States which rule on the provisions of Title IX. So as to further bolster the continued need for Title IX, I refer to the recent case of *Amber Parker et al v Franklin County Community School Cooperation*,<sup>232</sup> in which the United States Appeal Court reversed the decision of the lower court. A female team of basketball players sought relief in terms of Title IX, as they alleged that the Indiana School District violated the provisions of the legislation in respect of event scheduling.<sup>233</sup>

The girls' basketball team played all their matches on week nights which had an adverse effect on their ability to complete their school work, while the boy's teams

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<sup>229</sup> Gettings, John "The wage gap in pro sports: will equal pay for women arrive in the sports world", <http://www.infoplease.com/spot/sptwagegap1.html>

<sup>230</sup> "Does Title IX still matter?" <http://www.weeklythought.com/2012/06/24/does-title-ix-still-matter>

<sup>231</sup> Bryant, Arthur (2012) "Title IX at 40: Most schools still aren't in compliance", <http://www.csmonitor.com/Commentary/Opinion/2012/0627/Title-IX-at-40-Most-schools-still-aren-t-in-compliance>

<sup>232</sup> United States Court of Appeal, Seventh Circuit, 10-3595, <http://chronicle.com/items/biz/pdf/scheduling.pdf>

<sup>233</sup> See 232 *supra*

played all their games on Friday and Saturday nights. This not only gave the boys the opportunity to focus on their schoolwork in the week, but attendance at the games scheduled during the weekend was much higher than at the girl's matches.<sup>234</sup>

It would appear then that even after the lapse of 40 years and the resultant achievements which have been made, the necessity for Title IX in American Law still exists.

### 3.18 The Equal Pay Act and Title VII of the Civil Rights Act

The Equal Pay Act is United States legislation which was enacted in 1963. President Obama passed new legislation in 2009<sup>235</sup> which supplemented the Equal Pay Act to affirm that each gender unequal paycheck is a violation of the new law. While the Equal Pay Act will no doubt be enforceable in sporting specific instances, the Act does not make specific provisions to sport, such as in the United Kingdom's Equality Act 2012. Having said this, female sports coaches would be able to seek relief against their employers on this basis, as well as place reliance on Title VII of the Civil Rights Act which offers protection against discriminatory practices relative to recruitment and termination of employment.<sup>236</sup>

### 3.19 Earnings differentials – A statistic

An interesting statistic relative to monetary earnings in professional golf paints a different picture to the ideal of equality when one has regard to the men's and women's competitions. During September 2012, Tiger Woods became the first golfer to exceed the \$100 million earnings mark,<sup>237</sup> while the highest paid female golfer, Annika Sorenstam's career earnings are a mere \$22 million in comparison as at the end of 2011.<sup>238</sup>

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<sup>234</sup> See 232 *supra*

<sup>235</sup> The Lily Ledbetter Fair Pay Act of 2009 was legislation passed after the landmark case of *Ledbetter v Goodyear Tyre and Rubber Company* 550 US 618 (2007), <http://www.eeoc.gov/laws/statutes/titlevii.cfm>

<sup>236</sup> Passed in 1964. Several sections were repealed by the 1991 Civil Rights Act

<sup>237</sup> Golden, Jimmy (September 2012) "Tiger Woods tops \$100 million in earnings with 3<sup>rd</sup> place prize from Deutsche Bank Championship, [www.huffingtonpost.com/2012/09/03/tiger-woods-career-earnings-hundred-million\\_n\\_1852771.html](http://www.huffingtonpost.com/2012/09/03/tiger-woods-career-earnings-hundred-million_n_1852771.html)

<sup>238</sup> Top ten female golfers on top of LPGA Career money list, [www.infobarrel.com](http://www.infobarrel.com)

## Chapter 4

### 4.1 Conclusion

It is certainly apparent that sex and gender discrimination is still prominent in varying degrees in both amateur and professional sport today, and that many measures have been put in place to either prevent or limit discriminatory practices. The real test however is how effective these provisions are in achieving the result for which they were intended.

While there can be no doubt that participation in women's events has increased in the very pinnacle of sporting events, the Olympics since women were first entitled to compete, and the enactment of legislation such as Title IX as a tool to provide equality of resources in amateur sport in the United States of America, the enactment of legislation in the United Kingdom<sup>239</sup> has advanced the position of women and the Court of Arbitration for sport has provided a platform for speedy resolution of sporting issues, one cannot help but consider whether these advances are enough.

However, I am of the view, and agree with Forgues<sup>240</sup> that the supremacy of the IOC has the potential to take the progress of the rights of women to participate in sport backwards and has the potential to conflict important provisions in treaties such as CEDAW because of its powerful position.

CEDAW itself stumbles at the starting blocks due to the inability to enforce the principles for which it stands in the case of member states who fail to comply. While non-compliance is not ignored, member states seem to use failure to comply as a method to assert diplomatic pressure on defaulting states instead of focusing on bringing defaulters to book. Due to CEDAW's failure to apply its principles with strength, members would prefer to curry favour with the IOC because the IOC tends to enforce its rules and policies with an "iron fist".

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<sup>239</sup> The Sex Discrimination Act 1975, repealed by the Equality Act 2010

<sup>240</sup> See 140 *supra*

The United States of America is the world's largest democracy and advocates equality of the sexes, ironically the United States has not ratified CEDAW, presumably due to concerns that the ratification of this treaty may upset conservative, influential groups. Despite President Obama's support of CEDAW, it was perhaps not advisable to force the issue especially during 2012 in light of it having been an election year.

Saudi Arabia on the other hand fought nail and tooth against the IOC's policy regarding the inclusion of female athletes in its Olympic team at the London Games in 2012. The irony of the situation – Saudi Arabia is a signatory to CEDAW.<sup>241</sup>

Despite Saudi Arabia's blatant disregard for women's rights both in sport and in general<sup>242</sup> they were not ordered to withdraw from CEDAW. This lack of action, send a message to the world that women's rights can be compromised in the interests of political gain and countries like Saudi Arabia with less than acceptable levels of advancement of women's rights can still remain a part of CEDAW.

The United Kingdom relies on the Equality Act, however as is apparent women continue to be subject to discrimination in sports, specifically those that are historically male dominated, amateur sports in the United States rely on Title IX. However forty years after its enactment, it is still necessary for people to place reliance on it to enforce their rights and no institution which has received federal funding and has defaulted has ever had its funds withdrawn. South Africa is a constitutional democracy which enshrines the principle of equality between the sexes but the Equality Courts which were created to enforce this principle have proven to be ill equipped and ineffective on the whole.

Women's rights relative to participation in sport and equal treatment have advanced, however the failure by countries and sporting bodies to take real action speaks volumes. It is no longer good enough for parties to discuss and debate issues without taking steps to really resolve these issues.

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<sup>241</sup> Al-Nafjan, Eman (April 2012) "Stand up to IOC on Women says Saudi Cleric", [www.mideastposts.com/2012/04/stand-up-to-ioc-on-women-says-saudi-cleric](http://www.mideastposts.com/2012/04/stand-up-to-ioc-on-women-says-saudi-cleric)

<sup>242</sup> Helm, Toby (The Observer February 2012) "Olympic outrage at Saudi ban on women athletes" [www.guardian.co.uk/sport/2012/feb/26/olympic-outrage-saudi-ban-on-women-athletes](http://www.guardian.co.uk/sport/2012/feb/26/olympic-outrage-saudi-ban-on-women-athletes)

## 4.2 Suggested ways of addressing the issues raised in the future

I am of the view that a critical analysis needs to be undertaken of the current signatories to all treaties and declarations, regardless of whether they are binding or not, which seek to empower and protect women rights and the rights of vulnerable people to ensure that member states that are not worthy of retaining membership be dismissed as members so as to ensure that a precedent is set.

The supremacy of the IOC is a concern, this along with the weak enforcement measures available in terms of CEDAW. The Rules of the Olympic Charter and the principles of CEDAW should compliment each other and be equally respected by its respective members so as to avoid a conflict of interest. The principles of CEDAW need to be supplemented so as to ensure that bad choices made which fly in the face of CEDAW by member states attract serious consequences and do not result in an “all bark no bite” situation.

It must also be borne in mind that the difficulties relative to discrimination in sport also stem from society, due to stereotypes which are still rife in sport relative to participation, broadcasting and sponsorship. In this regard, the media should be educated to *inter alia* avoid sexualising women in sport by publishing articles which focus on a woman’s body or physical appearance instead of her performance.<sup>243</sup>

The position in South Africa is perhaps more challenging to address due to the diverse society in which we live which is often characterised by strict societal and cultural structures. In order to constantly challenge these stereotypes and the attitudes to the traditional role of women, I am of the view that education is key starting at grass root levels, which will over time manifest and change the way in which gender discrimination is dealt with.

I am unsure whether the playing fields in sport will ever be levelled or whether gender and sex discrimination will be eliminated entirely. I would submit that the position may

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<sup>243</sup> Matthews, Emily “The sexualisation of female sports figures” <http://happybodies.wordpress.com/2012/01/03/the-of-female-sports-figures/>

one day be truly equitable, but this will no doubt be harder to achieve in sport, because a large portion of society still cannot see that the potential of women extends beyond the stereotypical role society has assigned to women.

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